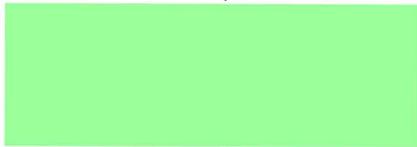




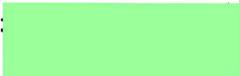
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: FEB 20 2013

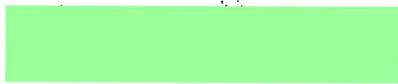
OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

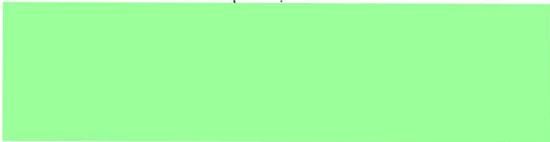
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel Martino
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director). The appeal was erroneously rejected by the director but was resubmitted and is now before the Administrative Appeals Office (AAO) on appeal. The director's wrong-party rejection will be withdrawn. However, the appeal will still be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

According to evidence in the record of proceeding, the petitioner initially appealed the director's decision on April 2, 2009. However, the director rejected the appeal as improperly filed, under 8 C.F.R. § 103.3(a)(2)(v)(A)(1), finding that the appeal had not been filed by the affected party as required by 8 C.F.R. § 103.3(a)(2)(i) and as defined by 8 C.F.R. § 103.3(a)(1)(iii)(B).

The director erroneously rejected the appeal, even though counsel had clearly marked on the Form I-290B, Notice of Appeal or Motion, that it was an appeal, and that the petitioner would be sending additional evidence in support of the appeal directly to the AAO.

The AAO has exclusive jurisdiction over appeals of immigrant visa petitions based on employment such as the instant appeal.¹ The regulation 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii) and the instructions on the Form I-290B direct the petitioner to submit its brief and/or additional evidence directly to the AAO, not to the director. As such, only the AAO has access to and may review any additional evidence or brief submitted to this office in support of the appeal to ascertain whether the appeal was properly filed.

Therefore, the AAO hereby withdraws the April 29, 2009 decision in which the director erroneously rejected the initial appeal.

After the director rejected the initial appeal on April 29, 2009, the petitioner re-submitted Form I-290B, and the Service Center received the appeal on May 18, 2009. The AAO will consider the appeal filed on this date and, given the fact that it was submitted 19 days after the director's rejection

¹ The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) (which includes petitions for immigrant visa classification based on employment at 8 C.F.R. § 103.1(f)(3)(iii)(B)), with one exception - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs-Enforcement (ICE).

notice, will treat it as timely, particularly since the initial appeal was also submitted in a timely manner.

Thus, the record shows that the appeal is properly filed,² timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 4, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on September 16, 2004. The proffered wage as stated on the Form ETA 750 is \$11.98 per hour (\$24,918.40 per year based upon a 40-hour work week). The Form ETA 750 states that the position requires two years or experience in the job offered: cook.

² The Form I-290B, which was submitted on May 18, 2009, was properly filed by the petitioner and is accompanied by a concurrently-filed G-28 bearing the signature of the owner of the petitioning entity.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

On appeal, the petitioner submits a brief; a letter dated January 22, 2009 from [REDACTED] owner of the petitioning entity; an excerpt from the petitioner's internet webpage; patron reviews as obtained from Yahoo.com; copies of IRS Forms W-2, which the petitioner issued to the beneficiary in 2004, 2006, and 2007; a copy of a pay statement, which the petitioner issued to the beneficiary in 2009; and copies of the petitioner's U.S. Income Tax Returns for an S Corporation for 2004, 2006, 2007, and 2009; and copies of two partial bank statements for 2006.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1956⁴ and currently to employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 21, 2004, the beneficiary claims to have worked for the petitioner since May 2000.

On appeal, counsel asserts that due to the "failing economy, the restaurant's profitability decreased slightly in the past two years" but that the petitioner remains a viable business. Counsel asserts that consideration should be given to the petitioner's liquid assets as reflected in its bank account statements. On appeal, counsel asserts that consideration should be given to the totality of the petitioner's financial circumstances.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker, using an earlier priority date than the priority date reflected on Form ETA 750.⁵

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ According to Section D of Form 1120S, the petitioner incorporated on January 1, 1981.

⁵ [REDACTED] was filed on November 28, 2001 and approved on February 6, 2002. The

Therefore, the petitioner must produce evidence that its job offer to each beneficiary is realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted copies of IRS Forms W-2, which it issued to the beneficiary in 2004, 2005, 2006, and 2007, as well as a copy of a pay statement, which it issued to the beneficiary in 2009. However, the IRS Forms W-2 and the pay statement contain a social security number (SSN), which is registered to an individual who is not the beneficiary.⁶ The AAO will not consider funds paid using a stolen SSN for purposes of

priority date accorded by the approval of the employment-based immigrant visa petition was April 27, 2001. The beneficiary of the immigrant visa petition obtained permanent residence on July 8, 2005. The petitioner also filed [REDACTED] and [REDACTED], both of which were denied.

⁶ Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding SSN fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with SSN fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to ...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft.

determining the petitioner's ability to pay. Therefore, the petitioner has provided no bona fide evidence which establishes that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

Specifically, the Act made it a Federal crime when anyone ...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on January 29, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 was the most recent return available at that time. However, on appeal, the petitioner submitted its federal income tax return for 2009, but not for 2008. The petitioner's tax returns demonstrate its net income for 2004, 2005, 2006, 2007 and 2009, as shown in the table below.

