



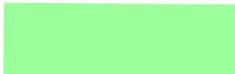
U.S. Citizenship
and Immigration
Services

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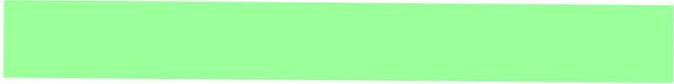
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IN RE:

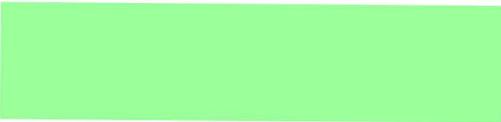
Petitioner:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's revocation is withdrawn and the matter will be remanded to the director.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The appellant is a Chinese and Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a "cook: specialty: traditional & modern Chinese food." 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).¹ The Consular Officer (U.S. Consulate General Guangzhou) concluded that the petitioning employer had been bought out by, or merged into, another corporation and returned the petition to the director. The director issued the NOIR explaining the Consular Officer's findings. The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out that the record did not establish that the appellant was a successor in interest to the original petitioner, and that this would warrant a denial if unexplained and un rebutted. Thus, the NOIR was properly issued for good and sufficient cause.

In response to the NOIR, the director determined that a new petition was not submitted by the appellant. The director revoked the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

¹ 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.

As set forth in the director's January 2, 2013 revocation, the basis for revocation was that a new petition for [REDACTED] as a successor-in-interest of [REDACTED] the petitioner listed on the Form I-140 and Form ETA 750, was not submitted.

On August 1, 2013, the AAO issued a notice of intent to dismiss and derogatory information (NOID). The AAO reissued its NOID on August 30, 2013 due to an inadvertent error in the address of counsel of record. In the NOID, the AAO indicated that on June 25, 2013, the website for the New Hampshire Corporation Division indicated that the appellant was "Not In Good Standing." The AAO also noted that the record did not establish that the appellant or the original petitioner, [REDACTED] had the ability to pay the proffered wage and that the petitioner failed to establish that the beneficiary is qualified for the offered position.

In response to the NOID, counsel submitted evidence that the appellant is now in good standing after filing its 2013 annual report and paying the required fee with the State of New Hampshire. Counsel also submitted two briefs and additional evidence.

As noted in the NOID, an appellant may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The record contains a Bill of Sale and a Purchase and Sale Agreement indicating that [REDACTED] the petitioner sold its business to [REDACTED] the appellant. The record also contains a letter from the petitioner indicating that the beneficiary's job will be the same as that originally offered on the labor certification. The evidence in the record meets the first and second conditions outlined above.

The evidence in the record does not satisfy all three conditions described above because it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.

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.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 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 31, 2002. The proffered wage as stated on the Form ETA 750 is \$23,920 per year for 40 hours of work per week. The Form ETA 750 states that the position requires six years of grade school, three years of high school, and two years of experience in the job offered of cook: specialty: traditional & modern Chinese food.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$694,791, and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year was based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 25, 2007, the beneficiary did not claim to have worked for the petitioner.

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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 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, neither the petitioner nor the appellant has established that it employed and paid the beneficiary the full proffered wage from the priority date of July 31, 2002 or subsequently.

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 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, 558 F.3d 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*, 719 F. Supp. 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 April 21, 2011 with the receipt by the director of the appellant’s submissions in response to the director’s NOIR. The AAO notes that the record contains tax returns for the appellant and for [REDACTED]. The record only contains the first page of the appellant’s tax returns for 2010, 2011, and 2012. Therefore, the appellant’s income tax return for 2009 is the most recent complete return available. The appellant’s tax returns demonstrate its net income for 2008, 2009, 2010, 2011, and, 2012, as shown in the table below.

- In 2008, the Form 1120 stated net income of \$4,229.
- In 2009, the Form 1120 stated net income of \$29,130.
- In 2010, the Form 1120 stated net income of \$5,118.
- In 2011, the Form 1120 stated net income of \$21,871.
- In 2012, the Form 1120 stated net income of \$5,859.

Therefore, for the years 2008, 2010, 2011, and 2012, the appellant did not have sufficient net income to pay the proffered wage. The appellant has established that it had sufficient net income to pay the proffered wage in 2009.

As noted above, the appellant must establish that it and its predecessor, [REDACTED], possessed the ability to pay the proffered wage for the relevant periods. The priority date is July 31, 2002 and the Bill of Sale is dated July 10, 2008. Therefore, the appellant must establish that [REDACTED] had the ability to pay the proffered wage from 2002 to 2007. The record does not contain a tax return for [REDACTED] for 2007. The record contains tax returns for [REDACTED] that demonstrate its net income for 2002, 2003, 2004, 2005, and, 2006, as shown in the table below.

- In 2002, the Form 1120 stated net income of \$22,561.
- In 2003, the Form 1120 stated net income of \$4,290.
- In 2004, the Form 1120 stated net income of \$5,738.
- In 2005, the Form 1120 stated net income of \$5,001.
- In 2006, the Form 1120 stated net income of \$(63,658).
- In 2007, no Form 1120 is submitted.

Therefore, for the years 2002, 2003, 2004, 2005, 2006, and 2007, [REDACTED] did not establish that it had sufficient net income to pay the proffered wage.

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.³ A corporation's year-end 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. As noted, the petitioner did not submit its complete tax returns for 2010, 2011, and 2012. Therefore, the AAO is unable to determine the petitioner's net current assets for 2010, 2011, and 2012.

