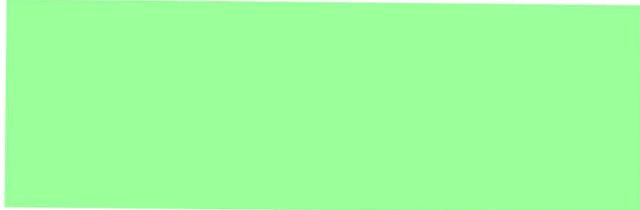


(b)(6)

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

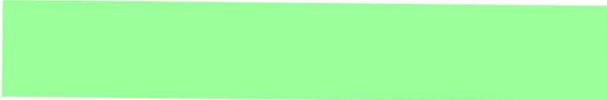


U.S. Citizenship
and Immigration
Services



DATE: **FEB 04 2014** OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to own and operate a horse farm. He seeks to employ the beneficiary permanently in the United States as a barn boss. As required by statute, the petition is accompanied by an 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 he had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's March 7, 2012 denial, the primary issue in this case is whether or not the petitioner has established that he 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 identified two additional issues: the identity of the petitioner, and whether or not the petitioner has established that the beneficiary is qualified for the offered position.

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

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

On the petition, the petitioner claimed to own and operate a horse farm with a federal employer identification number (FEIN) of [REDACTED]² to have been established in 1970; and to currently

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into 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).

² The ETA Form 9089 reflects that the employer is John McCrane, FEIN [REDACTED]. The North American Industry Classification System (NAICS) Code that would identify the nature of the petitioner's business is not listed on the ETA Form 9089. The Form I-140 petition lists the petitioner as [REDACTED] FEIN [REDACTED]. The petitioner identifies itself on the Form I-140 petition at Part 5(2.) as a horse farm and its NAICS code as 115120. That NAICS code is not a valid code number. *See*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed January 23, 2014). 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

employ one worker. On the ETA Form 9089, signed by the beneficiary on August 12, 2010, the beneficiary claimed to have worked for the petitioner since 2005.

The AAO issued a Request for Evidence (RFE) to the petitioner dated June 28, 2013, requesting him to submit his tax returns for 2011 and 2012, an itemized list of personal household expenses from 2010 – 2011, and copies of Internal Revenue Service (IRS) Forms W-2 or 1099-MISC issued to the beneficiary from 2010 – 2013. The AAO also requested the petitioner to submit evidence that he owned and operated a horse farm and that the job offer as barn boss was *bona fide*. The AAO indicated that the petitioner had an FEIN that was not the same as the social security number listed on the Form 1040 tax returns submitted to the record.³ The RFE stated:

[T]he record does not establish that you own and operate a horse farm. On your IRS Form 1040 for 2010, your Schedule F farm income is listed as revenue from pasture and farmland leases and firewood sales. None of your Schedule F income is derived from horse farming. Your schedule F lists your farm business as “other crop farming” (code 111900). We note that your name is listed as the employer alongside [REDACTED] on the ETA Form 9089 and the Form I-140 with Federal Employment Identification Number (FEIN) [REDACTED]. The schedule F, however, lists your wife as the proprietor of the farm, with no FEIN. Please explain these inconsistencies and establish that you intend to employ the beneficiary as a barn boss as certified by the United States Department of Labor, and that your offer to the beneficiary as a barn boss is *bona fide*. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Please submit independent objective evidence of the existence of a horse farm that will employ the beneficiary as a barn boss.

In response, the petitioner, through counsel, submitted IRS Forms 1040 for 2010, 2011 and 2012, with schedules, for [REDACTED] and his wife, [REDACTED] filing jointly; and statements of personal expenses of [REDACTED] in the form of profit and loss statements for 2011 and 2012. The petitioner also submitted a statement from his accountant stating that the horse farm is an expense, not an income generator; that the farm is listed as crop and logging on Schedule F for the real estate tax exemption; and that the petitioner is an elderly couple who owns a farm with horses. The accountant further stated that the Schedule F lists the petitioner’s spouse as the proprietor

suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

³ A sole proprietor who does not have any employees and who does not file any excise or pension plan tax returns does not need an FEIN. In that instance, the sole proprietor uses his or her social security number as the taxpayer identification number. However, at any time an employer hires an employee or has to file an excise tax return, it will need a new, separate FEIN. See [http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Form-SS-4-&-Employer-Identification-Number-\(EIN\)/Form-SS-4-&-Employer-Identification-Number-\(EIN\)-1](http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Form-SS-4-&-Employer-Identification-Number-(EIN)/Form-SS-4-&-Employer-Identification-Number-(EIN)-1) (accessed January 28, 2014). In the instant case, the petitioner claimed to have one employee and, therefore, should require an FEIN.

