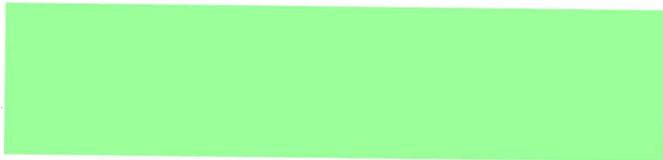




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 24 2013

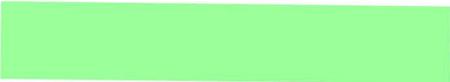
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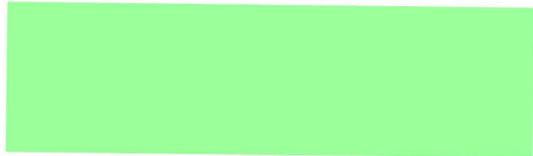
Petitioner:

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 is an IT services company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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).<sup>1</sup> 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 April 6, 2010 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 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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<sup>1</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

§ 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 July 12, 2002. The proffered wage as stated on the Form ETA 750 is \$88,250 per year. The Form ETA 750 states that the position requires a Bachelor's degree in computer science, math or engineering, and two years of experience as a software engineer or two years of experience in software design/development and/or data warehousing.

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.<sup>2</sup>

The evidence in the record of proceeding shows that the petitioner was structured as a limited liability company and filed its 2002 tax return on IRS Form 1065.<sup>3</sup> On the petition, the petitioner claimed to have been established in 1999 and to currently employ 26 workers. On the Form ETA 750B, signed by the beneficiary on April 15, 2005, the beneficiary claimed to work for the petitioner since 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

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<sup>2</sup> 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).

<sup>3</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner filed an IRS Form 1065, U.S. Partnership Income Tax Return, indicating that it was considered a multi-member LLC in 2002, and is considered to be a partnership for federal tax purposes.

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. In the instant case, the record contains the beneficiary's Forms W-2, Wage and Tax Statement, for 2003 through 2010. The Forms W-2 reflect that the petitioner paid the following wages to the beneficiary since the priority date:

<u>Tax Year</u>	<u>Wages</u>
2002	Not submitted <sup>4</sup>
2003	\$23,386.00
2004	\$48,362.00
2005	\$69,374.38
2006	\$75,168.30
2007	\$88,994.19
2008	\$82,366.55
2009	\$58,331.31
2010	\$36,103.34
2011	Not submitted <sup>5</sup>

Based on the above, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for 2002 through 2006, as well as 2008 through 2011. Therefore, the petitioner must establish its ability to pay the difference between any wages paid and the proffered wage.

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 (1<sup>st</sup> 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

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<sup>4</sup> While the labor certification indicates that the beneficiary was employed by the petitioner beginning in 2001, a 2002 Form W-2 was not provided with the petition on appeal. It is also noted that in the AAO's NOID, the AAO requested the beneficiary's Forms W-2 for all relevant years.

<sup>5</sup> The record reflects that the beneficiary was not employed by the petitioner from 2011 to the present.

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).

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).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the AAO closed on June 14, 2013 with the receipt by the AAO of the petitioner’s submissions in response to the AAO’s Notice of Intent to Dismiss and Request for Evidence (NOID). As of that date, the petitioner’s 2012 federal income tax return is the most recent return available.<sup>6</sup> The petitioner’s tax returns stated its net income as detailed below.

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<sup>6</sup> While the AAO requested that the petitioner provide its 2012 tax return, the petitioner did not submit this return or indicate why the requested evidence was unavailable.

<u>Tax Year</u>	<u>Tax Return</u>
2002	The petitioner's Form 1065 stated a net income of \$7,967. <sup>7</sup>
2003	The petitioner did not submit a complete tax return. <sup>8</sup>
2004	The sole proprietor's Form 1040 stated an adjusted gross income of \$189,579. <sup>9</sup>
2005	The sole proprietor's Form 1040 stated adjusted gross income of \$412,210.
2006	The petitioner's Form 1065 stated net income of \$273,902. <sup>10</sup>
2007	The petitioner's Form 1065 stated net income of \$19,711.
2008	The petitioner's Form 1065 stated net income of \$67,603.
2009	The petitioner's Form 1065 stated net income of \$162,090.
2010	The petitioner's Form 1065 stated net income of \$300,147.
2011	The petitioner's Form 1065 stated net income of \$92,977.

