(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: JAN - 4 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a floor covering company. It seeks to employ the beneficiary permanently in the United States as a carpet layer supervisor. 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).[1] 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 December 17, 2009 denial, an 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

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[1] The regulation at 20 C.F.R. § 656.30(b)(2) provides: "An approved permanent labor certification *granted before July 16, 2007 expires* if not filed in support of a Form I–140 petition with the Department of Homeland Security *within 180 calendar days of July 16, 2007.*" (Emphasis added). In the instant case, the petition was filed on May 23, 2008 with a copy of a labor certification approved by the Department of Labor (DOL) on May 5, 2004. A letter dated January 18, 2008 from counsel states, "... this petition had been previously filed and no reply was ever received." No evidence was submitted by counsel to corroborate his statement. A review of Service records fails to show any additional petitions filed by the petitioner for the beneficiary. The director requested and received a certified duplicate copy from the DOL. 312 days passed from July 16, 2007 until the filing of the petition with United States Citizenship and Immigration Services (USCIS). As no evidence of the filing of a prior petition was submitted, the record lacks evidence that the petition is accompanied by a valid labor certification. This issue must be resolved with any future filings.

> 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 March 30, 2001. The proffered wage as stated on the Form ETA 750 is $30.60 per hour ($63,648 per year based on 40 hours per week).[2] The Form ETA 750 states that the position requires two years of experience in the job offered as a carpet layer supervisor.

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]

The record indicates the petitioner was structured as a general partnership[4] for 2001 through 2006 and 2008, and as a limited partnership[5] in 2007, and filed its tax returns on IRS Form 1065. On the petition, the petitioner claimed to have been established in December 1980 and to currently employ 10 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a

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[2] The labor certification states that overtime will be compensated at "1 ½" per hour as needed.

[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] A general partnership consists of two or more partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage.

[5] A limited partnership (LP) consists of one or more general partners and one or more limited partners. A general partner is personally liable for the partnership's total liabilities. As such, a general partner's personal assets may be utilized to show the ability to pay the proffered wage. However, a general partner's personal expenses and liabilities must also be examined in order to make a determination that his or her assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment.

calendar year. On the Form ETA 750B, signed by the beneficiary on February 1, 2001, the beneficiary claimed to have worked for the petitioner beginning in December 1996 and continuing at least until the date the labor certification was signed on February 1, 2001.

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 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. In the instant case, the petitioner submitted the beneficiary's personal tax returns, Forms 1040, for the years 2004 through 2006. No Forms W-2 were submitted. For the years 2004 through 2006, the beneficiary's tax returns listed "0" under "Wages, salaries, and tips." The beneficiary reported income under "Business income or (loss)," but the petitioner failed to include copies of the beneficiary's Schedule C or C-EZ. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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.
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> 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).

In *K.C.P. Food*, 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).

The record before the director closed on June 26, 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 is the most recent return available. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net income of $18,490.[6]

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[6] Where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) or page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-

- In 2002, the petitioner's Form 1065 stated net income of $18,783.
- In 2003, the petitioner's Form 1065 stated net income of $22,911.
- In 2004, the petitioner's Form 1065 stated net income of $26,470.
- In 2005, the petitioner's Form 1065 stated net income of $23,930.
- In 2006, the petitioner's Form 1065 stated net income of $35,074.
- In 2007, the petitioner's Form 1065 stated net income of $37,848.
- In 2008, the petitioner's Form 1065 stated net income of $32,206.

Therefore, for the years 2001 through 2008, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net current assets of $25,059.
- In 2002, the petitioner's Form 1065 stated net current assets of -$3,080.
- In 2003, the petitioner's Form 1065 stated net current assets of $15,773.
- In 2004, the petitioner's Form 1065 stated net current assets of $51,690.
- In 2005, the petitioner's Form 1065 stated net current assets of $85,067.
- In 2006, no Schedule L was submitted.
- In 2007, the petitioner's Form 1065 stated net current assets of $0.

