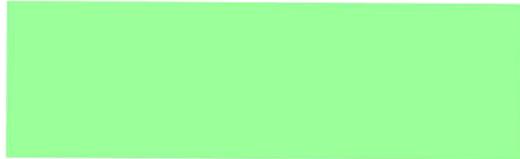




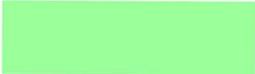
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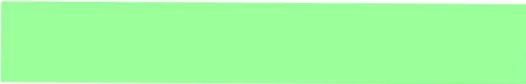


DATE: JUN 13 2013

OFFICE: TEXAS SERVICE CENTER

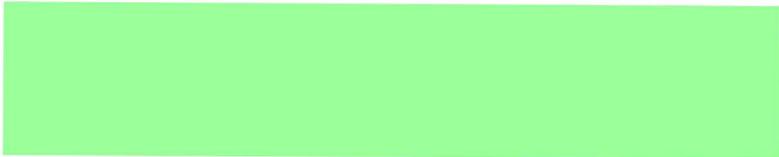
FILE: 

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,

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 describes itself as a construction and plumbing business. It seeks to employ the beneficiary permanently in the United States as a plumber. 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 and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 6, 2009 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 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 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 12, 2001. The proffered wage as stated on the Form ETA 750 is \$20.57 per hour (\$42,785.60 per year). The Form ETA 750 states that the position

requires two years of experience in the job offered as a plumber, or two years of experience as a plumber apprentice.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1996 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on April 3, 2001, the beneficiary claimed to work for the petitioner as a plumber since August 2000.

At the outset, the AAO notes that the Form ETA 750 was filed by the petitioner, "[REDACTED]" and signed by [REDACTED] as its "owner" on April 12, 2001. On August 17, 2007, the petitioner, "[REDACTED]" filed a Form I-140, Immigrant Petitioner for Alien Worker, on behalf of the beneficiary; the Form I-140 was signed by [REDACTED], with no title given, on January 28, 2007. A sheet included in the filing states that the petitioner is operated as a "sole proprietorship enterprise" and that its owner is "[REDACTED]". Accompanying this sheet is an Assumed Name Certificate filed with the [REDACTED], Texas, indicating that [REDACTED] registered the assumed name, "[REDACTED]" on October 27, 2003. The record contains Forms 1099-MISC issued to the beneficiary for 2001 through 2008 and 2012, issued by [REDACTED]. The record contains tax returns from [REDACTED] for the years 2001 to 2004, but the record does not contain any tax returns for [REDACTED]. It is unclear what relationship, if any, [REDACTED] had in the business from April 12, 2001 to October 27, 2003. The record reflects that on October 27, 2003, [REDACTED] assumed the petitioner's business name and subsequently filed the Form I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary on October 12, 2007. At the time of appeal, the record before the AAO did not clearly demonstrate whether [REDACTED] was the owner of the petitioner from the priority date onward, or whether he was a successor-in-interest to the labor certification employer, which appeared to be owned and operated by a different individual in 2001.

On November 26, 2012, the AAO sent the petitioner a Request for Evidence (RFE) in order to: (1) address whether [REDACTED] is the successor-in-interest to the business owned by [REDACTED]; (2) resolve the discrepancies in that the beneficiary's Forms 1099-MISC state nonemployee compensation from 2001 through 2004, but that contract labor is only reflected on the tax returns for 2004; (3) demonstrate that the purported sole proprietors can meet their personal expenses in addition to the proffered wage; and (4) resolve the discrepancies in the record regarding the dates of the beneficiary's past employment. The AAO also requested [REDACTED] tax returns from 2005

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).

through 2011. Through counsel, the petitioner responded to the AAO's RFE by submitting the following evidence:

- An "Assumed Name Certificate," dated May 13, 1999, indicating that the registrant's name of [REDACTED] was [REDACTED].
- An "Abandonment of Assumed Name" certificate, dated October 27, 2003, indicating that [REDACTED] withdrew the assumed name of [REDACTED].
- An "Assumed Name Certificate," dated October 27, 2003, indicating that the new registrant's name of [REDACTED] is [REDACTED].
- The monthly expenses for [REDACTED] listing him as owner of [REDACTED] as well as a copy of the appraisal of his home.
- The beneficiary's Form 1099-MISC for 2012, stating nonemployee compensation of \$44,600.00.
- An affidavit from the beneficiary attesting to the fact that he worked for the petitioner beginning in June 1999, that he began working there as a plumber's apprentice, and that the petitioner has always paid him the proffered wage.
- A letter from [REDACTED] dated October 10, 2006, stating that the beneficiary has been employed as plumber beginning in August 2000.
- A letter from [REDACTED] stating that the beneficiary was employed there as a plumber from June 1985 to March 1994.
- The 2010 IRS Form 1040, including Schedule C, for [REDACTED].

