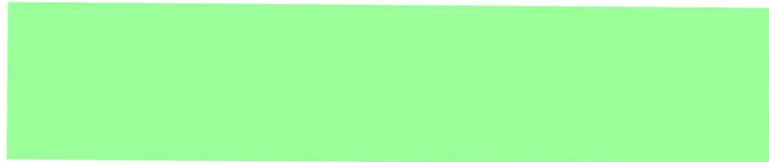




U.S. Citizenship
and Immigration
Services

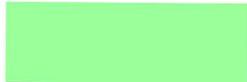
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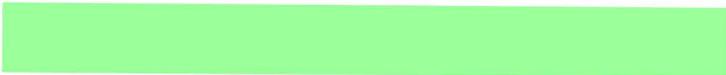
DATE: JUN 04 2013

OFFICE: NEBRASKA SERVICE CENTER

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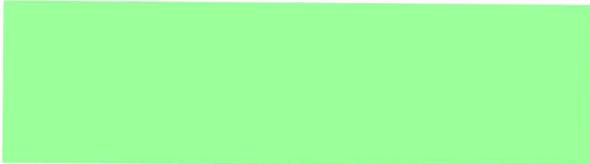


IN RE: Petitioner:
Beneficiary:



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. The matter came before the Administrative Appeals Office (AAO) on appeal, and the AAO dismissed the appeal on July 25, 2012. The matter is now before the AAO on a motion to reconsider. The motion will be granted, and the prior decision dismissing the appeal shall be affirmed.

The petitioner is a catering business. It seeks to employ the beneficiary permanently in the United States as a sous chef. 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.

The record shows that the motion 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.

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

On motion, counsel states that the AAO's prior decision must be reconsidered and reversed because the petitioner has only employed the beneficiary ten months a year as its [redacted] eating club is not open each July and August so the wage paid to the beneficiary was equal to or greater than the proffered wage. In addition, counsel states that the petitioner's financial ability to pay the proffered wage was not accurately represented on its tax returns, so the AAO should have further considered the additional financial information previously submitted. Counsel also argues that the petitioner is no longer able to train another employee like it did the beneficiary as the petitioner's business situation has changed, and because the beneficiary possessed the requisite experience for the proffered position as of the priority date.

The petitioner submits a notarized affidavit signed by [redacted], owner of the petitioner's business. In the affidavit, [redacted] notes that he is submitting copies of the beneficiary's Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements, which reflect that the beneficiary was paid the prevailing wage during all relevant times. The AAO notes that the IRS Forms W-2 submitted on motion were issued by [redacted] to the beneficiary in 2006, 2010, and 2011 and are in the respective amounts of \$29,590.00, \$36,680.00, and \$38,320.00. [redacted] contends that the beneficiary's total annual employment income is less than the figure would be if he had been paid at the prevailing wage for 40 hours per week for 52 weeks per year. [redacted] states that the relationship between the petitioner and the [redacted] is long standing and

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).

is under oral agreement, but that there is no written memorialization confirming that the [REDACTED] pays the salaries of the employees working for the petitioner's business.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

[REDACTED] states that he trained the beneficiary, thus providing the beneficiary with the requisite experience for the proffered position. [REDACTED] states that his current responsibilities would prevent him from training a new worker and that there are no other qualified trainers in his organization. Out of business necessity, he indicates that he needs to continue employing the beneficiary.

The petitioner submits documentation on motion, including two Board of Health licenses and a sanitary inspection report from the [REDACTED] Regional Health Commission, listing both the petitioner's business and the [REDACTED]. The AAO finds that these documents merely reflect that these two entities are affiliated for health inspection purposes in [REDACTED].

As set forth in the director's March 27, 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered of sous chef.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner did not state when it was established or how many workers it currently employs. According to the tax returns in the record, the petitioner was established in 1982, and its fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

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 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.

