U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: FEB 28 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a self-described school. It seeks to employ the beneficiary permanently in the United States as a preschool teacher. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor 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.

The record shows that the appeal is properly filed, 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 November 15, 2011, denial, the 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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on June 25, 2009. The proffered wage as stated on the ETA Form 9089 is $13.98 per hour ($29,078.40 per year). The ETA Form 9089 states that the position requires a high school diploma and 24 months experience in the position offered.

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.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2003, and to currently employ 10 workers. The petitioner did not state its gross annual income or net annual income despite the Form I-140's instructions to provide this information in the space provided in Part 5 of the form. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the ETA Form 9089, signed by the beneficiary on June 14, 2009, the beneficiary claimed to work for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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. The record of proceeding contains Form W-2, Wage and Tax Statements, issued to the beneficiary for the years 2009, 2010, 2011, and 2012. These W-2 statements indicate the following wages paid by the petitioner to the beneficiary:

- 2009 – $21,380.00, which is $7,698.40 less than the proffered wage.
- 2010 – $22,995.70, which is $6,082.70 less than the proffered wage.
- 2011 – $24,831.57, which is $4,246.83 less than the proffered wage.

[1] 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).

- 2012 – $29,564.85, which is more than the $29,078.40 proffered wage.

In the instant case, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2012. However, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2009, 2010, or 2011.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record closed on January 22, 2013, with the receipt by the AAO of the petitioner's submissions in response to the AAO's Request for Evidence (RFE).[2] As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 is the most recent return available. The petitioner previously provided its 2009 and 2010 tax returns, which each state that they were prepared by the petitioner's "Operator." In the RFE, the AAO notified the petitioner that its 2009 and 2010 tax returns are missing schedules and or statements, and are therefore incomplete copies. The AAO requested complete copies of the petitioner's tax returns for 2009 and 2010, as well as a copy of the petitioner's tax return for 2011, if the petitioner intended to rely on its tax returns to demonstrate its ability to pay the beneficiary's proffered wage.

In response to the AAO's RFE, the petitioner has provided three annual reports for the years 2009, 2010, and 2011. The petitioner's annual reports do not appear to be complete, as they do not contain a comprehensive report on the petitioner's activities during the relevant year. *Black's Law Dictionary* (9th ed. 2009) defines "annual report" as a "yearly corporate financial report for shareholders and other interested parties." An annual report includes a balance sheet, income statement, statement of changes in financial position, reconciliation of changes in owners' equity

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[2] USCIS received the petitioner's appeal December 29, 2011. As of that date, the Maryland Department of Assessments and Taxation indicated that the petitioner's corporate status had been forfeited as of October 6, 2006. *See* http://sdatcert3.resiusa.org/ucc-charter/CharterSearch_f.aspx (accessed February 13, 2013) (search by department ID "D10147031"). The AAO notified the petitioner of this derogatory information on December 4, 2012, and also requested additional information regarding the petitioner's ability to pay the beneficiary's proffered wage. The petitioner timely responded to the AAO's Request for Evidence (RFE) and provided documentation from the Maryland Department of Assessments and Taxation that it was in good standing in that state as of January 15, 2013. Although it appears that the petitioner filed to "revive" its corporate status in Maryland on January 10, 2013, the petitioner's corporate status remained forfeited in Maryland from October 6, 2006, until its revival, a period of time spanning the filing and approval of the labor certification and the filing, denial, and appeal of the instant petition. This may raise the question of whether a *bona fide* job offer existed throughout the entire time period. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) ("[d]oubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition"). However, the decision on the petitioner's appeal is based on the reasons set forth below.

accounts, a summary of significant accounting principles, other explanatory notes, the auditor's report, and comments from management about prospects for the coming year. *Id.* Each of the three annual reports provided by the petitioner are titled "Annual Report" and include a brief statement from the petitioner's "Operator," a mission statement, a goals statement, a summary of its curriculum highlights, an operating income and expenses statement, and a "Summary of Audit Findings" which states that "[a]n annual financial audit resulted in zero findings for ' None of the annual reports include a balance sheet, a statement of changes in financial position, a reconciliation of changed in owners' equity accounts, a summary of its significant accounting principles, explanatory notes, or an auditor's report. While the reports contain the statement that an audit was conducted and that "zero findings" were made, the reports do not indicate who the auditor was in any of the years, and the reports do not contain a copy of the report. The record suggests that the reports provided by the petitioner appear to be created by the petitioner on its own behalf, and do not appear to be based on financial statements audited by an independent party.[3] Without a copy of the auditor's report, the AAO is unable to ascertain the veracity or reliability of these annual reports. Therefore, the AAO does not find these annual reports to be credible evidence of the petitioner's finances. In any future filings, the petitioner should provide regulatory required evidence of its ability to pay the beneficiary's proffered wage from the priority date onward, such as audited financial statements or tax returns. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner's tax returns, Form 1120, demonstrate its net income for 2009 and 2010 as shown in the table below:

	Net Income (Line 28)
2009	-$154
2010	$21,290

[3] The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the financial statements in the annual reports indicate operating income, expenses, and profit for 2009 and 2010 that are different than the gross receipts, deductions, and net income reported on the petitioner's tax returns for the same years. These discrepancies cast doubt on the financial information provided by the petitioner. *Matter of Ho*, 19 I&N at 591. However, as these financial statements do not appear to be audited, the AAO cannot ascertain whether these figures correspond to those categories from the petitioner's tax returns. In any future filings, the petitioner should explain the discrepancies between the financial statements in its annual reports and the tax returns in the record, and provide independent, objective evidence, such as audited financial statements or certified tax returns, to overcome the discrepancy in the record. *Id.* at 591-92 ("[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.").

2011 Not provided

Therefore, for 2009, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages already paid the beneficiary, which was $7,698.40 less than the proffered wage in 2009. In addition, as the petitioner did not provide any credible evidence of its net income for 2011, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages already paid the beneficiary in 2011.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. If the petitioner's tax returns were credible, the AAO would analyze them to determine its net current assets for each year from the priority date onward. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

The AAO analyzed the petitioner's tax returns[5] to determine its net current assets. The petitioner's tax returns indicate its net current assets for 2009[6] are insufficient to pay the difference between the

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[4] 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.

[5] As the petitioner's annual reports are incomplete, do not include a balance sheet, and do not appear to be audited, the annual reports contain no credible information regarding the petitioner's assets or liabilities for the AAO to analyze.

[6] The petitioner's 2010 tax return appears to be incomplete, as Schedule L has been left blank. Schedule K, Line 13, to that form indicates that the corporation must complete Schedule L if the corporation's total receipts and total assets exceed $250,000. The petitioner's receipts for 2010 exceeded $250,000; Page 1, Part D, states the petitioner's total assets to be $71,762. The petitioner indicated on Schedule K that its receipts and assets were in excess of $250,000, and stated that it was required to complete Schedule L. However, the 2010 Form 1120, Schedule L provided to the AAO is blank. This casts additional doubt on the credibility of the financial documentation provided by the petitioner. *Matter of Ho*, 19 I&N at 591. The AAO noted this discrepancy in its RFE, and alerted the petitioner that the "discrepancy must be addressed" and that "the petitioner should obtain and submit IRS certified tax returns" to address the discrepancy. The petitioner declined to provide complete copies of its tax returns from the priority date onward, or certified copies of its returns; the petitioner chose instead to provide the annual reports discussed above. In the RFE, the AAO specifically alerted the petitioner that failure to respond to the RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The

proffered wage and the wages already paid the beneficiary. The petitioner's 2009 Form 1120, Schedule L, indicates the petitioner held $54,148 in current assets, and $54,148 in current liabilities, therefore, the 2009 tax return indicates that the petitioner had zero net current assets for that year. Therefore, for the years 2009 and 2011, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary.

Therefore, from the date the ETA Form 9089 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.

Counsel asserts on Form I-290B that the petitioner's bank statements evidence its continuing ability to pay the proffered wage from the priority date. The petitioner has provided bank statements "to establish that the petitioner had the ability to pay the proffered wage." Counsel's reliance on the balances 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 paints 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 return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets in 2009, or 2010, had a Schedule L been properly submitted.

Counsel advised that the beneficiary is currently being employed full-time or part-time[7] "depending on demand," and that the beneficiary will "assume the official duties of another employee ... who

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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). The tax returns would have demonstrated the amount of taxable income and net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents need not be excused.

[7] The AAO notes that the beneficiary stated on the labor certification under penalty of perjury that she had been employed full-time, 40 hours per week, by the petitioner beginning March 1, 2007. However, the petitioner's claim that it employed the beneficiary part-time is supported by evidence in the record. The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). While the petitioner is not required to employ the beneficiary full-time in the position offered until the beneficiary obtains permanent residence, the contradicted claims of full-time employment with the petitioner cast doubt on the information provided. *Matter of Ho*, 19 I&N at 591. In any future filings, the petitioner must overcome this discrepancy with

