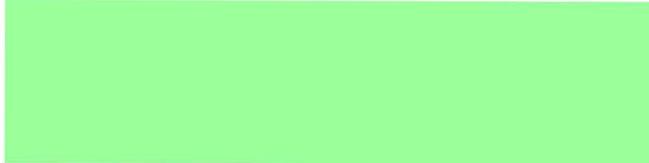




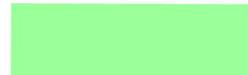
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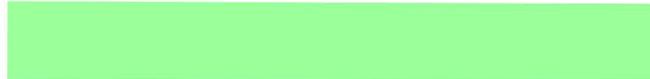


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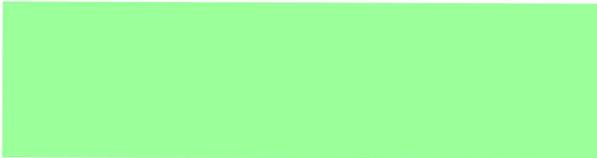


IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The appeal will be dismissed.

The petitioner is a [REDACTED] franchise. It seeks to permanently employ the beneficiary in the United States as a "first line supervisor/manager of retail sales workers." The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. On February 8, 2008, the director denied the petition accordingly. The petitioner appealed, and the AAO dismissed the appeal on March 17, 2011.

As set forth in the director's February 8, 2008 denial, the primary 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. In its dismissal, the AAO identified a second issue, namely, whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.²

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² 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 record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. On motion, as additional evidence of the ability to pay the proffered wage the petitioner submits wage reports of overtime payments to employees paid in the years 2001 through June 2004; and, to establish the beneficiary's qualifications, the petitioner submits a letter of experience. Thus the motion will be granted. Upon review, however, the appeal will be dismissed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

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.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

On motion, the petitioner requests the AAO to exercise its discretion to recognize the priority date from its Form ETA 9089 on August 10, 2006. The record reflects that the petitioner filed a Form ETA 9089 with the DOL on August 10, 2006, and at part A.1 "Refiling Instructions" the petitioner sought to utilize a previous filing date of April 30, 2001, [REDACTED]. The record reflects that on January 12, 2007, DOL denied the request to employ the earlier priority date, and

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

certified the Form ETA 9089 with a priority date of August 10, 2006. Upon review, DOL found that the petitioner had overcome its concerns about whether the petitioner had established it was a successor-in-interest to the entity that filed the April 30, 2001 labor certification application, and allowed the earlier priority date of April 30, 2001. In its decision, dated May 7, 2007, the DOL certified the application for labor certification with a priority date of April 30, 2001. Both of these DOL decisions are under ETA case number [REDACTED]. As such, the AAO will only recognize the most recent decision. The petitioner submitted the May 7, 2007 certified ETA 9089 in connection with the Form I-140. The AAO has no discretion to readjudicate the priority date established by the DOL. Thus, the priority date in this case is April 30, 2001, and the petitioner must establish the ability to pay since April 30, 2001.

The proffered wage stated on the labor certification is \$15.23 per hour (\$31,678.40 per year). On the petition, the petitioner claimed to have been established in 1984, to have a gross annual income of over \$500,000.00, and to employ 9 workers. According to the tax returns in the record, the petitioner [REDACTED] has been structured as an S corporation since 2005 with a fiscal year based on a calendar year. The California Secretary of State website states that the petitioner was incorporated on January 14, 2005. <http://kepler.sos.ca.gov>. Prior to 2005, the evidence in the record indicates that the owner of the petitioner operated the [REDACTED] store at the same address as a sole proprietorship [REDACTED].

The labor certification was originally filed by the sole proprietorship on April 30, 2001 using Form ETA 750, Application for Alien Employment Certification. After March 28, 2005, employers were required to file labor certification applications using ETA Form 9089. See 69 Fed. Reg. 77325 (Dec. 27, 2004)(hereinafter "PERM regulations"). The PERM regulations permitted employers with pending Forms ETA 750 to convert their labor certification applications to ETA Forms 9089 for processing under the new PERM program. 20 C.F.R. § 656.17(d). The petitioner requested the conversion of a labor certification filed by the sole proprietorship. DOL regulations require the conversion to be submitted by the same employer that filed the Form ETA 750. 20 C.F.R. § 656.17(d)(4). In approving the conversion, the DOL concluded that the petitioner was the same employer as the sole proprietorship, and therefore the petitioner is now the sponsoring employer on the certified ETA Form 9089.

In the instant case, when performing the analysis of the petitioner's ability to pay the proffered wage, the AAO will consider the petitioner to be a successor-in-interest to the sole proprietor that originally filed the Form ETA 750 on behalf of the beneficiary on April 30, 2001. In order for a successor-in-interest to establish its ability to pay the proffered wage, the petitioner must submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981). The successor must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. *Id.* As is stated above, the petitioner was formed in January 2005. Accordingly, this analysis will initially address the petitioner's ability to pay the proffered wage for 2005 and 2006, and then it will address the predecessor sole proprietorship's ability to pay the proffered wage for 2001, 2002, 2003, and

2004.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary did not claim to have worked for the petitioner or the sole proprietor. The record of proceeding contains no evidence that the petitioner or the sole proprietor has employed the beneficiary. Accordingly, the petitioner has not established that it paid the beneficiary an amount equal to or greater than 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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. 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. 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 sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total payroll exceeded the proffered wage is insufficient.

