U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 05 2009
SRC 07 900 05576

IN RE: Petitioner:
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:

[redacted]

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.

John F. Grissom
Acting 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 remanded to the Texas Service Center.

The petitioner operates a computer software application/IT business. It seeks to employ the beneficiary permanently in the United States as a software engineer (applications). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was timely, and made 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 denial dated May 17, 2007, the basis for denial of this case was whether or not the petitioner has the ability to pay the proffered wage as of the priority date. The AAO notes that the director did not address the beneficiary's degree equivalency, work experience inconsistencies, or failure to demonstrate fulfillment of other special requirements within her decision.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within

the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 20, 2004 and certified on November 17, 2006.[1] The proffered wage as stated on the Form ETA 750 is $58,512.00 per year. The Form ETA 750 states that the position requires a bachelor's degree or the foreign equivalent in computer science, engineering, or a related field and two years of experience in the proffered position, including experience in object-oriented programming (Java and/or PowerBuilder), web server (iPlanet, WebLogic, and/or WebSphere), and Oracle RDBMS.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750 Application for Alien Employment Certification approved by the DOL; the petitioner's annual reports filed with the Securities and Exchange Commission (SEC) for the fiscal years ending July 2004 and 2006[3]; a letter from the petitioner's Chief Financial Officer (CFO) dated April 18, 2007 stating that the petitioner employs approximately 564 employees and has the ability to pay the

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[1] It has been almost five years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, Form ETA 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

[2] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

[3] In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That further provides: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage." (Emphasis added.)

proffered salary[4]; the beneficiary's IRS Form W-2 Wage and Tax Statements for 2004 to 2006 issued by the petitioner in the amounts of $54,224.86, $53,061.45, and $55,736.63 respectively[5]; the beneficiary's pay stub from the petitioner for work performed in 2007[6]; and documentation concerning the beneficiary's qualifications.

On the petition, the petitioner claimed to have been established in 1998 and to employ 564 workers currently. The petitioner's fiscal year begins in August and ends in July. The net annual income and gross annual income stated on the petition were $0.00 and $109,100,000.00 respectively. On the Form ETA 750, signed by the beneficiary but never dated by the beneficiary, the beneficiary claimed to have worked for the petitioner since July 2001.[7]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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). USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the

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[4] The record of proceeding does not contain any derogatory information that persuades USCIS to doubt the credibility of the information contained in the CFO's statement. The AAO notes that the letter contains an original signature and references the beneficiary by name.

[5] The AAO notes that the beneficiary's IRS Form W-2 Wage and Tax Statement for 2004 states that the employer is Clearblue Technologies Management, Inc. rather than NaviSite, Inc. The petitioner submitted a letter dated June 1, 2005 from its human resources manager stating that the beneficiary joined AppliedTheory, Inc. in October 2001, that ClearBlue Technologies Management, Inc. purchased AppliedTheory, Inc. in June 2002, and that NaviSite, Inc. purchased ClearBlue Technologies Management, Inc. in December 2002. The record of proceeding contains no evidence explaining why Clearblue Technologies Management, Inc. was listed on the tax return as the beneficiary's employer in 2004 instead of NaviSite, Inc. *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.

[6] The AAO notes that this pay stub constitutes insufficient evidence of wages paid, because there is no evidence included with the pay stub that the corresponding check was cashed and processed by a bank.

[7] The AAO notes that the petitioner has only submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2004 to 2006 and the beneficiary's pay stub from the petitioner for work performed in 2007.

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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner 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 has not established that it paid the beneficiary the full proffered wage from the priority date.

Counsel submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2004 to 2006 issued by the petitioner in the amounts of $54,224.86, $53,061.45, and $55,736.63 respectively. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is $58,516.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is $4,287.14, $5,450.55, and $2,775.37 from 2004 to 2006 respectively.

If the petitioner does not establish that it 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. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage 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.

The AAO notes that the petitioner did not submit tax returns, but instead submitted annual reports filed with the SEC. The annual reports submitted demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2004, the annual reports stated net income of -$21,354,000.00.
- In 2005, the annual reports stated net income of -$16,084,000.00.
- In 2006, the annual reports stated net income of -$13,931,000.00.

The petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for 2004 to 2006.

If the net income the petitioner demonstrates it had available during the 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 assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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, USCIS 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.[8] 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 net current assets during 2004 were -$36,711,000.00.
- The petitioner's net current assets during 2005 were -$77,560,000.00.
- The petitioner's net current assets during 2006 were -$9,072,000.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for 2004 to 2006 even if the petitioner's net current assets are combined with wages paid to the beneficiary.

On appeal, counsel asserts that USCIS should 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 (BIA 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

[8] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. The AAO notes that the petitioner's 2006 annual report reveals that its revenue increased steadily from 2002 to 2006 and its net loss decreased steadily from 2002 to 2006. The AAO also notes that the petitioner submitted a letter from its CFO dated April 18, 2007 stating that the petitioner employs approximately 564 employees and has the ability to pay the proffered salary. The AAO notes that the letter is an original with an original signature and references the beneficiary by name. The record of proceeding does not contain any derogatory information that persuades USCIS to doubt the credibility of the information contained in the CFO's statement. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is June 20, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
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> > (A) *General.* 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.

> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The Form ETA 750 states that the position requires two years of experience in the proffered position, including relevant experience in object-oriented programming (Java and/or PowerBuilder), web server (iPlanet, WebLogic, and/or WebSphere), and Oracle RDBMS. The AAO finds the June 1, 2005 letter submitted by the petitioner to state that the beneficiary began working there in October 2001, but the beneficiary stated on the labor certification that she began working there in July 2001. The AAO finds the letter not to adhere to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and therefore be acceptable evidence that the beneficiary has experience in the proffered position. The AAO finds the July 18, 2000 letter submitted by Paramount Software Solutions, Inc. to appear to adhere to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and therefore be acceptable evidence that the beneficiary has almost three months of experience as a programmer/analyst due to work there from May to at least July 2000. The beneficiary had stated on the ETA Form 750 that she worked there from May 2000 to May 2001. However, the petitioner submitted a May 10, 2001 letter from Visionair stating that the beneficiary worked there from November 2000 to May 2001. Accordingly, the AAO does not find these experience letters to conform to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and to be acceptable evidence of the beneficiary's prior employment. The AAO finds the October 31, 2000 letter submitted by Hotpalm.com not to contain information regarding the beneficiary's dates of employment. The AAO finds the letter not to adhere to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and therefore be acceptable evidence that the beneficiary has experience in the proffered position. The petitioner submitted a March 27, 2000 letter by [redacted] stating that the beneficiary worked there as a software engineer from December 1997 to March 2000, but the beneficiary stated on the ETA Form 750 that she worked there from October 1997 to March 2000. The letter also does not contain information regarding the employer's address. The AAO finds the letter not to adhere to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and therefore be acceptable evidence that the beneficiary has experience in the proffered position.

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.

Additionally, the AAO notes that the beneficiary did not state on the ETA Form 750 that she had worked for Visionair or Hotpalm.com. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), where

the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

The AAO notes that the ETA Form 750 states that the position also calls for the special requirements of expertise in object-oriented programming (Java and/or PowerBuilder), web server (iPlanet, WebLogic, and/or WebSphere), and Oracle RDBMS. The documents contained within the record of proceeding do not state that the beneficiary has experience working with the applications of iPlanet, WebLogic, and/or WebSphere. Due to the lack of information regarding the beneficiary's experience with these special requirements, the petitioner has not demonstrated that the beneficiary possesses the requisite experience for the proffered position.

The director did not address within her May 17, 2007 decision the beneficiary's degree equivalency, work experience inconsistencies, or failure to demonstrate fulfillment of other special requirements. She also concluded that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date

Upon review of the record of proceeding, the AAO has determined that the Texas Service Center should have another opportunity to review the beneficiary's credentials and experience qualifications. Therefore, the AAO will remand the case to the director for further action.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director of the Texas Service Center for further action in accordance with the foregoing and entry of a new decision.