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FILE: [REDACTED]  
EAC 05 206 52749

Office: VERMONT SERVICE CENTER Date: DEC 11 2007

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director, Vermont Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development services company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as the systems analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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 May 2, 2006 denial, the primary issue 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. Further in these proceedings, the AAO will examine an issue not addressed by the director, namely the beneficiary's qualifications for the proffered position.

The petitioner filed the I-140 petition and specified that the classification sought for the petitioner was that of 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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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<sup>1</sup> On the I-140 petition, the petitioner identified itself as an S Corporation. In the cover letter that accompanied the I-140 petition, the petitioner described its actual business operation.

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$70,017.80 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job.

The AAO maintains plenary power to review each appeal on a de novo basis. 5.U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.<sup>2</sup> Relevant evidence submitted on appeal includes counsel's brief, and a copy of the beneficiary's Form W-2 for tax year 2005 that indicated the petitioner paid the beneficiary \$17,550 in 2005, and the beneficiary's monthly pay stubs for October 2005 to April 2006 that indicated the petitioner paid the beneficiary \$3,850 monthly. The petitioner also submitted a copy of its letter dated April 4, 2006 in which it responded to the director's Notice of Intent the Deny (NOID) the petition and resubmitted the exhibits submitted with its response. These exhibits include the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 1991 to 2005, the petitioner's owners' Forms 1040, U.S. Individual Income Tax Return, for tax years 1999 to 2005, and a statement written by [REDACTED], President, [REDACTED]. In his letter, Mr. [REDACTED] described the business relationship between the petitioner and himself. The record also contains a statement from [REDACTED] with regard to the petitioner's owners' stock portfolio as of March 2000, 2001, 2002, 2003, 2004, 2005 and 2006. Finally the record contains a line of credit document from Wachovia Bank dated September 8, 2004 in which the petitioner's owners received a line of credit for \$250,000.

In the materials submitted in response to the director's NOID, Mr. [REDACTED] the petitioner's secretary/treasurer, also submitted one-page analyses of the petitioner's financial standing based on the petitioner's gross sales, compensation of officers, and other costs, as applicable, for tax years 1991 to 1994. For each of these years, to further substantiate his statements, Mr. [REDACTED] submitted the petitioner's W-2 forms, Forms 941, or W-3 Forms, as well as parts of the petitioner's Forms 1120S. The record also contains copies of the petitioner's articles of incorporation dated February 14, 1990. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel cites *Matter of Sonogawa*, 12 I & N Dec. 612 (Reg. Com. 1967), and states that the petitioner's overall financial circumstances should be considered. Counsel also asserts that Citizenship and Immigration Services (CIS) should find that the petitioner demonstrates its ability to pay the proffered wage based on the fact that it has paid the beneficiary the prevailing wage since it hired her in October 2005. Counsel cites an interoffice memorandum written by William R. Yates, former CIS Associate Director of Operations, in support of his assertion.<sup>3</sup> Counsel also notes the petitioner's long history of profitability and states that this history also demonstrates the petitioner's ability to pay the prevailing wage as well as its reasonable expectation of increased business in the future, despite two years without profits in 2003 and 2004. Counsel notes that in the petitioner's response to the director's NOID, Mr. [REDACTED] states that since the start

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<sup>2</sup> 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).

<sup>3</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

of the petitioner's business operation, the business has been profitable and has provided him with a substantial income.

Counsel further states that the petitioner's tax returns from 1991 to the present reflect the financial success of the petitioner. Counsel provides a chart of the petitioner's gross sales, and of the owner's income from tax years 1991 to 2005 that reflect the petitioner's gross sales and the petitioner's owner's compensation.

Counsel states that CIS should view the petitioner's owner's income as funds available to pay the proffered wage. Counsel notes that in the priority year 2001, as is customary with sole proprietorships and other small businesses, the petitioner distributed approximately \$186,000 to Mr. [REDACTED] as compensation to the company officer and \$36,000 as additional profit. Counsel asserts that the petitioner's officer compensation should be included in the petitioner's net profits. Counsel states that in tax years 2001 and 2002, based on the petitioner's profits and officer compensation, the petitioner has sufficient additional funds with which to pay the proffered wage, while in tax years 2003 and 2004, the company underwent changes and further software development that produced the petitioner's first losses in twelve years. Counsel states that most recently in tax year 2005, the petitioner's gross sales are up to \$120,000, with approximately \$86,000 distributed to the petitioner's owners.

