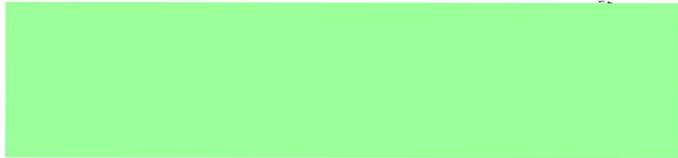
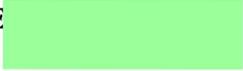




U.S. Citizenship
and Immigration
Services

(b)(6)

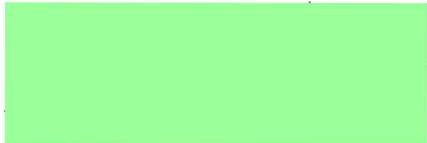


DATE: **MAR 18 2013** OFFICE: TEXAS SERVICE CENTER FILE 

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 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 petitioner is in the real estate and financial services business. It seeks to employ the beneficiary permanently in the United States as a senior mortgage loan counselor. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. Upon review of the appeal, the AAO issued a Notice of Intent to Dismiss and Request for Evidence (RFE) on June 21, 2012 to which the petitioner timely responded. 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.

In his May 1, 2009 denial, the director identified the issue of whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal, the AAO has identified another issue, whether the beneficiary possessed the minimum education and experience required to perform the offered position by the priority date.

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

¹The 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).

(b)(6)

Continuing Ability to Pay the Proffered Wage

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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on May 27, 2008. The proffered wage as stated on the ETA Form 9089 is \$36,000 per year.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 2008 and then elected subchapter S status beginning on January 1, 2009. On the petition, which was filed on March 31, 2009, the petitioner claimed to have been established in 2007, and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the ETA Form 9089, signed by the beneficiary on December 14, 2008, the beneficiary claimed to have started working for the petitioner on January 3, 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has submitted copies

of Internal Revenue Service (IRS) Forms W-2 it issued the beneficiary for 2008, 2009, 2010, and 2011, which reflect the wages paid to the beneficiary as shown in the table below.²

- In 2008, Form W-2 reflects wages of \$15,000.³ Wage shortfall of \$21,000.⁴
- In 2009, Form W-2 reflects wages of \$36,000. Wage shortfall of \$0.
- In 2010, Form W-2 reflects wages of \$36,000. Wage shortfall of \$0.
- In 2011, Form W-2 reflects wages of \$36,000. Wage shortfall of \$0.

Therefore, the petitioner has not established that it paid the full proffered wage to the beneficiary in 2008 and it must establish that it can pay the wage shortfall in that year. The petitioner has established that it paid the beneficiary the proffered wage in the years 2009, 2010, and 2011.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that 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).

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

²It is noted the petitioner also submitted copies of paystubs for 2012 indicating the petitioner continues to employ the beneficiary.

³The wage for each year is the amount shown in Box 1.

⁴The wage shortfall is the difference between the proffered wage and the paid wage.

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 31, 2009 with the filing of the petition. As of that date, the petitioner's 2008 federal income tax return was due, but the petitioner did not submit a copy of it with the petition. The petitioner did not submit a copy of its 2008 return with its appeal. In response to the AAO's RFE, the petitioner submitted a copy of an IRS account transcript showing the petitioner filed its 2008 tax return on March 17, 2009.⁵ Therefore, the IRS account transcript demonstrates the petitioner's net income for 2008 as shown in the table below.

- In 2008, the account transcript stated net income of -\$3,975.

Therefore, for the year 2008, the petitioner did not have sufficient net income to pay the wage shortfall.

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.⁶ A corporation's year-end

⁵The record contains no explanation for why the IRS account transcript was submitted instead of the petitioner's 2008 tax return.

⁶According 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

current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax account transcript does not reflect the petitioner's Schedule L entries, and the petitioner did not submit a copy of an audited financial statement or an annual report reflecting its net current assets for 2008.

Therefore, for the year 2008, the petitioner did not establish that it had sufficient net current assets to pay the wage shortfall.