On motion, the petitioner submitted copies of the beneficiary's IRS Forms W-2 Wage and Tax Statements for 2006, 2010, and 2011. However, as noted earlier, these IRS Forms W-2 were issued by the [REDACTED] with an Employer Identification Number (EIN) of [REDACTED], whereas the petitioner's EIN as listed on the petition is [REDACTED]. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Accordingly, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 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 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 March 11, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. 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 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001 to 2007, as shown in the below table.

- In 2001, the Form 1120S stated net income² of \$20,596.00.
- In 2002, the Form 1120S stated net income of \$11,975.00.
- In 2003, the Form 1120S stated net income of \$17,210.00.
- In 2004, the Form 1120S stated net income of \$15,392.00.
- In 2005, the Form 1120S stated net income of \$17,743.00.
- In 2006, the Form 1120S stated net income of \$12,812.00.
- In 2007, the Form 1120S stated net income of \$7,203.00.

Therefore, for the years 2001 through 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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.³ 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

² 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 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 26, 2012) (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 deductions and other adjustments shown on its Schedule K for 2001, 2002, and 2003, the petitioner’s net income is found on Schedule K of its tax returns in those years.

³ 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.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 to 2007, as shown in the below table.

- In 2001, the Form 1120S stated net current assets of \$4,110.00.
- In 2002, the Form 1120S stated net current assets of \$1,765.00.
- In 2003, the Form 1120S stated net current assets of \$282.00.
- In 2004, the Form 1120S stated net current assets of \$1,250.00.
- In 2005, the Form 1120S stated net current assets of -\$2,462.00.
- In 2006, the Form 1120S stated net current assets of -\$1,241.00.
- In 2007, the Form 1120S stated net current assets of -\$3,210.00.

For the years 2001 through 2007, 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, its net income, or its net current assets.

On appeal, counsel asserted that the petitioner has a contractual relationship with [REDACTED], a separate business entity, under which the petitioner employs workers, while [REDACTED] pays the workers' salaries. Counsel asserted that the petitioner, rather than [REDACTED] has the authority to hire, fire supervise, and train the employees. Counsel also stated that the petitioner, [REDACTED], has been employing the beneficiary since 1996 and that the beneficiary has been paid a salary which is equal or greater than the prevailing wage since April 30, 2001, the priority date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). On appeal, the petitioner submitted a letter from [REDACTED] dated June 15, 2009, which states that the petitioner has contracted with [REDACTED] to provide catering and that the employees of the petitioner's business are paid directly by [REDACTED]. The letter also states that the petitioner hires, fires, trains, and directs the workers, while [REDACTED] has responsibility for the bookkeeping and payroll. The record also contains copies of advertisements, a menu, and website pages describing the dining at [REDACTED] provided by the petitioner.

The petitioner also previously submitted copies of IRS Forms W-2 indicating payments from Cloister Inn to the beneficiary according to the below table.

- In 2001, the Form W-2 stated wages paid to the beneficiary of \$24,335.00.
- In 2002, the Form W-2 stated wages paid to the beneficiary of \$25,950.00.
- In 2003, the Form W-2 stated wages paid to the beneficiary of \$27,620.00.
- In 2004, the Form W-2 stated wages paid to the beneficiary of \$27,825.00.
- In 2005, the Form W-2 stated wages paid to the beneficiary of \$27,335.00.
- In 2007, the Form W-2 stated wages paid to the beneficiary of \$30,600.00.
- In 2008, the Form W-2 stated wages paid to the beneficiary of \$31,650.00.

However, as stated above, [REDACTED] is a separate corporation with a different EIN than that of the petitioner. See *Matter of M*, 8 I&N Dec. at 24, *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. at 530, and *Matter of Tessel*, 17 I&N Dec. at 631. The AAO also notes that the record does not contain copies of any contracts or other agreements between the petitioner and [REDACTED] to demonstrate the relationship between the two entities and establish that the petitioner paid his wages through another entity. Moreover, the tax returns submitted fail to reflect payments made to [REDACTED] or other parties to cover the costs of the beneficiary's wages. No salaries and wage deductions are reflected on any of the returns. The 2005 and 2006 Forms 1120S at Schedule A, Other Costs include an itemized listing, which includes "outside labor" of \$6,100.00 in 2005 and \$7,405.00 in 2006, but no expense figures on the returns appear large enough to include the amount of the beneficiary's claimed wages listed on the IRS Forms W-2 from [REDACTED].