The first issue on appeal is whether the petitioner is the same entity as the labor certification employer, a successor-in-interest to the labor certification employer, or a different entity.

Successor-in-interest

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the

predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

The AAO's RFE requested evidence to establish that the [REDACTED] company that filed the Form I-140 is the same entity or the successor-in-interest to the [REDACTED] company that filed the labor certification. Specifically, the AAO requested that the petitioner provide evidence of the transaction transferring ownership of all, or a relevant part of, the previous employer's business under [REDACTED] to [REDACTED]. As stated above, counsel submitted an "Abandonment of Assumed Name" certificate indicating that [REDACTED] withdrew the assumed name of [REDACTED] and an "Assumed Name Certificate" indicating that the new registrant's name of [REDACTED] is [REDACTED] each of which are dated October 27, 2003. The AAO notes counsel's assertion that the "Abandonment of Assumed Name" and "Assumed Name Certificate" filings are sufficient to establish a successor-in-interest. Counsel cited the [REDACTED], Texas website² to support this claim, which states the following:

It is necessary to file an Abandonment of Assumed Name if the business closes or the business address changes. A Withdrawal from an assumed name is filed if one or more partners in the business wishes to withdraw.

While the evidence suggests that [REDACTED] continued to operate a business under the name [REDACTED] after October 27, 2003, this evidence is insufficient to establish that a successor-in-interest relationship to the labor certification entity exists. The petitioner did not provide any independent, objective evidence to establish that the business assets or liabilities of [REDACTED] sole proprietorship transferred to [REDACTED]. The record of proceeding does not contain any document, such as correspondence from [REDACTED] contracts, or other evidence that would establish that anything other than the petitioner's name was transferred to [REDACTED].³ The

² See [REDACTED]

³ In any further filings, the petitioner must provide independent, objective evidence that [REDACTED] doing business as [REDACTED] continued to operate his sole proprietorship from the priority date to its purported transfer in 2003, such as evidence establishing the transfer of the sole proprietorship to [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile

withdrawal of an assumed name by one sole proprietor, and the subsequent registration for that assumed name, is insufficient to establish that the petitioner is the successor-in-interest to the labor certification entity. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). The AAO notes that the two sole proprietorships, in addition to having different owners, also have different addresses. In addition, while the petitioner has submitted a chart of the business assets to establish its ability to pay the proffered wage, it did not provide any evidence of these assets being transferred from the labor certification entity to the petitioner. 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)). Therefore, the petitioner has not established that it is the same entity, or a successor-in-interest, to the labor certification employer.

Even if [redacted] had established himself to be the successor-in-interest to the [redacted] under [redacted], the predecessor employer must also demonstrate its ability to pay the beneficiary's proffered wage from the priority date until the date of the transfer of ownership. The successor-in-interest must demonstrate its ability to pay the proffered wage from the date of transfer of ownership onward.

The next issue the AAO will address is, if the petitioner had established a successorship: (1) whether the original [redacted] under [redacted] had the ability to pay the beneficiary's proffered wage from April 12, 2001 to October 27, 2003; and (2) whether the [redacted] under [redacted] had the ability to pay the beneficiary's proffered wage from October 27, 2003 onward.

Ability to pay the proffered wage

The petitioner must establish that the 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 labor certification employer's and the petitioner's ability to pay the proffered wage are 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 labor certification employer and the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning

such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 labor certification employer and the petitioner employed and paid the beneficiary during their respective periods. If the petitioner establishes by documentary evidence that the beneficiary was employed by the relevant entity at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the entities' ability to pay the proffered wage. The record contains the beneficiary's Forms 1099-MISC,⁴ stating nonemployee compensation for 2001, 2002, and 2003, which were issued by [REDACTED] and state his social security number (SSN). However, as the AAO's RFE points out, the tax returns for [REDACTED] do not state any amounts of wages paid, contract labor expenses, or cost of labor amounts during those years. These discrepancies were not addressed in response to the AAO's RFE. In the instant case, the petitioner has not established that it or the labor certification employer employed and paid the beneficiary the full proffered wage from the priority date in 2001 onward.

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).

