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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]

DEC 21 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, on December 20, 2007. On January 25, 2008, the petitioner filed an appeal that the director determined was filed untimely;[1] however the director treated the matter as a motion to reopen. The director subsequently reopened the matter and denied the petition on February 15, 2008. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tour and travel agency. It seeks to employ the beneficiary permanently in the United States as a tour guide. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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 February 15, 2008 denial of the motion to reopen, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residence. The director also determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position. He specifically noted that the record did not establish that the beneficiary had two years of prior work experience as a tour guide.

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

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

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

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[1] In its appeal, the petitioner noted that neither it nor counsel had received the director's Request for Further Evidence prior to the receipt of the director' denial of the petition.

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 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, Application for Alien Employment Certification, 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $40,000 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered or in the related occupation of travel guide. The beneficiary is also required to have the ability to speak Hebrew and English.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, former counsel for the petitioner stated neither she nor the petitioner had received the director's RFE requesting further evidence to establish the petitioner's ability to pay the proffered wage and to establish that the beneficiary was qualified to perform the duties of the proffered position.

Former counsel submitted a letter signed by her, [redacted] and [redacted] dated April 15, 2008. The letter describes six companies that comprise the [redacted] and their opening dates and owners. Former counsel also provided a description of the beneficiary's relationship with [redacted] as well as the sale of [redacted] to the [redacted] in February 1997. Former counsel describes a business decision to merge [redacted] operations with [redacted] Former counsel states that in 2004, the [redacted] started another company, [redacted] a sightseeing company that has grown into the second largest sightseeing company in New York City.

Former counsel notes that all tour operations are done under the [redacted] corporate name, and that in 2007, [redacted] revenue exceeded $10,000,000. Former counsel noted that the job which was offered to the beneficiary under the DOL labor certification in both 1997 and 2001 still stands, although the name of the company that originally offered and sponsored the job has or is about to change structure in the near future. Former counsel states that another company within the conglomerate ([redacted]) offered the beneficiary the same job position with the same job qualifications and salary. Former counsel states that the company has more than sufficient income to pay the salary offered and the combined assets of the [redacted] companies exceed $25,000,000.

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[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).

Former counsel also notes that the DOL took six years to certify the ETA Form 750, and that legacy INC became sensitive to problems in which an employer may change a name or change altogether. Counsel claims that there is still a way to be fair to the beneficiary and to salvage the labor certification application and petition. Former counsel also submitted two legacy INS memoranda written by [redacted] Former counsel states that had the labor certification and application been timely processed [redacted] would still be in business, and have sufficient income to pay the proffered wage.

On appeal, former counsel submits the following evidence:

A letter from [redacted] dated January 22, 2008. In his letter, [redacted] states that due to business decisions, [redacted] will be completely phased out with the next year or two. [redacted] identifies the most active companies in the [redacted] business conglomerate as [redacted] of New York [redacted];

Federal tax returns for tax year 2003 for [redacted]

Federal tax returns for tax year 2004 for [redacted]

Federal tax returns for tax year 2005 for [redacted]

Federal tax returns for tax year 2006 for [redacted]

The record also contains a 2005 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for [redacted] with an Employer Identification Number (EIN) of [redacted]

On appeal, [redacted] discusses the upcoming phase out of the I-140 petitioner, [redacted] Such statements raise questions of whether [redacted] is in active status,

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[3] Memorandum from [redacted] Associate Director For Operations, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21 (Public Law 106-313)*, HQPRD 70/6.2.8-P, May 12, 2005. Memorandum from [redacted] Acting Associate Director For Operations, *Continuing Validity of Form I-140 Petition in accordance with Section 106 (c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16)*, HQBCIS 70/6.2.8-P, August 4, 2003.

or whether any of the businesses for which federal tax returns were submitted to the record are successor in interest to the petitioner.

With regard to successor in interest issues, *Matter of Dial Auto* is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Matter of Dial Auto involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

> Additionally, the *representations made by the petitioner* concerning the relationship between [redacted] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [redacted], counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [redacted] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987).* Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).[4] This is why the Commissioner said "[i]f the petitioner's claim is found to be true,

[4]The regulation at 20 C.F.R. § 656.30(d) (1987) states:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful

and it is determined that an actual successorship exists, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

The AAO notes that both the ETA Form 750 applicant and the I-140 petitioner are identified as [redacted] In the instant matter, both counsel and [redacted] assert that [redacted], part of a group of businesses owned by [redacted] relatives, is absorbing the petitioner, and/or the petitioner is being phased out. However, the assertions of either former counsel or the petitioners' owner do not constitute evidence. The assertions of counsel, and by extension, the petitioner's owner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence such as a purchase agreement or a merger statement that would establish any successor in interest relationship between the [redacted] and any other business owned by the [redacted] Further the state of New York corporate database reflects that [redacted] is still in active status. The AAO notes that if no successor in interest relationship is established, the financial assets of the other

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misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

businesses for which federal tax returns are found in the record can not be utilized the establish the ability to pay for a successor business.

The AAO also notes that while the petitioner, and the other businesses referenced in this matter may be owned by the same individual or group of individuals, because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 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."

For purposes of these proceedings, the petitioner is identified as [redacted] The record contains only one federal income tax return submitted in the name of [redacted] This tax return is for tax year 2005, and indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in March 10, 1992, and does not identify its current number of employees. The petitioner identifies its gross annual income in 2005 as $14,491,903. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 1, 2001, the beneficiary claimed to have worked for the petitioner from 1995 until the date that he signed the ETA Form 750.[5]

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, 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. Comm. 1967).