Therefore, 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, its net income, or its net current assets.

On appeal, counsel asserts that the petitioner can establish its ability to pay in 2008 by showing that it paid the beneficiary the proffered wage beginning with the priority date of May 27, 2008 through December 31, 2008; therefore, counsel requests that USCIS prorate the proffered wage for that portion of the year occurring after the priority date. 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. However, the petitioner has not submitted such evidence.

In its RFE response, counsel asserts that although the beneficiary was working for the petitioner in May and June of 2008, she was not placed on the petitioner's payroll until July of 2008. As evidence of the monies paid to the beneficiary once she was placed on the payroll, counsel submitted copies of the beneficiary's pay stubs for the months of July, August, September, October, November, and December of 2008, all of which indicate that the beneficiary was paid monthly on approximately the 15th of the following month. Thus, the beneficiary's July 2008 wages were paid in August of 2008 and her December 2008 wages were paid in January of 2009. Therefore, as evidenced by the petitioner's payroll records, the beneficiary was paid for 5 months in 2008 (July through November) earning \$3,000 monthly or \$15,000. The petitioner issued the beneficiary an IRS Form W-2 to reflect that it paid the beneficiary wages of \$15,000 in 2008, which has been considered above.

In addressing the months of May and June 2008, counsel asserts that the beneficiary was paid off the payroll and submitted copies of two deposit tickets and the first page of two checking account statements, which indicate that the beneficiary owns the checking account jointly with another individual. The first deposit ticket indicates a deposit of \$2,998 cash into the joint checking account on June 5, 2008 which is duly reflected on the associated joint checking account statement. Counsel

one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

asserts that this deposit represents the money the petitioner paid the beneficiary for May wages. The second deposit ticket indicates a \$3,000 check was deposited on July 2, 2003 into the joint checking account which is also duly reflected on the joint checking account statement. Counsel asserts that this deposit represents the money the petitioner paid the beneficiary for June wages.

With regard to the first deposit, counsel submitted no additional evidence and regarding the \$2 difference (\$2,998 vs. \$3,000), counsel conjunctures that the beneficiary may have spent it on the way to make the deposit, but that it is impossible to determine exactly why the deposit was \$2 short. With regard to the second deposit, as additional evidence counsel submitted a copy of the petitioner's July 2008 bank statement showing check number 2232 in the amount of \$3,000 cleared its account on July 3. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although this office's RFE specifically requested the petitioner to submit a copy of this cancelled check, the petitioner declined to provide a copy of it stating that it was unable to locate the check. The cancelled check would have demonstrated that the beneficiary was the payee of the check. The petitioner's failure to submit the cancelled check 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).

The record contains no other evidence that the petitioner paid the beneficiary monies for employment in May and June of 2008, such as an IRS Form 1099 issued by the petitioner, petty cash receipts, or the beneficiary's personal income tax return. Additionally, there is no evidence that the beneficiary was the only individual depositing monies into the joint checking account. Therefore the petitioner has not established that it paid the beneficiary in May and June 2008.

As previously noted, counsel requests USCIS to prorate the beneficiary's wages; however, the record does not contain evidence establishing that the petitioner paid the beneficiary the proffered wage from May 27, 2008 through December 31, 2008. For 2008, the record only establishes that the petitioner paid the beneficiary for the months of July, August, September, October, and November.⁷ Thus USCIS will not prorate the proffered wage and the petitioner must establish that it had the ability to pay the full proffered wage of \$36,000, which it has not done.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return account transcript as submitted by the petitioner that demonstrates that the petitioner could not pay the wage shortfall.