As stated above, the entity under [REDACTED] and the entity under [REDACTED] both appear to be a sole proprietorship, a business in which one person operates the business in his or her personal

⁴ The Forms 1099-MISC for 2001 to 2008 are hand-written; they do not contain an Individual Tax Identification Number (ITIN) for the beneficiary, and there is no indication that they were filed with the IRS. Additionally, the Forms 1099-MISC state [REDACTED] as the payer of nonemployee compensation for 2001, 2002, and 2003, but the Form 1040, Schedule C, for each of these years for [REDACTED] do not list any amounts in payment for wages, other expenses or costs of labor. Counsel asserts that the Forms 1099-MISC are *prima facie* evidence of ability to pay the proffered wage. First, the record does not contain any forms 1099-MISC for 2001 to 2003 from the labor certification employer, and second, it is unclear whether the Forms 1099 provided were submitted to the IRS and are credible, as stated above. Therefore, the Forms 1099-MISC as submitted cannot be accepted as evidence of the petitioner's ability to pay the proffered wage. The beneficiary's affidavit in the record regarding his being paid the proffered wage is self-serving. The record does not contain any other evidence of payment, such as paystubs, bank statements, or cashed payroll checks. In any further filings, the petitioner must resolve these discrepancies.

capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, nothing in the record demonstrates whether [REDACTED] under [REDACTED] had the ability to pay the proffered wage from April 12, 2001 to October 27, 2003. The record does not contain any of the tax returns for [REDACTED] under [REDACTED] which would be necessary to establish the labor certification employer's ability to pay the proffered wage for 2001 through 2003. Therefore, it has not been established that [REDACTED] under [REDACTED] had the ability to pay the beneficiary's proffered wage from the priority date until October 27, 2003.

The AAO will next consider whether [REDACTED] under [REDACTED] has established its ability to pay the beneficiary's proffered wage from October 27, 2003 onward. The record demonstrates that [REDACTED] supports a family of four and his tax returns reflect the following information:

Tax Year	Sole Proprietor's AGI (Form 1040)
2003	\$22,821.00
2004	(\$3,315.00)
2005	Not submitted
2006	Not submitted
2007	Not submitted
2008	Not submitted

In 2003 through 2008, the sole proprietor has not established that its adjusted gross income covers the proffered wage of \$42,785.60. The AAO's RFE specifically requested the sole proprietor submit its tax returns for 2005 through 2011. The petitioner did not submit these tax returns in 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 record reflects that the sole proprietor's

yearly personal expenses are \$38,111.04. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Therefore, even if [REDACTED] were able to establish a successor-in-interest relationship to the labor certification employer, he has not established his ability to pay the beneficiary's proffered wage.

On appeal, counsel asserts that the amount of [REDACTED] net assets for 2012 in addition to the value of [REDACTED] home, minus his yearly expenses of \$38,111.04 demonstrate that the sole proprietor has the ability to pay the beneficiary's proffered wage. However, a home is not a readily liquefiable asset that may be used to pay the beneficiary's proffered wage. Further, this evidence as provided only relates to 2012. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The petitioner asserts that the business assets should be considered toward establishing the ability to pay the proffered wage. These are not readily liquefiable assets, and it is unlikely that the petitioner would sell assets that are necessary to its business. Additionally, even if these assets could be used toward the ability to pay, the record does not contain any independent, objective evidence of the value of these assets.

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. 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 Form I-140 states that the petitioner has been in business since 1996 and that it employs one worker. As noted above, the record contains discrepancies between the Forms 1099-

MISC and the corresponding tax returns for 2001 through 2003, and the record does not contain tax returns for 2005 through 2008 to verify whether similar discrepancies are found in the Forms 1099-MISC in relation to those tax returns. The record does not contain any evidence of the petitioner's reputation in the industry, additional tax returns as requested by the AAO's RFE, or any evidence of the petitioner's historical growth. 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, 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. 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 as a plumber, or two years of experience as a plumber apprentice. On the labor certification, the beneficiary lists experience as a plumber for the petitioner from August 2000 until at least April 3, 2001, the date of signature; and as a plumber for [REDACTED] from April 1984 to August 1990.

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 from the petitioner which states that the beneficiary was employed as a plumber beginning in August 2000. However, the beneficiary's experience with the petitioner may not be used to qualify for the instant position. In *Delitizer*, the DOL's Board of Alien Labor Certification Appeals (BALCA) considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6) in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions, the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5. As stated above, the labor certification states that the beneficiary worked for the petitioner as a plumber from August 2000 to at least April 3, 2001. This

is the same position as the job offered. Therefore, this employment may not qualify the beneficiary for the instant position.

The AAO also notes the following inconsistencies: the Form G-325A in the record states that the beneficiary worked as a plumber for the petitioner beginning in January 2002, whereas the labor certification and the experience letter from [REDACTED] states this employment began in August 2000. 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).

The record also contains a letter from [REDACTED] which states that the beneficiary worked there as a plumber from June 1985 to March 1994, which conflicts with the labor certification that states he worked there from April 1984 to August 1990. 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). In addition, the letter does not appear to be from the employer as it is not on the employer's letterhead and lists only the personal address of the writer. The letter does not indicate the writer's official title, despite the inclusion of a title by the translator.⁵ 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.* As this letter does not conform to the regulatory requirements, it cannot be accepted as evidence of the beneficiary's experience.

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.

⁵ This letter states only that the beneficiary was a plumber, and does not provide a description of the beneficiary's experience. Therefore, the letter does not match the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).