It is unclear that the petitioner will be the beneficiary's employer and was authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the DOL regulation at 20 C.F.R. § 656.3⁴ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the petitioner has failed to establish what company would actually employ the beneficiary.

In addition, the AAO notes that the beneficiary set forth his credentials on the labor certification, and both the owner of the petitioner's business and the beneficiary signed their names on April 26, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part B, question 15 where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary did not list employment experience with the petitioner. Rather, the beneficiary claimed that he was employed solely by [REDACTED] from June 1994 to the present as a sous chef working 40 hours per week. Additionally, the petitioner's letter dated February 10, 2009 states that the beneficiary "was employed by [REDACTED] as a Sous Chef from November 1996 to 2001." On appeal, counsel's statement and [REDACTED] letter on behalf of [REDACTED] instead both claim that the beneficiary

⁴ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

worked for the petitioner, [REDACTED] since 1996. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

If the petitioner and the beneficiary claimed that the beneficiary worked for an entity which did not employ the beneficiary but was merely a business which performed bookkeeping and payroll duties, then the petitioner and the beneficiary misrepresented the beneficiary's credentials on the labor certification.

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

(d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

A material issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position. The beneficiary signed the labor certification application under penalty of perjury. Misrepresenting the beneficiary's actual qualifications would be deemed a willful effort to procure a benefit ultimately leading to permanent residence under the Act. See *Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.").

Further, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. at 591-592.

Therefore, the record does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. The AAO cannot rely on the petitioner's claims and must instead rely primarily on the tax returns as analyzed above, which show that the petitioner did not have sufficient net income or net current assets to pay the proffered wage. 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.

The AAO finds counsel's argument on motion that the petitioner's business is not serving [REDACTED] in July or August each year is unpersuasive. The AAO has analyzed all of the pertinent evidence that the petitioner submitted regarding its ability to pay. The AAO additionally finds that the petitioner has continuously failed to demonstrate any official financial relationship or tie between the petitioner's business and the [REDACTED]. The health certificates submitted on motion from [REDACTED] health officials that list the two entities together do not demonstrate such a financial relationship either. *See* 20 C.F.R. § 656.3.

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, the petitioner's gross receipts during the relevant years varied. No salaries and wages were paid, and only \$6,100.00 and \$7,405.00 were paid as outside labor costs in 2005 and 2006, respectively. The petitioner does not pay substantial compensation to its owner. The

petitioner did not submit evidence sufficient to demonstrate that the owner was willing and able to forego officer compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. The petitioner's website printouts submitted state that it has been acclaimed by the *New York Times* and *Philadelphia Inquirer*, but the record does not contain evidence of such. 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.

Beyond the decision of the director,⁵ the AAO noted on appeal that 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 of sous chef. On the labor certification, signed by the beneficiary on April 26, 2001, he claims to qualify for the offered position based on experience as a sous chef working 40 hours per week with the [REDACTED] from June 1994 to the present.

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 letter on the petitioner's letterhead dated February 10, 2009 from [REDACTED], the president of the petitioner's business, stating that the beneficiary worked for [REDACTED] as a sous chef from November 1996 to 2001. The AAO notes that: 1) this claim is in conflict with the petitioner's other claims that it employed the beneficiary, while [REDACTED] was responsible for bookkeeping and payroll for the petitioner's employees; 2) the ending date of employment is in conflict with the letter from [REDACTED] as well as counsel's statements; and 3) the regulation requires a letter from the prior employer attesting to the experience of the beneficiary, not a letter from the proposed employer attesting to experience gained elsewhere.

