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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 18 2014 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) 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.

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,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition on September 18, 2013. The petitioner filed a motion to reopen and a motion to reconsider the director's decision on October 22, 2013. The director dismissed the motion in an undated decision, and the petitioner appealed the director's decision to the Administrative Appeals Office (AAO) on February 26, 2014.[1] The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a drywall installer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). In both of his decisions, 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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.

As set forth in the director's initial decision and in the decision on the motion, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Additional issues that we have identified on appeal include whether the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker, and whether the beneficiary possesses the minimum experience required to perform the offered position by the priority date.

Ability to pay the Proffered Wage

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

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[1] The petitioner filed two appeals in connection with this matter: on February 26, 2014 and on February 27, 2014. This receipt number for this appeal is With this appeal, the petitioner requested that we "disregard" the other appeal. However, the petitioner did not withdraw that appeal. We have issued a separate decision in that appeal.

[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).

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on November 28, 2011. The proffered wage as stated on the ETA Form 9089 is $35,422.40 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on October 16, 2002, to have a gross annual income of $1,331,185, and to currently employ 8 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on January 3, 2013, the beneficiary claimed to have worked for the petitioner as a drywall installer from April 1, 2007 through the date the labor certification application was filed on November 28, 2011.

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

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

In the instant case, the beneficiary claims on the Form ETA 9089 to have worked for the petitioner as a drywall installer from April 1, 2007 through the date the labor certification application was filed on November 28, 2011. The petitioner's President, [redacted] states in a letter dated March 19, 2014 submitted on appeal that the beneficiary "has been working for our company … as of

2012." The letter also states that the beneficiary replaced another employee who was working for the petitioner in 2011. Further, in a letter dated October 17, 2013 filed with the petitioner's motion, the petitioner' counsel stated that it "is important to note that the beneficiary was not employed in 2011."

There are discrepancies between the beneficiary's claim that he was employed by the petitioner from 2007 to 2011, and the petitioner's claim that it did not employ the beneficiary until 2012. 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).

Further, it unclear whether the petitioner was operating from June, 2007 to October, 2011. The record contains Articles of Dissolution for signed by in his capacity as President of on June 20, 2007.[3] The Articles of Dissolution state that the dissolution of the corporation was approved by unanimous consent of all of the shareholders of the corporation on June 18, 2007.[4] However, in an undated letter submitted in response to the director's Request for Evidence (RFE) dated March 8, 2013, in his capacity as President of states that for "reasons beyond our control our corporation was terminated by the Virginia State Corporation Commission on July 9, 2007." If the termination was voluntarily approved by the consent of the corporation's shareholders, it is unclear how the termination was beyond the control of the corporation. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

filed Articles of Termination of Corporate Existence with the Virginia State Corporation Commission on June 25, 2007. The Articles of Termination were signed by the in his capacity as President of on June 20, 2007 and state that "[a]ll of the assets of the corporation have been distributed to its creditors and shareholders." The corporation was terminated by the Virginia State Corporation Commission on July 9, 2007.

On October 3, 2011, the corporate existence of was reinstated by the Virginia State Corporation Commission, following the filing of an Application for Reinstatement. On appeal,

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[3] The Articles of Dissolution indicate that the corporation's ID# is However, the petitioner's federal employer identification number (EIN) is The discrepancy has not been resolved by independent, objective evidence.

[4] The undated Articles of Incorporation for indicate that the shareholders and directors of the corporation were The petitioner's 2011 and 2012 tax returns indicate that is the sole shareholder of the corporation.

the petitioner's counsel notes that the petitioner was terminated on July and "was later reinstated on October "[5] He then states:

> Since then the Company has hired 55, 62, and 58 employees and earned gross income of $1,331,185.00, $1,852,432.00, and $1,177,365.00 in 2011, 2012 and 2013, respectively.