<sup>7</sup> For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) and page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed June 21, 2013) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedules K for 2002 and 2006 through 2011 have relevant entries for additional income, deductions and other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its 2002 and 2006 through 2011 tax returns.

<sup>8</sup> The petitioner provided only Schedule C to Form 1040. Schedule C, Profit or Loss From Business (Sole Proprietorship), provides only limited information, and does not provide the sole proprietor's adjusted gross income, which is used to determine the sole proprietor's net income. Therefore, the AAO is prevented from determining whether the petitioner had sufficient net income in 2003 to pay the difference between the wages paid and the proffered wage.

<sup>9</sup> For 2004 and 2005, the record reflects that the petitioner was a sole proprietorship, a business in which one person operates the business in his or her personal 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 (7<sup>th</sup> Cir. 1983).

<sup>10</sup> For 2006 through 2011, the record reflects that petitioner filed tax returns for a partnership on Forms 1065.

2012 The petitioner did not submit its tax return.

Therefore, for the years 2002, 2003, and 2012, the petitioner did not establish that it had sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage.

In addition, for years 2004 and 2005, the petitioner failed to submit a statement of the sole proprietor's monthly expenses as requested in the director's December 14, 2009 Notice of Intent to Deny (NOID).<sup>11</sup> This information has not been provided on appeal or in the petitioner's response to the AAO's NOID. Accordingly, the petitioner's ability to pay cannot be properly analyzed in 2004 and 2005. In any future filings, the petitioner must establish the sole proprietor's expenses for the relevant years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>12</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed below.

<u>Tax Year</u>	<u>Tax Return</u>
2002	The petitioner's Form 1065 stated net current assets of \$12,488.
2003	The petitioner did not submit a complete Form 1040.
2004	None submitted. <sup>13</sup>

<sup>11</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. As noted previously, a sole proprietor must be able to show 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 (7<sup>th</sup> Cir. 1983). Although specifically and clearly requested by the director, the petitioner declined to provide copies of the sole proprietor's statement of monthly expenses. The petitioner's failure to submit these documents cannot be excused. 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).

<sup>12</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>13</sup> Form 1040 is a personal tax return, and does not provide information on a sole proprietor's current assets or liabilities. However, a petitioner may provide audited financial statements pursuant to

2005	None submitted.
2006	The petitioner's Form 1065 stated net current assets of \$272,823. <sup>14</sup>
2007	The petitioner's Form 1065 stated net current assets of \$651,629.
2008	The petitioner's Form 1065 stated net current assets of \$255,805.
2009	The petitioner's Form 1065 stated net current assets of \$708,190.
2010	The petitioner's Form 1065 stated net current assets of \$720,131.
2011	The petitioner's Form 1065 stated net current assets of \$358,529.
2012	The petitioner did not submit its tax return.

Therefore, for the years 2002, 2003 and 2012, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

It is also noted that the petitioner filed a Form 1065 tax return in 2002, which indicates the petitioner was an limited liability company. Subsequently, the petitioner provided personal tax returns on Forms 1040 for 2003 (incomplete) through 2005, and then Forms 1065 for 2006 through 2011. It is unclear whether these forms represent documentation for the same entity. The inconsistency casts doubt on whether the petitioner continued to operate throughout this time period, and whether a *bona fide* job offer exists. A labor certification is only valid for the particular job opportunity listed on the labor certification. 20 C.F.R. § 656.30(c)(2). Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.*

On appeal, counsel asserts that USCIS "must take into consideration the beneficiary's ability to generate income as part of the petitioner's ability to pay assessment." Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of *Masonry Masters* decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.<sup>15</sup> Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a programmer analyst/software

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8 C.F.R. § 204.5(g)(2). In this case, the petitioner has not provided this documentation for tax years 2003, 2004, or 2005.

<sup>14</sup> For 2006 through 2011, the record reflects that petitioner filed tax returns for a partnership on Forms 1065.

