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: JUN 07 2013 OFFICE: TEXAS 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,

Josh K
FOR

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[1] is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (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 March 11, 2010 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 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.

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[1] The petitioner's name as listed on the labor certification and the Form I-140 is ' however, this appears to be a trade name. The corporation's name as reported on the tax returns in the record is The Federal Employer Identification Number (FEIN) for ' matches the FEIN on the Form I-140 filed by the petitioner, In any further filings, the petitioner must clarify the relationship between ' and

§ 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 December 2, 2002. The proffered wage as stated on the Form ETA 750 is $12.09 per hour ($25,147.20 per year). The Form ETA 750 states that the position requires two years of experience in the job 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.[2]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 8, 2001, the beneficiary claimed to have worked for the petitioner beginning in April 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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe

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[2] 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).

including the period from the priority date in 2002 or subsequently. The petitioner did, however, submit W-2 Wage and Tax Statements for 2002 to 2007.[3]

- 2002 - $20,400.00
- 2003 - $18,372.00
- 2004 - $12,320.00
- 2005 - $13,520.00
- 2006 - $13,000.00
- 2007 - $15,524.74

The AAO notes that the director found that the petitioner paid the beneficiary a "pro-rated" salary in 2002 sufficient to establish its ability to pay the beneficiary's proffered wage. However, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Therefore, the W-2 Form for 2002, which represents income for an entire year, cannot be construed to determine the petitioner's ability to pay a pro-rated portion of the proffered wage.

Thus, the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those sums are:

- 2002 - $4,747.20
- 2003 - $6,775.20
- 2004 - $12,827.20
- 2005 - $11,627.20
- 2006 - $12,147.20
- 2007 - $9,622.46

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

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[3] The AAO's Request for Evidence (RFE), dated February 8, 2013, requested copies of the beneficiary's Forms W-2 or 1099 for 2008, 2009, 2010, and 2011. The petitioner did not provide any such evidence in its response. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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.
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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).

The record before the director closed on June 15, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns in the record demonstrate its net income for 2002 to 2011, as shown in the table below.

- In 2002, the Form 1120S stated net income[4] of $6,235.00.
- In 2003, the Form 1120S stated net income of ($518.00).
- In 2004, the Form 1120S stated net income of $2,391.00.
- In 2005, the Form 1120S stated net income of ($8,538.00).
- In 2006, the Form 1120S stated net income of $14,960.00.
- In 2007, the Form 1120S stated net income of $16,283.00.
- In 2008, the Form 1120S stated net income of $15,566.00.
- In 2009, the Form 1120S stated net income of ($2,551.00).
- In 2010, the Form 1120S stated net income of $3,668.00.
- In 2011, the Form 1120S stated net income of ($1,010.00).

The net income listed above may be used to demonstrate the ability to pay difference between the proffered wage and wages paid to the beneficiary for 2002 through 2011, as follows:

Year	Difference between the proffered wage and the wages paid to the beneficiary (the amount of the deficiency in the wages paid to the beneficiary)	Net income	Year(s) in which the net income exceeded the amount of the deficiency in the wages paid to the beneficiary
2002	$4,747.20	$6,235.00[5]	
2003	$6,775.20	($518.00)	
2004	$12,827.20	$2,391.00	

[4] 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 (2002-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed April 30, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The petitioner did not submit its Schedule K for 2002, preventing the AAO from determining its actual net income. The net income listed above for 2002 is shown on line 21 of its Form 1120S; however, the AAO notes that this amount may not reflect the petitioner's true net income. As the petitioner had additional deductions shown on its Schedule K for 2003 through 2011, the petitioner's net income is found on Schedule K of its tax returns for these years.

[5] As stated above, without the petitioner's Schedule K for 2002, the AAO cannot determine the petitioner's actual net income. *Supra*, n.4. The AAO stated, "unless you provide complete copies of your tax returns for the years 2002 through 2007, including all schedules and attachments, the AAO intends to dismiss your appeal." 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 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).

2005	$11,627.20	($8,538.00)	
2006	$12,147.20	$14,960.00	X
2007	$9,622.46	$16,283.00	X
2008	$25,147.20	$15,566.00	
2009	$25,147.20	($2,551.00)	
2010	$25,147.20	$3,668.00	
2011	$25,147.20	($1,010.00)	

The petitioner had sufficient net income to pay the difference between the proffered wage and the wages paid to the beneficiary for 2006, and 2007. Therefore, the director's finding that the petitioner did not have the ability to pay the proffered wage for 2006 and 2007 is withdrawn. The petitioner did not submit a complete copy of its 2002 tax return; the AAO cannot determine whether the petitioner had sufficient income to pay the difference between the proffered wage and the wages paid to the beneficiary in 2002. The petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages paid to the beneficiary for the years 2002, 2003, 2004, 2005, 2008, 2009, 2010, and 2011.