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

⁷The petitioner paid the beneficiary's December 2008 wages in January 2009 and the petitioner is relying on those monies to establish its ability to pay in 2009. To consider the December 2008 wages in both 2008 and 2009 would not be appropriate.

new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner had minimal gross receipts that have fluctuated since 2008, thus it has not established a historical growth. There is no evidence of the petitioner's reputation within its industry. There is no evidence of a temporary and uncharacteristic disruption of the petitioner's business activities in 2008 from which it has since recovered. There is no evidence that the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beneficiary Qualifications: Education and Experience

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'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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 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. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position is for a senior mortgage loan

counselor and has the following minimum requirements:

- H.4. Education: Other.
- H.4-A. Equiv. of Bachelor's degree based on any suitable combo of ed/training/exp. in the field of Business Administration in Financial Management.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months as senior mortgage loan counselor.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 24 months as mortgage loan officer or any suitable combination of ed/training/exp.
- H.14. Specific skills or other requirements: None required.

On the labor certification, regarding education, Part J of the labor certification states that the beneficiary has the equivalent of a Bachelor's degree in Business Administration in Financial Management from [REDACTED] Ecuador completed in 1986.

The record contains a copy of the beneficiary's degree and transcripts from The [REDACTED] Ecuador conferring the degree of Professional Guide of Tourism on September 18, 1985. The transcripts accompanying the diploma indicate the beneficiary attended classes for three years. The record also contains a First Certificate in English issued by [REDACTED] certificate) for an examination in December 1984, but there are no accompanying transcripts for attendance of any classes. The record also contains a certificate from [REDACTED] certificate) issued to the beneficiary for her participation in a one-day seminar in August 1991.

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on September 28, 2004. The evaluation concludes that the beneficiary's degree from [REDACTED], the [REDACTED] certificates, along with a seminar in computer training and earning an advanced level of French from [REDACTED] (both of which are not documented in the file) equate to a Bachelor of Arts degree in Hospitality and Tourism or alternatively 60 academic credit hours toward a Bachelor of Science degree in Business Administration at a regionally accredited United States institution.

Ms. [REDACTED] continues by considering the beneficiary's purported 11 years of work experience,⁸ and applies the nonimmigrant rule equating three years of experience for one year of education to ultimately conclude that the beneficiary's academic credentials plus professional work experience are the equivalent of a Bachelor of Science degree in Business Administration with a major in

⁸ The file documents less than 10 years of work experience.

Financial Management.⁹

Regarding experience, Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a mortgage loan officer with Mortgages by [REDACTED] in [REDACTED] FL from April 13, 2005 through October 31, 2007 and her supervisor was [REDACTED].¹⁰ Part K also states that the beneficiary began working with the petitioner on January 3, 2008.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter dated October 7, 2008 from [REDACTED] Sr. Loan Officer/Manager [REDACTED] stating that the beneficiary worked for [REDACTED] from April 13, 2005 to October 31, 2007 in the position of Mortgage Loan Officer. The beneficiary's duties are also listed.¹¹

The labor certification at Part H.4. indicates that the petitioner intended to consider an alternative to a United States bachelor's degree or a single foreign equivalent degree; however, Part H.8. states that no alternate combination of education and experience will be accepted. To reconcile these statements, in its RFE, the AAO requested evidence to establish the petitioner's intent regarding the minimum requirements of the offered position. The AAO solicited evidence of how the petitioner expressed its actual minimum educational and experiential requirements to the DOL during the labor certification process and to United States workers.

The AAO specifically requested the petitioner to provide: a copy of the signed recruitment report required by 20 C.F.R. § 656.17(g)(1); a copy of the prevailing wage determination; copies of all online, print, and additional recruitment conducted for the position; a copy of the job order; a copy of the posted notice of filing of the labor certification; copies of all the resumes received in response to the recruitment efforts, and; copies of any other communications with the DOL that may be probative of the petitioner's intent.

⁹ The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to nonimmigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

¹⁰ The labor certification at Part J, questions 18 and 20 further indicate the beneficiary is relying on experience with [REDACTED].

¹¹ In its RFE response, the petitioner submitted copies of the beneficiary's IRS Forms W-2 for the years 2005, 2006, and 2007 issued by [REDACTED].