Comparing its overall operations in 2012 and 2013 to its results in 2011, it is not clear how the petitioner employed 55 employees and earned $1,331,185.00 in 2011, if it was operating only during the final quarter of the year. Its number of employees and gross income only slightly increased from 2011 to 2012 and 2013.[6] The unaudited profit and loss statement provided on appeal indicates that the petitioner earned only $77,409.90 in gross income from December 1, 2011 to December 30, 2011, which suggests that the remaining gross income of $1,253,775.10 listed on its tax return would have been earned in October and November of 2011. The record does not account for the large discrepancy in gross income that would thus have been earned in the months of October/November and the month of December, 2011. The petitioner has not resolved the inconsistencies in the evidence regarding its operation from June, 2007 to October, 2011 with independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

Because of the unresolved discrepancies in the evidence relating to the beneficiary's employment with the petitioner during a time when the petitioner states that it was not operating; the discrepancies in the petitioner's gross income and the number of its employees in the last quarter of 2011 when compared to the full year of operations in 2012 and 2013; and the discrepancies between the number of employees claimed on the petition, (8 employees in January, 2013) and the number claimed by counsel (58 employees in 2013), we cannot accept the IRS Forms 1099 submitted by the petitioner on appeal as credible evidence that it paid the beneficiary $45,000 in 2012 and $45,000 in 2013. The petitioner has not resolved the discrepancies with independent, objective evidence.

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

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[5] In a response to the director's RFE dated March 8, 2013, the petitioner's counsel stated that the petitioner was reinstated in August 2011.

[6] Despite counsel's claim that the petitioner employed 62 employees in 2012 and 58 employees in 2013, the petitioner indicated on the Form I-140 that it had only 8 workers. The Form I-140 was filed on January 9, 2013.

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.
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> 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 IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2011 and 2012, as shown in the table below.

- In 2011, the Form 1120 stated net income of $7,639.
- In 2012, the Form 1120 stated net income of $21,118.

Therefore, for the years 2011 and 2012, the petitioner did not have 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.[7] 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2011 and 2012, as shown in the table below.

- In 2011, the Form 1120 stated net current assets of $0.
- In 2012, the Form 1120 stated net current assets of $0.

Therefore, for the years 2011 and 2012, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

On appeal, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date. The petitioner provided an unaudited profit and loss statement indicating that its net income for the period from December 1, 2011 to December 30, 2011 was $7,542.62. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying the profit and loss statement, we cannot conclude that it is an audited statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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

On appeal, the petitioner submits its bank statement for the month of December 2011. The petitioner's reliance on the balance in the petitioner'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 petitioner 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, it is not clear whether the funds reported on the petitioner's bank statement were also reflected on its 2011 tax return in its taxable income (income minus deductions), or whether the funds should have been included in the cash specified on Schedule L of the petitioner's IRS Forms 1120.[8] The petitioner's 2011 and 2012 tax returns show $0 cash at the end of each year. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Further, on appeal, the petitioner advises that the beneficiary will replace who worked for the petitioner as a drywall and ceiling tile installer. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner submits an IRS Form 1099, Miscellaneous Income, for Mr. showing that it paid him $56,293.00 in 2011. However, as previously noted, it unclear whether the petitioner was operating from June, 2007 to October, 2011. If its first day of operation following its termination was October 3, 2011, it is doubtful that the petitioner paid Mr. $56,293.00 for less than 3 months of work. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Moreover, there is no evidence Mr. performed the same duties as those set forth in the Form ETA 9089 for the proffered position. The petitioner has not documented the position, duty, and termination of Mr. If he performed other kinds of work, then the beneficiary could not have replaced him.

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[8] It appears that the petitioner's shareholder used the business checking account for personal use, as some of the debits included women's clothing stores and Therefore, it is unclear whether the balance in the bank account includes personal funds of the shareholder. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Additionally, the beneficiary claimed to have worked for the petitioner as a drywall installer from April 1, 2007 through the date the labor certification application was filed on November 28, 2011. If the beneficiary performed the same job for the petitioner at the same time as Mr. [redacted] the beneficiary could not have replaced Mr. [redacted]

