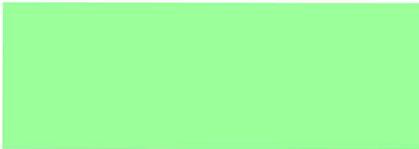


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



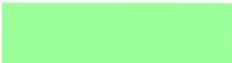
U.S. Citizenship  
and Immigration  
Services

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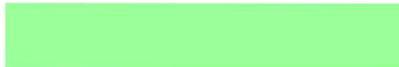


DATE: SEP 27 2013

OFFICE: TEXAS SERVICE CENTER

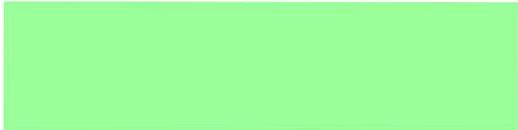
FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

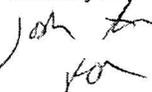
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO) and the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. The motion will be granted, the previous decision by the AAO dated June 24, 2013, will be affirmed, and the petition will remain denied.

The petitioner is a construction/home renovation company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. On appeal the AAO affirmed the director's finding and also concluded that the petitioner failed to establish that the beneficiary is qualified for the position offered. Accordingly, the AAO dismissed the appeal on these grounds.

The record shows that the motion 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.

As set forth in the director's June 19, 2012 denial, one of the issues in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation 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 labor 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 labor

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 ETA Form 9089 was accepted on March 3, 2011. The proffered wage as stated on the ETA Form 9089 is \$71,386.00 per year. The ETA Form 9089 states that the position requires twenty-four months of experience in the position offered.

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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year runs from November 1 to October 31. On the labor certification, the petitioner claimed to have been established in 1978, and to employ two workers. As noted in the AAO's prior decision, Form I-140 requests information on the petitioner's date of establishment, current number of employees, gross and net annual income; however, the petitioner did not include any of this required information. On the ETA Form 9089, signed by the beneficiary on May 18, 2011, the beneficiary claimed to have worked for the petitioner full-time in the position offered beginning on March 1, 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, 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 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. The record contains a Form W-2 for 2010, which is prior to the priority date, issued by the petitioner to the beneficiary indicating wages paid in the amount of \$20,000. The petitioner also submitted Form W-2 for 2011, indicating wages paid to the

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<sup>1</sup> The submission of additional evidence on motion 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 motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary during the year 2011 in the amount of \$21,025.95. The proffered wage of \$71,386 is greater than the actual wages paid to the beneficiary during 2011. On motion, the petitioner did not submit any wage information for 2012. Therefore, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onward. The petitioner must demonstrate its ability to pay the difference between the proffered wage and wages paid in 2011, which is \$50,360.05. The petitioner submitted no further evidence in its motion to indicate that it paid the beneficiary the proffered wage during any other relevant time period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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 specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash; neither does it represent amounts available to pay wages.

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

*River Street Donuts* at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

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 closed on July 24, 2013, with the receipt of the petitioner’s motion. The petitioner submitted Form 1120 covering the period from November 1, 2011, to October 31, 2012.<sup>2</sup> The petitioner’s net income is indicated below:

- Form 1120 for fiscal year 2010 demonstrates its net income, line 28, as \$11,501.
- Form 1120 for fiscal year 2011 demonstrates its net income, line 28, as \$24,189.

The AAO previously determined in its June 24, 2013 decision that the petitioner did not demonstrate an ability to pay the difference between the proffered wage and the actual wages paid to the beneficiary through its net income in the fiscal year 2010. The AAO also finds upon motion that the petitioner did not demonstrate sufficient net income to pay the difference between the proffered wage and actual wages paid to the beneficiary in the fiscal year 2011 based on its Form 1120.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>3</sup> 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.

- Form 1120 demonstrates its end-of-year net current assets for fiscal year 2010 as (\$52,004).

<sup>2</sup> The petitioner also submitted federal income tax returns for the years 2008 and 2009. However, since the priority date is March 3, 2011, the 2008 and 2009 tax returns would not be used in demonstrating the ability to pay the beneficiary the proffered wage from the priority date. These returns will be considered in the later review of the totality of the petitioner’s circumstances

<sup>3</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- Form 1120 demonstrates its end-of-year net current assets for fiscal year 2011 as (\$29,436).

The AAO previously determined that for the fiscal year 2010, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages paid in 2011. The AAO finds upon motion that based on wages paid in 2011, and net current assets for fiscal year 2011 the petitioner has also not demonstrated sufficient net current assets to pay the difference between the proffered wage and the actual wages paid.