In response to the RFE, counsel stated that the petitioner would have accepted “a U.S. degree, a foreign degree, experience equivalent to a degree, or any combination of education, training and experience that is equivalent to a bachelor’s degree.” The petitioner submitted: a copy of its signed recruitment report, which states 12 resumes were received; the prevailing wage determination; copies of print and on-line advertisements; and a copy of the posted notice. The petitioner also submitted a copy of computer printout indicating the job order was created on March 7, 2008, but did not submit a copy of its content. The petitioner did not indicate whether or not it had any communication with the DOL during the certification process. The petitioner did not submit any of the 12 resumes it received.

Based on the foregoing submissions, the petitioner represented the educational and experiential requirements during the recruitment process as follows:

- The prevailing wage determination stated the position as mortgage loan counselor and the degree requirement as “bachelor,” with no educational equivalency listed.¹² The prevailing wage determination also states that two years of experience is required, but no equivalency to experience is listed.
- The *Orlando Sentinel* print advertisement indicated the position as mortgage loan counselor and stated “Req BA in Bus. Admin/Finan Mgmt or any suitable combo of ed/training/exp equiv to a BA + 2 years of exp.” The petitioner’s advertisement on OrlandoSentinel.com was identical to the print advertisement.
- The Seminole Chronicle print advertisement indicated the position as mortgage loan counselor and stated “Req Bachelor’s in Bus.Admin/Financial Mngmt or any suitable combo of ed/training/exp equiv to Bachelor’s + 2 yrs exp.”
- The petitioner’s posting notice indicated the position as senior mortgage loan counselor and stated “Equivalent of Bachelor’s Degree based on any suitable combination of ed/training/exp.” The posting notice does not require 24 months experience as a senior mortgage loan counselor or alternatively, 24 months experience as a mortgage loan officer or any suitable combination of education/training/experience.
- The petitioner’s recruitment report indicates that it also advertised on WUCF radio station, and although the petitioner submitted a broadcast log from the radio station, there is no indication of the text of the ad.

Regarding the recruitment report, it states that 12 resumes were received and that four of the applicants did not have the requested experience in the field nor did they have a Bachelor’s Degree in Business Administration in Financial Management, and five of the applicants did not have the required Bachelor’s Degree in Business Administration in Financial Management. Based on the recruitment report, it appears that 9 of the 12 applicants were rejected because they did not have a

¹²Counsel states in response to the AAO’s RFE that at the time the prevailing wage determination was filed, the form did not allow for an explanation or detail under the degree required field, thus it was impossible for the petitioner to indicate that it would accept an equivalent to a bachelor’s degree.

Bachelor's degree; however, this is inconsistent with the labor certification, which at H.4 states that a Bachelor's degree is not required.

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.

Additionally, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of the 12 resumes it received. The resumes would have demonstrated the applicants' educational and experiential qualifications, thereby helping to establish the petitioner's intent regarding the minimum requirements of the offered position. 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).

Regarding the job order, counsel cites to *A Cut Above Ceramic Tile*, 2010-PER-00224 (2012 BALCA), for the premise that the petitioner is not required to submit a copy of the job order and that the start and end dates of the job order as entered on the labor certification serve as documentation that the job order was placed. Counsel does not state how the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. 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, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. *See* 8 C.F.R. § 103.9(a). Moreover, the AAO did not request the job order as proof that it was placed, but rather to review the job order to determine the petitioner's intent regarding the minimum requirements of the offered position. 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).

Additionally, the petitioner has not explained the following inconsistencies:

- The labor certification states the proffered position is senior mortgage loan counselor, while the print and on-line advertisements and the prevailing wage determination state the proffered position as mortgage loan counselor.
- The labor certification states the petitioner will consider 24 months in the alternate occupation of mortgage loan officer, yet the print and on-line advertisements and prevailing wage determination do not mention experience in an alternate occupation.
- It is also noted that the labor certification indicates that the petitioner will accept any suitable combination of education/training/experience for the 24 months of experience requirement, but none of the petitioner's advertising or prevailing wage determination includes this language.

- The labor certification requires 24 months of experience yet the petitioner's posting notice requires no experience.

The petitioner has not resolved the noted inconsistencies with independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. at 591-592. 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.