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

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of

the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[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).

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 assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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 net income for the required period, as shown in the

⁴ 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.

table below.⁵

Year	Net Income (\$)
2005	73,545.00
2006	35,745.00

Therefore, for the years 2005 and 2006, the petitioner possessed sufficient net income to pay the proffered wage. Accordingly, it is not necessary to review the petitioner's net current assets for 2005 and 2006.

Next is the analysis of the predecessor sole proprietorship's net income and net current assets. Unlike an S corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable 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 (IRS 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. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).⁶

In the instant case, the sole proprietor's tax returns state that he supports himself and a dependent parent. The sole proprietorship's adjusted gross income is as follows:

Year	Net Income (\$)
2001	45,428.00
2002	55,881.00
2003	57,065.00
2004	61,596.00

As discussed in the AAO dismissal, it is improbable that the sole proprietor could support himself and his parent on less than \$30,000 for an entire year, which is what remains after reducing the

⁵ The petitioner filed its tax returns using Form 1120S, U.S. Income Tax Return for an S Corporation. For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18 (2006 to present) or Line 17e (2005). When the two numbers differ, the number reported on Schedule K is used for net income.

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

adjusted gross income for each year by the amount required to pay the proffered wage. The improbability of the sole proprietor being able to pay the proffered wage is exemplified by his Schedules A. In 2002, 2003 and 2004, the petitioner reported significant home mortgage interest expenses reducing his adjusted gross income to under \$10,000.00 in each of those years when also subtracting the proffered wage. It is not credible that the petitioner could have employed the beneficiary, paid the one expense of mortgage interest, and paid all other reasonable household expenses in 2002, 2003 and 2004, as less than \$10,000 in income would have been available in each of those years. Further, the sole proprietor's individual tax returns do not contain financial data that would permit an analysis of net current assets.

On motion, counsel asserts that during the years 2001 through June 2004 the petitioner paid its employees overtime in an amount sufficient to cover the proffered wage in each of these years. Counsel contends that had the petitioner employ the beneficiary during these years it would not have to pay overtime to its employees. On motion, the petitioner submits payroll statements as new evidence of the payments it made to employees for overtime. The statements indicate the number of hours overtime and the overtime amounts:

- In 2001, total overtime hours = 3,083.92 hours; overtime wages paid = \$38,831.37
- In 2002, total overtime hours = 3,052.25 hours; overtime wages paid = \$38,543.68
- In 2003, total overtime hours = 3,595.42 hours; overtime wages paid = \$46,766.08
- In 2004, total overtime hours = 1,683.82 hours; overtime wages paid = \$21,381.58⁷

The petitioner asserts that it has been able to pay the proffered wage from 2001 through 2004 because the overtime work would have performed by the beneficiary had he commenced employment in the proffered position. According to the petitioner, the beneficiary would have performed the work, and overtime payments would have been sufficient to cover the proffered wage as the payments it made for overtime were available to pay the proffered wage.

While the payroll documents indicate the names of the persons who were paid overtime, they do not reflect the duties of such employees. As such, the record does not establish the "overtime payments" would have been available to pay the beneficiary for his duties in the proffered position as a first line supervisor/manager of retail sales workers. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner failed to submit evidence to show that overtime compensation payments were paid solely for services as first line supervisor/manager of retail sales workers, and not for other services. Without such evidence, the AAO does not find counsel's claim persuasive. 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).

⁷ Counsel states that the petitioner's records were destroyed and this amount represent amounts through June 2004. The petitioner, however, has the burden of proof and must establish the ability to pay in all years. Even were the AAO to consider the overtime paid to the other workers from 2001-2004, the petitioner has not established its ability to pay in 2004.

Counsel infers that the beneficiary will replace its overtime workers. The record does not, however, provide evidence that the petitioner has replaced or will replace the overtime workers with the beneficiary. As noted above, in general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the overtime workers involves the same duties as those set forth in the ETA 750. The petitioner has not documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If any of the employees performed other kinds of work, then the beneficiary could not have replaced him or her.⁸

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 750 was accepted for processing by the DOL.

As noted in its previous decision, the AAO 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. 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.