Counsel notes that, based on Mr. [REDACTED] statement submitted to the record, the petitioner's financial numbers would be more advantageous if it had more employees, and the petitioner's negative income in 2003 and 2004 and low income in 2005 reflected additional investment in the development of new products. Mr. [REDACTED] in his statement also noted that if the petitioner had had another employee, it was possible that the years 2003 and 2004 could have been profitable, if the petitioner could both work on new products and provide services. Mr. [REDACTED] also noted that the visa application process for the beneficiary was started in 2001, and that it took a long time to get the beneficiary a work permit. Mr. [REDACTED] states that since the beneficiary's employment with the petitioner, the company has been able to leverage investments and product/service development and that the petitioner is now experiencing growth that he anticipated would outpace the petitioner's most profitable years.

Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 Board of Alien Labor Certification Appeals (BALCA)), for the proposition that the petitioner can use the assets of its owners to establish its ability to pay the proffered wage. Counsel states that CIS should consider Mr. [REDACTED] personal assets when determining the petitioner's ability to pay the proffered wage. Counsel states that the [REDACTED] brokerage statements submitted to the record for March 2000 to February 2006 demonstrate that Mr. [REDACTED] had sufficient personal assets to pay the proffered wage throughout the relevant period. Counsel also notes the line of credit provided to Mr. [REDACTED] and his wife in 2004. Counsel refers to a response from the Vermont Service Center to questions raised by the American Immigration Lawyers Association (AILA) liaison to the Service Center that were posted on the AILA Infonet on May 13, 2003. Counsel states that based on these minutes, CIS has indicated that lines of credit can be favorably considered when determining a petitioner's ability to pay the prevailing wage. Counsel states that the [REDACTED]' line of credit is additional evidence of the petitioner's ability to pay the proffered wage and of its reasonable expectation of continued financial strength in the future.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on February 14, 1990, to have a gross annual income of \$200,000, and a net annual income of \$110,584, and to currently have two employees. On the Form ETA 750, signed by the beneficiary on March 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA-750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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. Comm. 1967).

On appeal, counsel states that the petitioner's owner's assets should be considered as evidence of the petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel further states that the line of credit obtained by the petitioner's two shareholders and officers should be considered as evidence of the petitioner's ability to pay the proffered wage. However, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's or the corporation's owners' credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. It is further noted that the line of credit is dated 2004, and would not have been available as additional funds with which to pay the proffered wage in the 2001 priority year. As noted above, 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. 1971).

Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the borrower's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

On appeal, counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities that regularly fail to show profits can typically rely upon individual or family assets to pay the proffered wage. Counsel does not state how the Department of Labor's (DOL) BALCA precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated

and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation. Counsel's reference to *Ranchito Coletero*, therefore, is not persuasive.

Counsel also states that the officer compensation provided by the petitioner to the petitioner's owner and wife should be considered additional funds with which the proffered wage can be paid. The AAO will examine the issue of officer compensation further in these proceedings when it examines the totality of the petitioner's financial circumstances.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 Form for tax year 2005, and pay stubs for the months October 2005 to May 2006. The pay stubs indicated that the petitioner paid the beneficiary \$5,850 each month, which on an annual basis would equal \$70,200, or a wage slightly higher than the proffered wage of \$70,017.80. Therefore, for the years 2001 to 2004, the petitioner has not established that it paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2005 and 2006. Since the proffered wage is \$70,017.80, for tax years 2005 and 2006, the petitioner must establish it can pay the difference between the beneficiary's actual wages and the proffered wage, which is \$52,467.80 in tax year 2005 and \$40,17.80 in tax year 2006. For tax years 2001 to 2004, the petitioner must establish that it can pay the entire proffered wage of \$70,017.80.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since October 2005, according to the language in Mr. ██████ memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that since Mr. ██████ referred to the petitioner's current payment of the proffered wage, CIS should consider the wage rate paid in October 2005 and onward as satisfying that particular method of demonstrating a petitioning entity's ability to pay. The Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the ██████ memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in October 2005 when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in prior years 2001 to 2005. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 CIS, 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner submitted the first page of its Form 1120S for tax years 1991 to 2000 to the record as a part of the petitioner's owner's analysis of the petitioner's gross sales and the petitioner's combined net income and officer compensation. The petitioner also submitted copies of its tax returns for tax years 1999, 2000, and 2001 with accompanying Schedules L. The petitioner's tax returns for tax years 2002, 2003, and 2004 were incomplete with no accompanying Schedules L. The petitioner's tax return for tax year 2005 does contain a Schedule L. For purposes of determining the petitioner's ability to pay the proffered wage based on the petitioner's net income, the tax returns submitted to the record for tax years 1991 to 2000 are not dispositive. First, these returns are not complete, and second, they document the petitioner's net income prior to the 2001 priority year. The petitioner's tax returns for tax years 2001 to 2005 are dispositive, and to the extent possible, the AAO will examine both the petitioner's net income and net current assets, based on these returns.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$70,017.80 per year from the priority date:

- In 2001, the Form 1120S stated a net income<sup>4</sup> of \$36,184.

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<sup>4</sup>Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions

- In 2002, the Form 1120S stated a net income of \$9,391.
- In 2003, the Form 1120S stated a net income of -\$61,042.
- In 2004, the Form 1120S stated a net income of -\$51,284.
- In 2005, the Form 1120S stated a net income of \$85,696.

Therefore, for the year 2005, the petitioner had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage; however, as of the 2001 priority date and through tax years 2002, 2003, and 2004, the petitioner did not have sufficient net income to pay the entire 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 examination of the petitioner's net current assets is based on the information contained on the petitioner's Schedule L; however, as previously stated, the petitioner only provided a Schedule L with its 2001 tax return. Therefore the AAO can only examine the petitioner's ability to pay the proffered wage based on its net current assets for the 2001 priority year. Based on the information contained in the petitioner's 2001 Form 1120S, the petitioner had net current assets of -\$1,479, an amount which is insufficient to pay the entire proffered wage of \$70,017.80. Therefore the petitioner has not established that it had sufficient net current assets as of the 2001 priority year and continuing through tax year 2004 to pay the proffered wage.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2005.

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or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). For purposes of these proceedings, the AAO will use the petitioner's net income identified on line 21.

<sup>5</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.

On appeal, counsel asserts that CIS should consider the totality of the petitioner's financial circumstances in its review of the petitioner's appeal. In support of this assertion, counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. In the instant petition, the petitioner's owner states that the two unprofitable years of 2003 and 2004 occurred because he was developing new software rather than handling current clients or businesses, and that with an additional employee, the two years may not have been unprofitable. However, the petitioner describes itself as a software development services company, and therefore, has not established that development of software in 2003 and 2004 is a one time or unusual circumstances. Further, with regard to counsel's assertions that the employment of the beneficiary and the projected earnings based on its partnership with River City Software Associates will improve the petitioner's ability to pay the proffered wage, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The AAO also notes that counsel and the petitioner's co-owner state that the officer compensation provided by the petitioner to its officers should be considered as an additional source of funds with which to pay the proffered wage. The AAO notes that the petitioner has paid significant officer compensation during each year of its operations, with the exception of tax years 2003 and 2004. The AAO also notes that the officer compensation is the only wages, salaries or other compensation paid by the petitioner from 1991 to 2002, and in 2005. While the officer compensation does vary, and the two shareholders do appear to have discretion to change the amount of officer compensation, the AAO does not find this factor alone sufficient to establish that the petitioner could use part of the officer compensation to pay the proffered wage. In addition, the use of officer compensation in tax years 2003 and 2004 to pay the proffered wage is not possible, as there was no officer compensation paid to the two officers during these two years.

Counsel also asserts that consideration of the petitioner's future growth is reasonable. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Counsel'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 Form ETA 750 was accepted for processing by the Department of Labor.

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

Beyond the decision of the director, the petitioner has not established that the beneficiary has the requisite education or work experience to fulfill the duties of 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany 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 Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of systems analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
  - Grade School 8
  - High School 4
  - College N/A
  - College Degree Required N/A
  - Major Field of Study N/A

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A stated the following special requirements: "Ability to write and detail system specifications in Polish Language, and communicate verbally in Polish."