Therefore, from the date the labor certification 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 net current assets.

On motion counsel re-asserts that the petitioner would utilize a portion its compensation to officers to pay the proffered wage to the beneficiary, and that it has paid a sum of \$119,600 during fiscal year 2011 to its sole officer as compensation.<sup>4</sup> In its motion the petitioner, submits the sole officer's personal income taxes Form 1040 for the calendar year 2012 in order to demonstrate this payment. The sole officer indicates that he would be able to forgo a portion of his compensation to pay the difference between actual wages paid and the proffered wage. However, in viewing the officer compensation amount indicated as paid of \$119,600 according to the Form 1125E for fiscal year 2011, along with the sole officer's total claimed personal income for 2012 according to Form 1040, it remains unclear which portion of the officer income would be discretionary as stated. As the petitioner's taxes are filed on a fiscal year and the shareholder's taxes are filed on a calendar year, there is a period of overlap or a gap between any given year, which cannot be reconciled without additional information to document when compensation was paid or received. Further, upon review of the shareholder's 2012 taxes, the return indicates the shareholder received compensation of \$130,000, and The shareholder's spouse was paid \$25,000 by the petitioner. The record is unclear as

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<sup>4</sup> In its appeal, the petitioner submitted an itemized list of monthly expenses for the sole shareholder and sole officer of the company totaling \$6,922 per month for the calendar year 2011, and indicates he has sufficient additional income to pay his personal expenses without the officer compensation which is discretionary. The petitioner's sole shareholder indicated that he would be willing to forgo a portion of this officer compensation in order to pay the additional amount over the actual wages paid of \$21,025.95 necessary to meet the proffered wage amount of \$71,386, and also "to make up any difference in the beneficiary's past wages and the proffered wage." The AAO notes that the shareholder's expense report indicates expenses of \$6,922 per month and income of \$8,000 per month. If this report were accepted, it would document insufficient income after expenses (\$1,078 per month) to pay the difference between the proffered wage and wages actually paid (\$50,360.05 in 2011). As the AAO previously noted, the petitioner has not provided any official evidence of the shareholder's expenses. The expense sheet provided does not appear to accurately portray the shareholder's expenses, as for example it states college expenses of \$200 a month, but the shareholder's personal 2012 income taxes indicate college expenses in excess of \$4,000 were claimed.

to what amounts were received by whom at what time, or how these amounts relate to the shareholder's compensation reported at line 12 of Form 1120. The AAO notes that the petitioner's 2010 and 2011 tax returns indicate no salaries or wages paid in either year, although costs of labor are reported for those years. Further, the petitioner did not provide the shareholder's personal income tax returns for 2011, preventing the AAO from analyzing any information relevant to that tax year. The record of proceedings also does not contain the beneficiary's Form W-2 or 1099 for 2012.

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

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.

As previously indicated by the AAO, it has therefore, not been sufficiently established that any officer compensation would be available income from which the petitioner would be able to pay the difference between the proffered wage and actual wages paid to the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The AAO again notes that even if the petitioner had established the officer's expenses to be accurate as provided in its motion, the evidence in the record would be insufficient to establish that the officer had income after expenses that would cover the \$50,360.05 difference between the proffered wage and wages paid in 2011; the officer indicates only \$1,078 in income per month after expenses, which annually is less than the difference noted. 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 sole owner also indicates that some combination of a portion of his officer compensation with the entity's total net income for 2012 could be utilized to pay the difference in the proffered wage. However, the fiscal year 2012 income taxes are not yet due if filed in the same manner as previous returns for the entity contained in the record, therefore this information is not yet available to determine if it would be sufficient to pay the difference in the proffered wage. In addition, even if the petitioner indicated it would use its fiscal year 2011 net income in combination with a portion of officer compensation, this would still be insufficient to demonstrate that the petitioner had the ability to pay the difference between the actual wages and the proffered wage since the priority date of March 3, 2011, for the reasons previously indicated. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Thus, it is affirmed that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary from the priority date onward.