⁸ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

The record contains payroll reports in the name of [REDACTED], for the petitioner, indicating a total payroll of \$171,482.68 in 2001, \$198,317.66 in 2002, \$209,721.69 in 2003 and \$203,058.64 in 2004. The record also contains profit and loss statements generated by [REDACTED] for the sole proprietorship covering the years ending December 2000, December 2001, December 2002, December 2003 and December 2004. The statements indicate that the store had total sales of \$1.2 million in 2001, \$1.3 million in 2002, \$1.3 million on 2003, and \$1.3 million in 2004.⁹ A letter of [REDACTED] Field Consultant of [REDACTED] dated March 4, 2008 states that [REDACTED], the franchisor, "retains all accounting functions pertaining to the franchised store including yearly internal audits for profits and losses and payroll" and that the reports are based on the accounting conducted by [REDACTED]. Further, the letter states that the payroll expenses on the sole proprietor's tax returns resulted from [REDACTED] independent accounting of the store's payroll.¹⁰

As noted in the AAO dismissal, the store has been in business for many years, and has annual

⁹ There are also two profit and loss statements for the petitioner generated by [REDACTED] for 2005 and 2006. The financial data, and what appear to be store numbers, differ on each statement. Since there is no explanation in the record of these differing statements, they will not be considered here. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

¹⁰ If the petitioner relies on financial statements to demonstrate ability to pay, the financial statements must be audited. 8 C.F.R. § 204.5(g)(2). As noted in the AAO dismissal, contrary to counsel's assertion on appeal, the profit and loss statements generated by [REDACTED] are not audited financial statements. Audited financial statements are the highest level of service a Certified Public Accountant (CPA) provides. Audited financial statements contain a report from the CPA stating the audit was performed in accordance with Generally Accepted Auditing Standards, and provides reasonable assurance that the financial statements are free of material misstatement. The CPA also provides an opinion, or disclaimer of opinion, as to whether the financial statements are presented in accordance with Generally Accepted Accounting Principles.

In the instant case, the submitted profit and loss statements appear to have been internally generated by the franchisor, [REDACTED]. In appropriate cases, USCIS has the discretion to consider additional evidence of the petitioner's ability to pay the proffered wage, including, but not limited to, unaudited profit and loss statements which have been submitted in addition to the required annual reports, federal tax returns, or audited financial statements. 8 CFR § 204.5(g)(2). Even if the AAO accepted the data on the unaudited statements, they still do not establish the predecessor sole proprietor's ability to pay the proffered wage. Further, the letter from [REDACTED] states that the sole proprietor's tax returns incorporated the data from the profit and loss statements, therefore it is unclear what additional value they provide to the petitioner's tax returns.

sales of over \$1 million. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service. The evidence of record shows that, from April 30, 2001 until January 14, 2005, the predecessor sole proprietorship did not have the ability to pay the beneficiary's proffered wage in addition to supporting himself and his dependent.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As discussed in the AAO dismissal, 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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

- H.4. Education: None required.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months required.
- H.7. Alternate field of study: Not accepted.
- H.8. Alternate combination of education and experience: Not accepted.
- H.9. Foreign educational equivalent: Not accepted.
- H.10. Experience in an alternate occupation: Not accepted.
- H.11. Job Duties: Oversee convenience store; prepare work schedules, operate cash register and credit card purchases, sell groceries and gasoline, maintain inventory and equipment; be responsible for ordering and purchasing; reconcile all accounts; and prepare daily sales reports.
- H.14. Specific skills or other requirements: None.

Therefore, the petitioner must establish that the beneficiary has two years of experience in the offered position of "first line supervisor/manager of retail sales workers."

Any experience requirements for skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien. 8 C.F.R. § 204.5(1)(3)(ii)(B).

On appeal, the AAO found that the evidence of record did not establish that the beneficiary was qualified to perform the duties of the position as of the priority date. The AAO found that the evidence established the beneficiary had attained only five months of experience by the priority date and was not qualified for the position. The AAO also noted that the beneficiary's claimed periods of employment for all three full-time positions overlap. The beneficiary claims on the labor certification that he worked 120 hours per week in June 2004 in three separate jobs each located approximately 30 miles apart from the other in the Dallas, Texas metropolitan area.

On motion, the petitioner submits documentation indicating that the beneficiary had an ownership interest in [redacted] and neighborhood [redacted] and worked at both stores simultaneously from 2003-2004 during the transition periods. As mentioned in the AAO's initial decision, however, even were the AAO to accept the beneficiary's experience with the [redacted] from December 1, 2000 until the priority date, April 30, 2001, this is still only five months of relevant experience before the priority date.

On motion, the petitioner submits an experience letter, dated April 7, 2011, from [redacted] of [redacted] located in Karachi, Pakistan. [redacted] states that from January 1988 to July 1990, the beneficiary was employed full-time as a sales manager. He states that the beneficiary was responsible for overseeing day to day retail sales, managing cash and bank deposits, reconciling, managing and ordering inventory and generating sales and other reports for the business, and overlooking other sales persons.

[redacted] does not indicate how he dates the beneficiary's employment; whether the he derived his information from company records and the source and nature of these records. Also, [redacted]

does not indicate his position in the company during the claimed employment, nor does he indicate his current position with the company and thus does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, letter lacks probative value.

In addition, the record lacks supporting evidence of the claimed employment experience with Imperial Automobiles. It is also noted that the beneficiary did not list this relevant employment on his ETA 750. The petitioner does not explain why such employment was excluded from the beneficiary's claimed relevant employment experience. Given the fact that this information was not submitted with the initial Form ETA 9089, and was not mentioned anywhere in the record until the AAO found insufficient employment experience, the evidence falls short of establishing the beneficiary's experience prior to the priority date. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

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 director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145.

Upon review, the petition will again be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen and reconsider is granted. The appeal is dismissed. The denial of the petition is undisturbed.