because she pays the farm expenses.⁴ Counsel stated that the horse farm is operated as a hobby for tax purposes. In the response to the RFE, neither counsel nor the petitioner's accountant identified the owner of FEIN [REDACTED] listed on the labor certification application and on the Form I-140 petition.

On November 4, 2013, the AAO issued a Notice of Intent to Deny (NOID) to determine the identity of the petitioner. The AAO noted that the DOL regulation at 20 C.F.R. § 656.3⁵ states:

Employer means: (1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

The AAO requested the petitioner to again explain the discrepancies regarding the identity of the petitioner. The NOID raised the concern that the petitioner was not properly identified on the ETA Form 9089 and the Form I-140. The AAO stated:

On August 19, 2010 you certified under penalty of perjury that the employer on the ETA Form 9089, is [REDACTED] that you have one employee and commenced business in 1970 with FEIN [REDACTED] Further, on December 8, 2010, you certified under penalty of perjury that your business is a horse farm, and that you seek a barn boss. You now claim that your wife shows horses as a hobby.

In response to the NOID, the petitioner stated that he is a sole proprietor. He stated that he has never claimed to be other than a sole proprietor using the individual social security numbers of the petitioner and his spouse, and that he has never claimed other than that the horse farm is an expense and a hobby of him and his spouse for tax purposes. These assertions are without merit. The

⁴ It is not clear why [REDACTED] was listed on the ETA Form 9089 as the employer and on the Form I-140 as the petitioner, while [REDACTED] is listed as the sole proprietor of the farm on the submitted tax returns. The record contains no evidence that the [REDACTED] elected to be treated as a joint venture.

⁵ The regulations governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

petitioner claimed to have an FEIN on both the labor certification and the Form I-140 petition; however, the FEIN does not appear to be a valid number. The petitioner's name is not listed on the submitted tax returns as the sole proprietor of a horse farm; instead, his wife's name is listed as the sole proprietor of a crop and logging farm with income from pasture, farmland and firewood leases. Further, the petitioner did not explain why wages purportedly paid to the beneficiary as a barn boss were deducted on Schedules F to IRS Forms 1040, when such deductions are not permitted by the IRS if the horse farm is operated a hobby.⁶

As noted in the RFE and in the NOID, the failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. at 591-92. The petitioner failed to provide independent, objective evidence that he owned and operated a horse farm as a sole proprietorship with FEIN [REDACTED]. Therefore, the petition shall be denied for this reason.

Further, even if the petitioner had established that he owned and operated a horse farm as a sole proprietorship with FEIN 20-8109529, the petitioner has not established his 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 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 August 23, 2010. The proffered wage as stated on the ETA Form 9089 is \$11.45 per hour (\$23,816 per year).

⁶ The 2011 and 2012 profit and loss statements of personal expenses for the [REDACTED] include farm expenses, including costs of labor for a barn boss. If the wages paid to the barn boss were in paid in pursuit of a "hobby" for tax purposes, they are appropriately considered as personal expenses of the petitioner and should not have been deducted on the petitioner's Schedule F to IRS Form 1040. Instead, hobby expenses can only be deducted on Schedule A to IRS Form 1040. Furthermore, the IRS limits the amounts that can be deducted. *See* IRC § 183. 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. *See Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner must establish that his job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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 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 he 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 not established that he employed and paid the beneficiary the full proffered wage from the priority date onwards. The IRS Forms 1040 for [REDACTED] indicate that wages in excess of the proffered wage were deducted on the Schedule F in each relevant year. The petitioner asserts that the wages claimed on the Schedule F were paid to the beneficiary, but the petitioner submitted no evidence of wages paid to the beneficiary, such as IRS Forms W-2 or IRS Forms 1099-MISC. Therefore, the petitioner has not established that it paid wages to the beneficiary in any relevant year.