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pdf/i1065.pdf (accessed November 29, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner failed to submit copies of Schedule K for the years 2001 through 2006, and, therefore, its net income is found on Line 22 of page one of its 2001 through 2006 tax returns. The petitioner's Schedule K for 2007 and 2008 has relevant entries for additional income, credits, deductions, and other adjustments, and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its 2007 and 2008 tax returns.

[7] 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.

- In 2008, the petitioner's Form 1065 stated net current assets of $0.

Therefore, for the years 2001, 2002, 2003, 2004, 2006, 2007, and 2008, the petitioner did not establish that it had 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 states:

> ... the denial was based on the conclusion that because the first page of Petitioner's federal tax returns did not show an excess of net earnings to pay the wage, it was not possible to determine that the Petitioner could pay the proffered wage. In fact, the Schedule of expenses (1.e [*sic*] adjusted gross income), of the company clearly showed an excess profit after expenses in excess the proffered salary and included the salary paid to the beneficiary.

As discussed above, the petitioner's federal tax returns failed to establish the ability to pay the proffered wage through net income and net current assets. While the labor certification indicates that the beneficiary worked for the petitioner at least from December 1996 through February 1, 2001, no Forms W-2 were submitted.

Counsel asserts that the petition was "... denied by USCIS on the basis that the Petitioner did not fully comply with a Request for Evidence sent by USCIS... The demand for personal information of the owner of the business not only invades the privacy of the owner and is onerous, but it goes beyond the Regulation's authorization to request records."

A review of the record shows that the petition was initially submitted with copies of the beneficiary's personal tax returns, Form 1040, for 2004, 2005, and 2006. No documentation was submitted from the petitioner. The Request for Evidence (RFE) sent by the director on May 28, 2009, requested, among other things, the following:

> From the evidence submitted, it appears that you are a sole proprietor or individual employer. In order to establish that you had the financial ability to pay the offered wage as of March 30, 2001 and continue to have that ability, submit the following additional evidence:
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> - The employer's 2001 – 2008 Federal Income Tax Returns.
> - List of the employer's monthly recurring household expenses (supported by documentary evidence), including but not limited to:
> - Mortgage or rent payments
> - Automobile payments
> - Installment loans

- Credit card payments
- Other household expenses

- If you have employed the beneficiary, please submit copies of his Form W-2. If he was paid less than the certified wage for any of the years that the labor certification has been pending, you must submit documentary evidence to establish that you had the ability to pay the difference.

A review of the December 17, 2009 decision indicates that, while the director may have initially requested information relating to a sole proprietor or individual employer, the denial was not based on the petitioner's failure to provide such information once the petitioner's federal tax returns were received and it was established that the petitioner is structured as a general partnership. The AAO notes that the only portion of the decision where the director refers to the petitioner's failure to submit requested evidence is in relation to the beneficiary's Forms W-2. The director states, "Although the ETA 750 indicates that the petitioner employed the beneficiary from December 1996 to at least February 2001, the petitioner has failed to submit any evidence establishing that the beneficiary was employed and paid a wage by the petitioner." However, the denial was not based on the petitioner's failure to provide the beneficiary's Forms W-2, but rather on the petitioner's failure to establish its ability to pay the proffered wage based on the evidence that was submitted.

Counsel also asserts that:

> ... the Decision denying the Petition concludes that the Petitioner did not supply information not requested in the Request for Evidence. A reasonable interpretation of statue and regulation requires that the Petitioner have failed to produce the requested evidence, and that the Decision denying the Petition be based on failure to comply with the Request for Evidence sent to the Petitioner. It cannot be based on failure to supply documents not requested as was the case in the instant matter.

As previously discussed, a review of the denial does not indicate that the decision was based on the petitioner's failure to provide any specific piece of evidence, but on the failure to establish the petitioner's ability to pay the proffered wage based on the evidence submitted.