has served in the capacity of a full time, permanent Pre School Teacher for the past several years." The record indicates the name of this worker, and provides information on the worker's job duties. Further, the petitioner has provided a letter, dated November 23, 2011, attesting that this worker will be replaced by the beneficiary "as soon as [the petitioner is able to] backfill [the] existing position with a full time permanent person."[8] Counsel's conclusion that the petitioner will be able to demonstrate its ability to pay the proffered wage if the petitioner promotes this worker, and hires the beneficiary full-time, is without merit. First, the record of proceeding indicates that the petitioner intends to promote the worker from a preschool teacher position to that of a "Program Director;" ostensibly, this would indicate that the petitioner has taken on greater wage obligations through any additional salary increase that accompanies the worker's new position, as well as the additional cost to make the beneficiary's position full-time. As such, the beneficiary is not replacing the worker by stepping into a position vacated by a worker, which would provide the petitioner with additional funds, but rather the beneficiary is becoming a full-time employee while the petitioner promotes and retains the other worker. Further, the AAO does not find the petitioner's assertion credible, as the record contains countervailing evidence. The petitioner has provided this worker's W-2 statements for the years 2009, 2010, 2011, and 2012. Counsel asserted on June 14, 2011, that the petitioner pays this worker an annual salary of $31,872. However, the 2009 W-2 reported wages of $31,200. The 2010 W-2 referenced by counsel indicated wages of $31,872. In response to the AAO's RFE, the petitioner provided a 2011 W-2 for this employee indicating wages paid of $33,609. The worker was in theory promoted in November 2011, however, the 2012 W-2 statement provided indicates a reduction in the worker's salary to $31,548. From the record, it does not appear that this worker was promoted as claimed by the petitioner. Further, as the AAO notified the petitioner in its RFE, the record contains conflicting W-2 statements that cast doubt on the credibility of these documents. One 2010 W-2 statement provided for this worker indicates wages of $31,872, while the other 2010 W-2 statement for the same worker indicates wages of $25,872. Further, the "W-2 Preview" which includes a summary of the salaries paid by petitioner in 2010 states that this worker was paid $25,872. These discrepancies in the wages purportedly paid to this worker cast doubt on the credibility of the evidence provided. *Matter of Ho*, 19 I&N at 591. The AAO does not find the petitioner's claim that it will be replacing a worker with the beneficiary to be credible.[9] USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act,

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independent, objective evidence that the position offered is a *bona fide* full-time position. *Id.* at 591-92.

[8] From the record, it appears that the petitioner "backfilled" this vacancy shortly after issued the November 23, 2011, letter. The record contains another letter from the petitioner, dated November 30, 2011, to the beneficiary, offering her "full time temporary employment" beginning "Monday, December 5, 2011" at a rate of $14.50 per hour. This is confirmed by the pay statements issued to the beneficiary by the petitioner for pay periods ending December 23, 2011, and January 6, 2012, which indicate that the beneficiary's rate of pay is $14.50 per hour.

[9] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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, the petitioner claims to have operated a school since 2003, however, there is no credible financial information in the record for the AAO to determine whether the circumstances of the petitioner's business are similar to the circumstances considered in *Sonegawa*. The petitioner indicated on Form I-140 that it employed 10 workers, however, its payroll information for 2010 suggests that it employed approximately 18 workers, although a number of workers appear to be employed part-time. The salaries and wages claimed to have been paid by the petitioner in 2009, 2010, and 2011, are nominal for this number of employees. The petitioner did not provide any evidence of its reputation within its industry, or any evidence of uncharacteristic expenditures or losses.

The petitioner has not established its historical growth since its establishment, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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, 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)(l), (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 Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, 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 a high school diploma, or foreign educational equivalent, and 24 months experience in the position offered as a preschool teacher. On the labor certification, the beneficiary claims to qualify for the offered position based on a Bachelor's degree in Education from [redacted] completed in 1998. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a "teacher" for "Springs School" from June 1, 1992, to November 1, 2006.

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 a "Service Certificate," dated June 26, 2010, on [redacted]' letterhead. The letter is signed and below the signature is stamped "head master," however, the individual signing is not clearly identified. Further, the certificate states that the beneficiary was employed as a "Science Teacher." The letter does not provide a description of the beneficiary's job duties, nor does it indicate whether the beneficiary's employment was full-time or part-time. Therefore, this letter does not meet the regulatory requirements for an experience letter. *Id.*

The director's Request for Evidence noted these deficiencies, and requested that the petitioner provided evidence to overcome them. In response, the petitioner provided a letter, dated June 3, 2011, from the head master of [redacted] This letter states that the beneficiary was employed as a "pre-school science teacher" and provides a description of her duties which mirrors a portion of the duties provided on the labor certification, including that she attended to children's basic needs including dressing them and changing their diapers. The letter does not state any duties that would support a job title of "science" teacher, either for pre-school or high school age students. In addition, this letter contains a long paragraph which states that the beneficiary "fulfilled the following Preschool Teacher's special requirements" and goes on to list the special skills as described on the labor certification. This second letter is inconsistent with the first letter, in that it

states a different position title, which now suggests the teaching position was limited to pre-school age children. Further, the school's letterhead indicates that it is a "high school," and nothing in the record indicates what grades of students attend the school. This casts doubt on whether the beneficiary's purported employment by was as a "pre-school science teacher." *Matter of Ho*, 19 I&N at 591. The AAO does not find this second letter to be credible evidence that the beneficiary possessed the required experience, 24 months in the position offered, preschool teacher.

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.

Additionally, the petitioner did not provide copies of the beneficiary's high school degree, or foreign equivalent, or the beneficiary's foreign Bachelor's degree (to exhibit completion of the required high school education). The evidence in the record does not establish that the beneficiary possessed the required high school education 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.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.