The appellant's tax returns demonstrate its end-of-year net current assets for 2008 as shown in the table below.

- In 2008, the Form 1120 stated net current assets of \$13,090.

Therefore, for the years 2008, 2010, 2011, and 2012, the appellant did not establish that it had sufficient net current assets to pay the proffered wage.

The record contains tax returns for [REDACTED] that demonstrate its net current assets, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of \$35,608.
- In 2003, the Form 1120 stated net current assets of \$40,812.
- In 2004, the Form 1120 stated net current assets of \$59,242.
- In 2005, the Form 1120 stated net current assets of \$82,181.
- In 2006, the Form 1120 stated net current assets of \$38,332.

³According 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.

- In 2007, no Form 1120 was submitted.

Therefore, for the year 2007, [REDACTED] did not establish that it had sufficient net current assets to pay the proffered wage. [REDACTED] has established that it had sufficient net current assets to pay the proffered wage in 2002, 2003, 2004, 2005, and 2006.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner and the appellant 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.

On appeal, counsel asserts that the appellant had assets as shown in the table below.

<u>Year</u>	<u>Assets</u>
2008	\$108,898 (half year)
2009	\$125,319
2010	\$130,338
2011	\$148,383
2012	\$154,154

Counsel's assertion that the appellant's total assets should have been considered in the determination of the ability to pay the proffered wage is without merit. The appellant's total assets include depreciable assets that the appellant uses in its business, including real property that counsel asserts should be considered. 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 appellant's total assets must be balanced by the appellant's liabilities. Otherwise, they cannot properly be considered in the determination of the appellant'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.

Counsel's reliance on the balance in the appellant's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the appellant in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the appellant's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the appellant's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the appellant's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the appellant that demonstrates that the petitioner and the appellant could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, counsel states that other economic factors may be considered. In his brief, counsel notes that the appellant paid salaries as shown in the table below.

<u>Year</u>	<u>Salaries Paid</u>
2008	\$47,867 (half year)
2009	\$69,836
2010	\$108,262
2011	\$69,289
2012	\$71,600

The appellant's payment of salaries from 2008 to 2012 does not indicate that the original petitioner had the ability to pay the proffered wage from 2002 through 2008, the date that the transfer of ownership took place. The appellant has not stated that the beneficiary would be replacing an employee. 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. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the

appellant has not established that it or its predecessor had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director,⁴ the appellant 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 (1st Cir. 1981).

As noted in the AAO's NOID, in the instant case, the Form ETA 750 states that the offered position requires six years of grade school and three years of high school, and three years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on studies as a "cook" at [REDACTED] China, completed in January 2000. The beneficiary began her studies at [REDACTED] in March 1998 and was therefore at the corporation for 22 months. The record contains no evidence that the beneficiary completed six years of grade school or three years of high school or that her graduation from a 22-month program at [REDACTED] is the equivalent of three years of high school.

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 (1st Cir. 1981).

In response to the AAO's NOID, the appellant submitted a translated high school diploma for the beneficiary indicating that she fulfilled all of the courses, passed the exams in three years, and

⁴ 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).

graduated in June 1984. The AAO notes that this diploma is inconsistent with the information listed in the beneficiary's Form ETA 750B. The beneficiary listed her graduation from elementary school in 1973, her graduation from middle school in 1978, and her graduation from [REDACTED] in 2000 in response to Question 11 of the Form ETA 750B. The beneficiary did not list any information regarding attending or graduating from high school on the labor certification. Counsel does not provide an explanation regarding why the beneficiary did not list her graduation from high school in 1984 in the Form ETA 750B. 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).

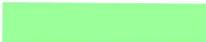
The appellant did not submit any evidence that the beneficiary attended six years of grade school.

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a cook working for [REDACTED] in China from May 2000 to March 2003. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(1)(3)(ii)(A). The record contains two employment letters for the beneficiary on [REDACTED] letterhead, signed by [REDACTED] Manager and [REDACTED] Manager. The letters state that the beneficiary worked for the hotel as a cook from July 18, 2004 to March 20, 2007. The beneficiary's employment for [REDACTED] was after the priority date of July 31, 2002. The record contains no other employment letters.

In response to the NOID, the appellant submitted an employment letter for the beneficiary signed by [REDACTED] Formal Manager of [REDACTED]. In his letter, Mr. [REDACTED] states that the beneficiary worked as a "Chinese Cook in training" from May 2000 to March 2003. The letter states that the beneficiary was trained daily to an increasing level of skill and that after being trained in preparation, she was expected to work independently. The letter is not clear as to when the beneficiary's training was complete and so the AAO is unable to determine that the beneficiary had the experience required by the labor certification before the priority date of July 31, 2002.

The evidence in the record does not establish that the beneficiary possessed the required education or experience set forth on the labor certification by the priority date. Therefore, the appellant has also failed to establish that the beneficiary is qualified for the offered position.

Finally, counsel suggests that the director's adjudication of the petition was unfair. The appellant has not demonstrated any error by the director in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. See *Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).



The appellant has established that it meets the first two prongs of a valid successor-in-interest relationship for immigration purposes. Therefore, the AAO will withdraw the revocation and remand the case to the director to request and consider evidence of the petitioner's ability to pay the proffered wage, such as federal tax returns, audited financial statements, or annual reports, and evidence that the beneficiary completed six years of grade school and has two years of work experience in the job offered as a as required by the labor certification. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director of for issuance of a new, detailed decision.