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.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003 through 2011, as shown in the table below.

- In 2002, the petitioner did not submit its Schedule L.
- In 2003, the Form 1120S stated net current assets of $50,797.00.
- In 2004, the Form 1120S stated net current assets of $43,726.00.
- In 2005, the Form 1120S stated net current assets of $27,394.00.
- In 2006, the Form 1120S stated net current assets of $17,074.00.
- In 2007, the Form 1120S stated net current assets of $5,424.00.
- In 2008, the Form 1120S stated net current assets of $1,946.00.
- In 2009, the Form 1120S stated net current assets of $2,171.00.
- In 2010, the Form 1120S stated net current assets of ($17,658.00).
- In 2011, the Form 1120S stated net current assets of ($14,032.00).

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

The net current assets listed above may be used to demonstrate the ability to pay the difference between the proffered wage and wages paid to the beneficiary for 2002 through 2011, as follows:

Year	Difference between the proffered wage and the wages paid to the beneficiary (the amount of the deficiency in the wages paid to the beneficiary)	Net current assets	Year(s) in which the net current assets exceeded the amount of the deficiency in the wages paid to the beneficiary
2002	$4,747.20	Not submitted	
2003	$6,775.20	$50,797.00	X
2004	$12,827.20	$43,726.00	X
2005	$11,627.20	$27,394.00	X
2006	$12,147.20	$17,074.00	X
2007	$9,622.46	$5,424.00	
2008	$25,147.20	$1,946.00	
2009	$25,147.20	$2,171.00	
2010	$25,147.20	($17,658.00)	
2011	$25,147.20	($14,032.00).	

The petitioner had sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary for 2003, 2004, 2005, and 2006. However, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary for 2002, 2007,[7] 2008, 2009, 2010, and 2011.

Although the director stated that the petitioner established its ability to pay the proffered wage for 2002, the record does not support this finding. In nine of the tax returns provided, the petitioner's actual net income is found on Schedule K and was lower than the income stated on Line 21 of the Form 1120S. Because the petitioner has not provided its 2002 Schedule K as noted in the director's RFE, the director's decision, and the AAO's RFE,[8] the petitioner has not established its ability to pay the proffered wage for 2002.

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.

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[7] The petitioner demonstrated that it had sufficient net income to pay the difference between the proffered wage and the wages paid to the beneficiary in 2007.

[8] As noted above, the AAO specifically requested in its RFE that the petitioner "provide complete copies of [its] tax returns for the years 2002 through 2007, including all schedules and attachments," which was also previously requested by the director.

Counsel asserts on appeal that the USCIS should consider the petitioner's bank account statements in determining whether it has the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts 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.

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 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 Form I-140 states that the petitioner has been in business since January 1, 1998. The AAO notes that this may be a scrivener's error as the prior Form I-140 filed for the instant beneficiary states that the petitioner has been in business since January 1, 1988. However, both Form I-140s conflict with the Connecticut Secretary of State website which states that the

petitioner was incorporated on June 11, 1979. The petitioner's tax returns, listing the same Federal Employer Identification Number (FEIN) as the one listed on the Form I-140, state that it was incorporated in January 1988. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.* This calls into question the longevity of the business. The petitioner did not submit any W-2 Forms that it issued the beneficiary for 2008, 2009, and 2010 as requested by the AAO. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner has not provided any evidence of its reputation in the industry. While the petitioner's gross receipts have grown since the priority date, the petitioner has not alleged or documented any uncharacteristic occurrences to explain its ability to pay the difference between the proffered wage and the wages paid in 2002 or after 2007.

The Form I-140 states that the petitioner employs 12 workers. In response to the AAO's RFE, the petitioner claims to employ 20 workers. However, the petitioner's reported salaries and wages are not substantial, given this number of employees. The figures reported on its tax returns suggest that many of the 20 employees may be employed part-time. The petitioner states that it "currently employs 20 full-time and part-time employees," but does not indicate how many are full-time or part-time. Given the wages paid to the beneficiary to date, it appears that the beneficiary may only be employed part-time.

Additionally, it is unclear that the beneficiary will be employed full-time. The Form I-140 states that the beneficiary will be paid $12.09 per hour ($25,147.20 per year). The record demonstrates that the beneficiary has not been paid this amount, and the beneficiary's personal tax return in the record for 2003 states his occupation as a custodian. This casts doubt upon whether the beneficiary has or will be employed full-time by the petitioner. 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). 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. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 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. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook for from June 1997 to June 8, 2001, the date of signature.

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 two undated letters from the Financial Administrator of The first states that the beneficiary worked there "for the year ending 1999, 2000, until September 16, 2001. The second letter conflicts with this letter and states that the beneficiary worked there as a cook from June 1997 to September 2001. Neither letter states whether the beneficiary was employed full-time or part-time, preventing the AAO from determining the length of his employment.

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.

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. 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.