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated she attended elementary school in Kolbiel, Poland, studying academics from September 1959 to June 1967, and that she received a diploma. The beneficiary also stated that she attended a technical vocational high school in [REDACTED] Poland, studying academics and vocational training from September 1967 to June 1972, and that she received a diploma.

On Part 15, eliciting information of the beneficiary's work experience, she represented that she was self-employed from 1996 to March 2001 as a bioenergy therapist, in Plainsboro, New Jersey, and that previously she had worked for Carcade Sp.z.o.o., in Warsaw, Poland, from January 1993 to November 1996 as a systems analyst, in which she created system specifications, and graphical user interfaces, as well as wrote systems for developers, among other pertinent duties.<sup>6</sup> The beneficiary does not provide any additional information concerning her employment background on that form, or any evidence as to any training in the job duties described in her Warsaw position prior to or during this employment. Thus, the beneficiary's educational basis for the claimed employment as a systems analyst is her high school diploma obtained 21 years prior to the claimed employment.

The petitioner indicated in its cover letter to the I-140 petition that it was filing the petition under the skilled worker category. Based on the Form ETA 750, the proffered position requires four years of elementary school and eight years of secondary school, along with two years of experience in the proffered position.

Based on the Form ETA 750, the proffered position requires a high school degree and two years of experience in the proffered position. The petitioner stated that the position is for a skilled worker. On the Form ETA 750, [REDACTED] assigned the occupational code of 03016-7014, computer systems analyst, to the proffered position.<sup>7</sup> [REDACTED]'s occupational codes are assigned based on normalized occupational standards. According to [REDACTED] public online database at <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed November 7, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to [REDACTED], two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed November 7, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

Upon review of the DOL classification for the proffered position, the AAO finds that the proffered position of systems analyst is primarily a professional classification that would require education beyond the secondary level, although, as DOL states, some positions may not require a baccalaureate degree. Furthermore, based on

<sup>6</sup> The record reflects that the director in a request for evidence dated September 26, 2005 requested a more specific letter of work experience, itemizing any training, or experience and training received through prior employment. The petitioner then submitted a second letter of work experience from the [REDACTED] Carcade Sp.z.o.o. The AAO notes that the beneficiary's job duties changed significantly from the first letter of work experience to the second letter. In the first letter, for example, the beneficiary worked in the projects and system programming division, testing new software, and then was involved in the analysis and design of a company finance and spreadsheet system. In the second letter, the beneficiary's job title was identified as system analyst, and her job duties included testing and auditing new software, as well as designing and developing software, creating system specifications, graphic user interface, writing systems for developers, and analyzing software problems, among other job duties.

<sup>7</sup> This DOL code is cross referenced to the DOL occupational code 15-1051-00, computer systems analyst, in the DOL Crosswalk database.

the beneficiary's description of her educational background and work experience, the AAO questions whether the beneficiary's academic qualifications and work experience are sufficient to perform the duties of the proffered position, either as a skilled worker or professional. As previously stated, the record reflects no further academic or professional training undertaken by the beneficiary before her employment in Warsaw, Poland.

The AAO also notes that the record contains a Form I-360 Petition for Amerasian, Widow, or Special Immigrant, filed for the beneficiary by ██████████ St. Petersburg, Florida, on January 14, 1998.<sup>8</sup> The petitioner submitted work records that indicate the beneficiary worked as a religious worker with it from November 5, 1997 to May 3, 1998. The petition also contains certificates attesting to the beneficiary's participation in church youth activities in July 1995 and July 1996. This claimed employment conflicts with the beneficiary's stated self-employment in New Jersey from 1996 to March 2001, and her claimed employment in Warsaw, Poland as of July 1995 and 1996. Thus, a discrepancy exists in the record. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." *Matter of Ho* also 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." *Id* at 591. In the instant matter, the AAO questions whether the beneficiary actually performed the duties outlined in her letter of work experience verification submitted to the record by Carcade Sp. z.o.o., Warsaw, Poland. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

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<sup>8</sup> The Texas Service Center denied this petition on March 8, 1999. The director had issued a request for further evidence on October 19, 1998 to which the I-360 petitioner did not respond. The director then denied the petition based on abandonment.