If the petitioner does not establish that he 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. 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).

The petitioner claims to own and operate a horse farm.⁷ Similar to a sole proprietorship, the petitioner's adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner's ability to pay. Farm owners report annual income and expenses from their farms on

⁷ The petitioner has not submitted annual reports, federal tax returns, or audited financial statements reflecting FEIN [REDACTED]. Instead, the Schedules F submitted with the petitioner's tax returns indicate that the petitioner's wife, [REDACTED] is the sole proprietor of the farm. The Schedules F list [REDACTED] social security number instead of an FEIN for the sole proprietorship.

their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss From Farming, and are carried forward to the first page of the tax return. See <http://www.irs.gov/publications/p225/ch03.html> (accessed January 28, 2014). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. See *Ubeda*, 539 F. Supp. 647.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

Tax Year	2010	2011	2012
AGI (Form 1040, line 37)	\$164,232.00	\$178,348.00	\$271,396.00
Yearly expenses ⁸	unknown	\$177,094.43	\$221,734.24
Difference Between AGI and Yearly Expenses	unknown	\$1,253.57	\$49,661.76

Even if the petitioner had established that he owned and operated a horse farm as a sole proprietorship, he has not established his ability to pay the proffered wage and cover his existing household expenses in 2010, as he did not submit a statement of his yearly household expenses for 2010.

The petitioner's accountant asserted that the petitioner could have used monies donated to charity to pay the proffered wage. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his AGI in its determination of the petitioner's ability to pay the proffered wage. See *Sonegawa*, 12

⁸ Despite repeated requests, the petitioner failed to submit a statement of personal expenses for 2010. The petitioner submitted profit and loss statements from 2011 and 2012 and a letter from his accountant stating that the expenses listed on the profit and loss statements are the personal expenses of the petitioner, including the farm expenses. There are two different profit and loss statements for 2011. As there is no explanation for the two different figures in 2011, the AAO has used the higher expenses for 2011. The AAO also requested the petitioner to provide a list of expenses without the farm expenses, which include labor for the farm in 2011 in the amount of \$32,920; and in 2012, \$35,050. The petitioner failed to respond to this request. The failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

I&N Dec. at 614-15.⁹ USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker 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 identity of the petitioner has not been established with independent, objective evidence. Further, the petitioner has not established any uncharacteristic expenditures or losses. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

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 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 requires 12 months of experience as a barn boss. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a barn boss. The beneficiary claimed experience on the ETA Form 9089 with the petitioner from September 1, 2005 to the present; with [REDACTED] as a barn boss in New Jersey from October 1, 2002 until August 1, 2005; and with [REDACTED] as a barn boss in New Jersey from March 1, 1997 until July 20, 2002.

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(l)(3)(ii)(A). The record contains two letters from associates of the beneficiary outlining his previous experience. However, the record does not contain any letter from a former employer as

⁹ 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.

required by the regulation. Nor has the petitioner established the need for secondary evidence as outlined at 8 C.F.R. § 103.2(b)(2)(i), or that any evidence of record conforms to the parameters for secondary evidence. The record does not establish that the beneficiary has one year of qualifying experience as a barn boss.

The beneficiary claims to have worked for the petitioner since 2005 as a barn boss. Any experience with the petitioner may not be used to establish the beneficiary's qualifying work experience. Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.¹⁰ Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

¹⁰ 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

experience in an alternate occupation, are not applicable. In response to question J.21, which asks, “Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?,” the petitioner answered “no.” The petitioner specifically indicates in response to question H.6 that 12 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable¹¹ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a barn boss, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he/she was performing the same job duties more than 50 percent of the time. According to DOL regulations,

-
- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
 - (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer’s actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer’s expense unless the employer offers similar training to domestic worker applicants.

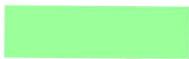
(5) For purposes of this paragraph (i):

- (i) The term “employer” means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
- (ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

¹¹ A definition of “substantially comparable” is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- ...
- (ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.



therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered 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). 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 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.