Further, in its previous motion, the petitioner asserted that it planned to use wages paid to four subcontractors in 2011 to pay the proffered wage, as the four workers were "no longer employed with the Petitioner." The petitioner provided IRS Forms 1099 for [redacted] showing that it paid the workers $19,520.00, $2,257.00, $1,880.00 and $45,970.00, respectively, in 2011. There is no evidence these workers performed the same duties as those set forth for the proffered position in the Form ETA 9089. The petitioner has not documented the positions, duties, and termination of these workers. If they performed other kinds of work, then the beneficiary could not have replaced them. It is also unclear if the petitioner is asserting on appeal that the beneficiary is replacing a fifth worker, Mr. [redacted] in addition to the four discussed on motion. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 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, the petitioner was incorporated in 2002, but it is unclear whether the petitioner was operating from June, 2007 to October, 2011. Therefore, it has not established its historical growth. While its tax returns indicate that its gross receipts increased from 2011 to 2012, and that it paid substantial payments to subcontractors in those two years, the petitioner has not resolved the discrepancies between the results listed on its tax return in 2011, the unaudited profit and loss statement for December 2011, the bank statement for December 2011, and the evidence establishing that its corporate status was not reinstated until October 3, 2011. Further, the petitioner has not established its reputation in its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Incorrect Classification

Beyond the decision of the director,[9] the petition does not require at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. 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)(iii) of 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.

Here, the Form I-140 was filed on January 9, 2013. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a skilled worker.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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[9] 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 this case, the labor certification indicates that the proffered job requires only 12 months of experience as a drywall installer, and there are no education or training requirements for the proffered position. However, the petitioner requested the skilled worker classification on the Form I-140. The proffered job does not require at least two years of training or experience.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. For this additional reason, the petition may not be approved.

Beneficiary's Qualifications

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (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 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 has the following minimum requirements:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience with [redacted] Maryland as a drywall installer from February 18, 2000 to March 28, 2007; and experience with the petitioner as a drywall installer from April 1, 2007 through the date the labor certification application was filed on November 28, 2011. No other experience is listed. The beneficiary signed the labor certification under a declaration

that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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

The record contains an experience letter from dated July 2, 2010, stating that the beneficiary worked for as a drywall finisher from February 18, 2000 to March 28, 2007. However, the letter does not provide the title of the signatory; it does not describe the beneficiary's duties in detail; and it does not state if the job was full-time. In response to the director's RFE, the petitioner submitted an affidavit dated May 28, 2013 from It states that he used to be President of that the company closed on October 1, 2012; and that the beneficiary worked full-time for as a drywall installer from February 18, 2000 to March 28, 2007.[10] The affidavit details the beneficiary's duties as a drywall installer.

The Form I-140 indicates that the beneficiary entered the United States on June 1, 2000. A Form I-130 filed on behalf of the beneficiary on April 12, 2001 also indicates that the beneficiary entered the United States on June 1, 2000. If the beneficiary entered the United States on June 1, 2000, he could not have been working full-time for Maryland as a drywall installer starting on February 18, 2000. Further, the beneficiary indicated on the Form I-130 that he began working with as a contractor on June 5, 2000, not 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. at 591-92.

Additionally, as previously discussed, although the beneficiary claimed to have worked for the petitioner as a drywall installer from April 1, 2007 through the date the labor certification application was filed on November 28, 2011, the petitioner stated in a letter dated March 19, 2014 that the beneficiary "has been working for our company … as of 2012." The letter also states that the

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[10] The Maryland Department of Assessment and Taxation website indicates that was incorporated in Maryland on March 24, 2004 and forfeited on October 1, 2012. *See* (accessed August 27, 2014). It is unclear how the beneficiary worked for starting on February 18, 2000 when the corporation was not established until March 24, 2004. 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. at 591-92.

beneficiary replaced another employee who was working for the petitioner in 2011. Further, in a letter dated October 17, 2013 filed with the petitioner's motion, the petitioner' counsel stated that it "is important to note that the beneficiary was not employed in 2011."

There are discrepancies between the beneficiary's claim on the labor certification that he was employed by the petitioner from 2007 to 2011, and the petitioner's claim that it did not employ the beneficiary until 2012. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

The record does not contain independent, objective evidence resolving the inconsistencies in the beneficiary's work experience. Thus, the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

In sum, the petitioner has not established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; it has not established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker; and it has not established that that beneficiary possess the minimum experience required to perform the offered position by the priority date.

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, 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.

ORDER: The appeal is dismissed.