<sup>15</sup> Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

programmer will significantly increase profits for a IT services company. Further, as the beneficiary has purportedly been employed by the petitioner since 2001, it is unclear what additional ability to generate income is being asserted. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

On appeal, counsel submits a copy of a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum). See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). Counsel asserts that USCIS “should make a positive ability to pay determination” in accordance with the Yates’ Memorandum. The Yates’ Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity’s ability to pay if, in the context of the beneficiary’s employment, “[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage.” The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. Here, the petitioner has not demonstrated its ability to pay the proffered wage from the priority date onwards.

Counsel further asserts that the petitioner should not be required to demonstrate its ability to pay the entire proffered wage, but only from the actual date of the priority date, i.e. prorate for the initial year. Counsel cites to a previous AAO decision, but fails to submit the decision as evidence. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel refers to a decision issued by the AAO concerning the approval of a petition even though the petitioner did not show that it could pay an entire year’s salary to the employee, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel requests that USCIS prorate the proffered wage for a portion of the priority date year. We will not, however, 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.

On appeal, counsel asserts that for the years that the petitioner was purportedly a sole proprietor, it is “entirely possible to support six individuals” on the adjusted gross income remaining after deducting the beneficiary’s proffered wage. While counsel acknowledges the requirements discussed in *Ubeda*, the petitioner has provided no evidence of the sole proprietor’s monthly expenses, and the petitioner has not provided a statement of expenses. The assertions of counsel do not constitute

evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, counsel asserts that USCIS “must look at the totality of circumstances when reviewing a petitioner’s ability to pay.” 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 petitioner claims to have been doing business since 1999. The petitioner’s net income has been inconsistent in growth since 2002, with substantial decreases in 2006, 2007, and in 2011. The petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Further, the petitioner failed to submit necessary information regarding the sole proprietor’s tax returns and a statement of the sole proprietor’s monthly expenses, which precludes the AAO from making a determination as to whether it has the ability to pay the proffered wage. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company’s accomplishments. Nor has it included any evidence or detailed explanation of the business’ milestone achievements. Further, the petition appears to have exited, and reentered, partnerships during the relevant time period, without providing any documentation to establish the impact of those reorganizations on its financial health or corporate existence. 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.

In addition, according to USCIS records, the petitioner has filed over 400 immigrant and nonimmigrant petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the

continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

Although requested in the AAO's NOID, the petitioner failed to submit evidence to document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The AAO's NOID notified the petitioner that 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).

Based on the above, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Beyond the decision of the director,<sup>16</sup> 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires a Bachelor's degree in computer science, math or engineering, and two years of experience as a software engineer or two years of experience in software design/development and/or data warehousing.

On the labor certification, regarding the experience requirements, the beneficiary claims to qualify for the offered position based on experience as a computer programmer/software engineer with [REDACTED] India from June 1997 to May 2000. The beneficiary also listed his experience as a programmer analyst/software programmer with the petitioner from July 2001 to the date he signed the labor certification on April 15, 2005.

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

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<sup>16</sup> 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 (9<sup>th</sup> 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).

C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a copy of a letter dated May 17, 2000 from [REDACTED] as Director of [REDACTED] India. The letter states that the beneficiary was appointed in the post of Programmer on June 1, 1997 and was promoted as Software Engineer on June 1, 1998 and worked until May 17, 2000. The letter does not list any duties performed by the beneficiary, therefore this letter does not meet the regulatory requirements. *Id.* Further, the letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment.

The record also contains the beneficiary's Form G-325A, Biographic Information signed by the beneficiary and submitted in support of his application for adjustment of status. The Form G-325A requires the beneficiary to list his last occupation aboard; however, the beneficiary did not list any occupation in India, which is inconsistent with the labor certification and the experience letter.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Because the work experience listed on the labor certification is inconsistent with other information in the record, in the AAO's NOID, the petitioner was requested to provide independent, objective evidence of the beneficiary's former employment. On appeal, counsel states that the beneficiary "does not have any other documents to provide with regard to his previous employment." Counsel asserts that the previously submitted employment letter "should be persuasive evidence of his prior employment experience despite any inconsistencies in the labor certification application." The petitioner has failed to provide any independent, objective evidence to reconcile the inconsistency in the record.

The petitioner has not provided evidence of the beneficiary's claimed experience pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A). 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.

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.