⁵ 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)

As noted earlier, the record contains a letter from [REDACTED] club business manager of [REDACTED] [REDACTED] dated June 15, 2009, which states that the petitioner has contracted with [REDACTED] to provide catering, that the employees of the petitioner's business are paid directly by [REDACTED], and that the beneficiary has been employed by the petitioner's business since 1996. This letter fails to meet the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) in that it does not attest to employment with the entity which provided the letter and it fails to provide a description of the beneficiary's duties, job position, or experience details. Further, the letter is in conflict with the claims made by the petitioner and the beneficiary that it was [REDACTED] which employed the beneficiary. The AAO notes that presenting inconsistent evidence about where the beneficiary gained his qualifying employment experience would be a material misrepresentation. See previously referenced section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, and 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation.

The beneficiary set forth his qualifications and signed the labor certification application under penalty of perjury. Misrepresenting those actual qualifications would be deemed a willful effort to procure a benefit ultimately leading to permanent residence under the Act. 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. See *Matter of Ho*, 19 I&N Dec. at 591-592.

It appears that the petitioner wishes to claim in the context of the ability to pay discussion that it employed the beneficiary, while it claims in the context of an analysis of the beneficiary's experience that [REDACTED] employed the beneficiary and provided the required two years of experience as a sous chef.

The petitioner set forth the job parameters on the labor certification, which required two years of experience in the job offered of sous chef, and then the owner of the petitioner's business signed his name on April 26, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. The Form ETA 750 at question 13 states that the duties of the position of sous chef are as follows:

Prepare lunch and dinner entrees, supervise support staff, as indicated by Manager. Must be familiar with meal timing---hot and cold food preparation, sanitary and health requirements. Must have understanding of the relationship between food and preparation in kitchen and service in dining room. Must have good interactive social skills in order to accommodate needs of patrons with regards to food services.

The petitioner, through counsel, submitted conflicting letters of experience attesting to the beneficiary's experience. If counsel's assertions and the letter from [REDACTED] are taken as accurate, then it appears that the petitioner hired the beneficiary for the position of sous chef in 1996

prior to the beneficiary having gained experience in the position with [REDACTED] and then submitted the labor certification for the position of sous chef in 2001, claiming that the position required two years of experience in the job. No evidence was submitted to clarify the contradiction created by the claims that the position required two years of experience even though the beneficiary was previously hired for the position without the requisite two years of experience in the job. *See Matter of Ho*, 19 I&N Dec. at 591.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position of sous chef are two years of experience in the job offered. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. However, counsel states that the beneficiary was hired in the offered position as a sous chef in 1996. The AAO also notes that the beneficiary's Form G-325A submitted with the Form I-485 states that he was hired by the petitioner as a sous chef in 1996. The record of proceeding contains no probative evidence of any employment experience in the position prior to this claimed employment.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted an analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that it had been employed with the petitioner in any position. Therefore, the DOL was precluded from conducting an analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.⁶

On motion, the petitioner and counsel fail to address the fact that the petitioner has not demonstrated that the beneficiary possessed the requisite two years of experience in the proffered position as sous chef as of the priority date. Merely stating that the petitioner is not able to train a new employee does not demonstrate that the beneficiary was qualified for the position as of the labor certification's filing date.

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.

Based on a review of the underlying record and the arguments submitted on motion, the AAO finds that the Form I-140 petition was properly denied and that the appeal to the denial of the Form I-140

⁶ The fact that the beneficiary's experience with the petitioner was not mentioned on Form ETA 750, Part B also precludes the consideration of this experience to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. In *Matter of Leung*, 16 I&N Dec. at 2530, 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.

(b)(6)

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petition was properly dismissed on this basis.

The AAO's decision of July 25, 2012 dismissing the appeal to the denial of the Form I-140 petition will be affirmed for the above stated reasons, with each considered as an independent and alternative basis for denying the Form I-140 petition. 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 motion to reconsider is granted. The prior decision of the AAO dismissing the appeal shall be affirmed.