The AAO notes that former counsel for the applicant referenced USCIS interoffice memoranda entitled "Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of [AC21]," dated August 4, 2003 (2003 Memo), and "Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by [AC21]" (2005 Memo), both authored by [redacted] In a subsequent brief, counsel referenced the 2005 memorandum for the premise that because the applicant's labor certification had taken six years to be certified, and the beneficiary had changed employers, USCIS should approve the I-140 petition.

[5] In a letter submitted on appeal, the beneficiary states that he worked for [redacted] but never received sufficient compensation to file an income tax return. He also states that as of 2007 he works for [redacted]

Former counsel misconstrues the contents of both the 2003 and 2005 Memos. Both of these memos stand for the proposition that an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed. The issue under review is not whether a beneficiary with an approved I-140 petition can "port" to another employer if he or she has been pending a determination of his or her adjustment of status application. In the current matter, the primary issue is whether the petitioner has established its ability to pay the proffered wage, and thus can establish that the I-140 application should be approved. Thus the AAO will not discuss these memos any further in these proceedings.

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 director in his RFE requested that the petitioner submit any Forms W-2 or Forms 1099-MISC to establish whether the petitioner had paid the beneficiary a salary equal to or greater than the proffered wage.[6] The petitioner did not submit any of the requested evidence. Therefore the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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 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 USCIS should have considered income before

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[6] The beneficiary in his letter submitted on appeal states that the director requested his income tax returns. However, the director did not make any such request.

expenses were paid rather than net income. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (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.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

The record before the director closed as of October 4, 2007. The director in considering the petitioner's appeal as a motion to reopen and granting the motion, also accepted the petitioner's additional evidence submitted to the record. As stated previously, the only tax return found in the record for [redacted] is for tax year 2005. The record contains no evidence with regard to the petitioner's ability to pay the proffered wage in the 2001 priority year, or during 2002, 2003, 2004, 2006, or 2007. The petitioner's tax returns demonstrate its net income for 2005, as shown in the table below.

- In 2005, the Form 1120S stated net income[7] of -$146,187.

[7] Where an S corporation's income is exclusively from a trade or business, USCIS 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 or other adjustments, net income is found on line 23* (1997-2003) line 17e* (2004-2005) line 18* (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a

Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2005, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of $2,641.

Therefore, for the year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the 2001 date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 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 (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

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summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions, shown on its Schedule K for 2005, the petitioner's net income is found on Schedule K of its tax return. .

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

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, while the record reflects significant information with regard to the financial assets of other businesses owned by the petitioner's owner, or his relatives, the actual petitioner's business operations are only anecdotally described. The record only contains one tax return for the identified petitioner, and contains no evidence whatsoever as to the petitioner's business viability during the five years of the relevant period of time. The single tax return submitted to the record for the petitioner does not reflect a viable business entity. 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.

The AAO will now address the second issue the director noted in his decision. As stated previously, the director in his decision also stated that the petitioner had not established that the beneficiary had the requisite two years of prior work experience in either the proffered position or in the related profession of tour guide.

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 petitioner must 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). Here, the Form ETA 750 was accepted on January 14, 1998.

On appeal, former counsel submits a letter dated April 10, 2008 from [redacted] Managing Director [redacted] states that as the owner of [redacted] he knew the beneficiary to be an exceptional tour guide/escort and

medic since 1991. He further states that from 1991 to 1994, the beneficiary was a tour guide working for [redacted] also describes the beneficiary's expertise as a tour guide escort and medic in his work in the United States.

The record also contains a letter from the beneficiary apparently submitted with the petitioner's Motion to Reopen. He states that he worked from [redacted] which is no longer in existence. He states that he worked for [redacted] from September 1, 1991 to December 31, 1994. A letter in Hebrew with English translation is also in the record. The letter is written b[redacted] Former Manager, [redacted] In his letter, [redacted] states that the beneficiary worked for the company from 1991 to 1994 as a medical assistant and as a travel guide.

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. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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 tour guide. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	
High School	4
College	(Blank)
College Degree Required	(Blank)
Major Field of Study	(Blank)

The applicant must also have two years of experience in the job offered, or in the related occupation of tour guide. The duties of the proffered job 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, Other Special Requirements, states that the applicant must have the ability to speak Hebrew and English.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has worked for the petitioner in the proffered position since 1995 to the date he signed the ETA Form 750. He also represented that he worked for [redacted] as a travel tour and guide from 1991 to 1994. He does not provide any additional information concerning her employment background on that form.

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

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

On appeal, the beneficiary states that his wages were so low while working with the petitioner that he did not file income tax returns. The AAO would question then whether the years of employment claimed by the beneficiary with [redacted] prior to 2001 were actually fulltime work. Further, the record contains no documentary evidence such as Forms 1099-MISC or W-2 Forms that would more clearly establish that the ETA Form 750 applicant and I-140 petitioner employed the beneficiary prior to 2001.

With regard to the beneficiary's claimed employment in Israel as a tour guide and medic, the letter of work verification from [redacted] states that he worked as a medic and tour guide, which raises questions as to whether this previous position included fulltime work as a tour guide. The AAO finds that the petitioner has not established that the beneficiary has the two requisite years of work experience prior to the 2001 priority date. The AAO also notes that the certified labor certification requires that the beneficiary possess four years of high school education which has also not been documented by the petitioner.

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.