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

The AAO determined upon appeal that the petitioner had not offered sufficient evidence in line with *Sonogawa* to establish that based on the totality of circumstances it had the ability to pay the beneficiary difference in the proffered wage from the priority date until lawful permanent residence. While on the labor certification the petitioner claimed to have a commercial business in 1978, the petitioner's tax returns indicate it was not incorporated until 1985. Counsel again asserts in the instant motion that the petitioner's business is growing, however, the petitioner's 2008 to 2011 taxes continue to show no wages or salaries paid, although it does report costs for labor. However, the record still does not establish whether these costs represent direct employment, or contract labor, or subcontractor costs. As discussed above, a portion of these costs appear to be income paid to the shareholder and the shareholder's spouse. While the petitioner claimed two employees on the labor certification, it is unclear whether this representation is accurate. The petitioner reported only \$36,900 in cost of labor in 2009, which appears insufficient to document the wages of two employees, given that the labor certification indicates the beneficiary is employed full-time by the petitioner in the position offered. In addition, as also previously stated, the petitioner did not pay the beneficiary the full proffered wage during any relevant year. While the beneficiary has been purportedly employed by the petitioner full-time in the position offered since 2002, the wages paid to the beneficiary are not significant compared to the proffered wage suggesting that the position

offered may be part-time or contractual, rather than a full-time position as requested by regulation.<sup>5</sup> In any future filing, the petitioner must establish that the position offered is a *bonafide*, full-time job offer. The petitioner indicated that the sole owner could forgo his officer compensation to supplement the wages paid to the beneficiary, but failed to offer sufficient supporting objective evidence of this assertion in its motion.

Given the petitioner's number of employees and wages paid, the record does not document prospects similar to those in *Sonegawa*. The petitioner has also still not provided any evidence of its reputation, or of any uncharacteristic losses in the instant motion.

Therefore, the petitioner has also failed in its motion to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after reviewing and reconsidering the totality of the circumstances, the petitioner has still failed to establish its ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director, the AAO also determined that the petitioner did not establish that the beneficiary was qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

The AAO determined that the labor certification requires twenty-four months of experience in the position offered of carpenter. The petitioner submitted a letter from [REDACTED], in order to demonstrate that the beneficiary possess this experience. However, the letter indicates that the

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<sup>5</sup> The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

Full-time teachers are considered to be in full-time employment. *See Dearborn Public Schools*, 91-INA-222 (BALCA Dec. 7, 1993).

beneficiary worked an "average of 40 hours per-week." This information does not conclusively allow the AAO to determine the actual amount of experience the beneficiary received while working with this employer since it does not offer specific information as to the amount of time the beneficiary was employed with this establishment, and suggests the beneficiary may not have been employed full-time. As this is the only experience listed on the labor certification, it has not been sufficiently demonstrated that the beneficiary possessed the required experience for the job offered at the time the labor certification was filed. Moreover, the letter provided does not indicate the writer's title or the date it was prepared as required by regulation. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

Counsel asserts in the instant motion that the letter indicates that the beneficiary worked with [REDACTED] from February of 1996 to February of 1998 as a carpenter, and this therefore, demonstrates that the beneficiary completed the required two years of experience. Counsel also indicates that "the AAO chose to ignore the clear evidence and instead imposed additional conditions on the job requirement questioning whether an average work week of 40 hours sufficiently meets the two year experience limit as required by the labor certification."

The labor certification in the instant case requires twenty-four months of experience in the position offered. In order to determine that the beneficiary obtained the required amount of experience as of the priority date the evidence presented must demonstrate this information. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

The AAO previously found that the letter submitted regarding the beneficiary's experience was insufficient to determine he possessed the required experience as of the priority date because it offers an indefinite description of the amount of experience the beneficiary purportedly gained with this employer. As the labor certification requires twenty-four months of experience, and the letter provided indicates the beneficiary was employed "from" February of 1996 to February of 1998 for an "average" of 40 hours, this description casts doubt on whether the beneficiary possessed the twenty-four months of experience. The AAO notes that the beneficiary would have been 16 years old in February 1996. The letter does not indicate on what day the beneficiary's employment began or ended, thereby preventing the AAO from determining whether the beneficiary's employment ended before, on, or after the twenty-four months of employment. The AAO also previously noted that the letter did not indicate the title of the author, or the date of its creation, and that the wording

of the beneficiary's experience in the letter, and the experience required on the labor certification are notably similar, casting doubt on the beneficiary's claimed experience with this employer. The petitioner was further informed that in any further filings, evidence of the beneficiary's experience must include independent, objective evidence of that experience, such as pay records, government work records, or other government records. 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). Counsel has provided no further independent, objective evidence upon motion regarding this issue as requested. See 8 C.F.R. § 204.5(l)(3)(ii)(A). 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).

Therefore, the petitioner failed to demonstrate that the beneficiary possessed the experience required by the labor certification as of the priority date. 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 remains denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden on motion.

**ORDER:** The motion to reopen and reconsider is granted. The prior decision by the AAO is affirmed, and the petition remains denied.