- In 2004, the Form 1120S stated net income⁷ of \$5,580.00.
- In 2005, the Form 1120S stated net income of \$14,550.00.
- In 2006, the Form 1120S stated a net loss of \$123.00.
- In 2007, the Form 1120S stated a net loss of \$23,662.00.
- For 2008, the petitioner submitted no regulatory prescribed evidence of its net income.
- In 2009, the Form 1120S stated net income of \$16,779.00.

⁷ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 11, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedule K for 2004, 2005, 2006, 2007, and 2009, the petitioner's net income is found on Schedule K of its tax returns for those years.

As explained above, for 2004 and 2005, the petitioner must demonstrate the ability to pay the beneficiaries of two I-140 petitions.⁸ For 2006 onwards, the petitioner must demonstrate the ability to pay the proffered wage to the beneficiary of the instant petition. The petitioner provided no evidence of the wage owed to the beneficiary of the other I-140 petition and no evidence of wages paid to the other beneficiary. Therefore, without evidence to the contrary, the AAO will assume that the beneficiary of the other approved I-140 petition is being offered the same wage offered to the beneficiary of the instant petition.

For the years 2004 and 2005, the petitioner did not have sufficient net income to pay the beneficiaries of the two I-140 petitions. For 2006, 2007, and 2009, the petitioner did not have sufficient net income to pay the beneficiary of the instant petition the full proffered wage. For 2008, the petitioner did not demonstrate sufficient net income to pay the proffered wage, because it provided no regulatory prescribed evidence of its net income for that year.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

With its initial petition submission, the petitioner did not provide its Schedule L or any other evidence of its current assets for 2006. On December 17, 2008, the director issued an RFE, asking the petitioner to provide, among other things, its Schedule L for 2006. The petitioner failed to provide the requested evidence both in its response to the director's request and on appeal. Further, the petitioner provided no explanation for the failure to provide the requested document.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a copy of its Schedule L for 2006. The 2006 Schedule L would have demonstrated the amount of current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit this document cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

⁸ The beneficiary of [REDACTED] was granted a priority date of April 27, 2001 and obtained permanent residence on July 8, 2005.

⁹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, 2005, 2006, 2007, and 2009, as shown in the table below.

- In 2004, the Form 1120S, Schedule L stated net current liabilities of \$10,930.00.
- In 2005, the Form 1120S, Schedule L stated net current liabilities of \$2,626.00.
- For 2006, the petitioner provided no regulatory prescribed evidence of its net current assets.
- In 2007, the Form 1120S, Schedule L stated net current liabilities of \$64,605.00.
- For 2008, the petitioner provided no regulatory prescribed evidence of its net current assets.
- In 2009, the Form 1120S, Schedule L stated net current liabilities of \$27,678.00.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage to the beneficiaries of the two I-140 petitions. For 2006 and 2008, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage, because it provided no regulatory-prescribed evidence of its net current assets. For 2007 and 2009, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that, due to the "failing economy, the restaurant's profitability decreased slightly in the past two years" but that the petitioner remains a viable business, even increasing the amount spent on wages. A mere broad statement by counsel that, due to the downturn in the U.S. economy, the petitioner's business has been adversely affected, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the current economic climate. Further, the petitioner's gross sales have remained consistent during the period from 2004 through 2009. While the petitioner claims that the strength and viability of the business may further be measured by the fact that it has increased wages, this contention is not supported by the evidence. During the period in which wages were increased, the amount of officer compensation, which the petitioner pays, was proportionately decreased. Further, the issue is not whether the petitioner has paid wages, but whether the petitioner has demonstrated the ability to pay the proffered wage to the beneficiary of the instant petition and the beneficiaries of any other pending petitions. The petitioner has not demonstrated that it ever paid the beneficiary of the instant petition the full proffered wage.

On appeal, counsel asserts that consideration should be given to the petitioner's liquid assets, which appear in the petitioner's bank account. However, counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise

presents an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L which was considered above in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, although the petitioner states that it has been operating for many years, it provided financial documentation for only five years of operations (excluding 2008). During the five years, the petitioner's gross sales remained consistent, whereas its profitability and officer compensation decreased. Of the five years, the petitioner was either unprofitable or only marginally profitable. The petitioner has not demonstrated the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within the business¹⁰, or whether the beneficiary is replacing a former employee or an

¹⁰ The petitioner provided three pages of customer reviews/opinions from Yahoo.com. However, the comments are from individuals who have visited the restaurant relatively recently. The petitioner provided no reviews from critics which appear in newspapers or from sources which receive a wide

outsourced service. Further, the petitioner had one other I-140 petition pending during the period relevant to the instant petition and therefore, must demonstrate the ability to pay at least one other beneficiary for two of the years affecting the instant petition. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director,¹¹ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered: cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook with the petitioner since May 2000 as well as experience as a cook with [REDACTED] Brazil from May 1996 until November 1998.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains one letter from [REDACTED] manager of [REDACTED] Brazil. According to Mr. [REDACTED] the beneficiary worked for his restaurant as a cook for two consecutive years.

However, there are deficiencies in the experience letter. First, although the document is accompanied by a translation, the translator has not certified that the translation is complete and accurate or that the translator is competent to translate from the foreign language into English, as required by 8 C.F.R. § 103.2(b)(3). For this reason alone, neither the translation nor the letter may

circulation and readership even within the locality in which the petitioner's restaurant operates. The evidence is not indicative of a long-standing reputation within the petitioner's industry.

¹¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

(b)(6)

Page 12

be accepted. Further, the letter is not dated and does not contain the dates during which the beneficiary was supposed to have worked for [REDACTED]. Additionally, Mr. [REDACTED] does not indicate whether the beneficiary worked on a full-time basis or provide the duties of the beneficiary. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record contains no other letters describing or substantiating the beneficiary's qualifying experience. Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.