The petitioner'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 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 has been in business since December 1980 and employs 10 workers. The tax returns for 2001, 2002, 2003, 2004, 2006, 2007, and 2008 fail to demonstrate the petitioner's ability to pay the beneficiary the proffered wage. The petitioner's gross receipts decreased from 2001 to 2008. No evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. The petitioner also failed to provide evidence of any factors that may have impacted the petitioner during the relevant years. 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 AAO also notes that there are inconsistencies in the record. The labor certification indicates that the employer was initially listed as which was later amended on August 11, 2003 to The petition also lists the petitioner as However, the tax returns submitted are for . The AAO notes that share the same address and Employer ID Number (EIN). Further, the petition states that the petitioner, was established on December 10, 1980. The federal tax returns show the following dates for

Tax Year	Date Business Started
2001	01-01-1996
2002	blank
2003	blank
2004	blank
2005	01-01-2002
2006	blank
2007	01-01-2001
2008	01-01-2001

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless

the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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,[8] 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 two years of experience in the job offered as a carpet layer supervisor.

On the labor certification, the beneficiary listed experience as a carpet layer supervisor with the petitioner, in California beginning in December 1996 and continuing at least until the date the labor certification was filed, on February 1, 2001. The labor certification also includes partial information regarding experience in part 15b. However, the beneficiary only indicates that he was a carpet and floor laying supervisor for a floor covering business with the same duties as he performed for The name and address of the employer, as well as the beneficiary's dates of employment were left blank. No other experience is listed. The record also contains several amendment requests, with one dated February 12, 2002, signed by the beneficiary. The beneficiary requested that Form ETA 750, Part B, item 15b be amended to reflect the following:

Name of Prior Employer:	
Address of Prior Employer:	
Date Started:	1991
Date Left:	1994

[8] 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).

A review of the labor certification shows that the DOL approved and certified several of the amendment requests, writing in the changes by hand and annotating and stamping the date. However, no annotations were made to part 15b. Therefore, it has not been established that DOL approved and certified the request to amend part 15b.

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 an experience letter dated June 19, 2009, written by The letter indicates that the beneficiary was employed by the company on a full-time basis from May 1991 to June 1994 as a supervisor. The beneficiary's specific jobs duties were not included. This experience was not listed on the Form ETA 750 and no evidence was provided to indicate that the DOL approved and certified the amendment. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

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.

Also beyond the decision of the director, it has not been established that the petition was accompanied by a valid, unexpired labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i). All I-140s based on approved labor certifications must be filed within 180 days of the labor certification approval.[9] All permanent labor certifications approved on or after the effective date of July 16, 2007, will expire 180 calendar days after certification, whether the original application was filed under the PERM or pre-PERM regulations, unless the employer uses the approved labor certification prior to expiration in support of an I-140 petition with USCIS. Likewise, all labor certifications approved prior to July 16, 2007 expired in 180 calendar days, unless filed in support of an I-140 petition with USCIS prior to the expiration date. Therefore, all labor certification applications

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[9] The regulation at 20 C.F.R. § 656.30(b) states:

> (b) Expiration of labor certifications. For certifications resulting from applications filed under this part and 20 CFR part 656 in effect prior to March 28, 2005, the following applies:
> (1) An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification.
> (2) An approved permanent labor certification granted before July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of July 16, 2007.

approved prior to July 16, 2007 must have been filed in support of an I-140 petition by January 12, 2008.

As noted above, the petition was filed on May 23, 2008 with a labor certification approved by the Department of Labor (DOL) on May 5, 2004. 312 days passed after July 16, 2007 and prior to the filing of the petition with United States Citizenship and Immigration Services (USCIS). As the filing of the instant case was after 180 days of July 16, 2007, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i). Although counsel asserts that a previous petition was filed prior to the expiration of the labor certification, no evidence of a prior petition was submitted or was located in USCIS records. In his May 28, 2009 RFE, the director specifically requested a copy of the Form ETA 750 with the original signatures of the petitioner and beneficiary. The petitioner's June 26, 2009 response to the RFE does not address this request.

The evidence in the record does not establish that the labor certification is unexpired, and that the petition is accompanied by a valid labor certification.

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.