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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
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U.S. Citizenship  
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Services

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FILE: [REDACTED]  
SRC 06 226 50900

Office: TEXAS SERVICE CENTER

Date: NOV 20 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Khew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a neuromonitoring technology business. It seeks to permanently employ the beneficiary in the United States as a "medical technician (neuromonitoring)." The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

As set forth in the director's August 29, 2007 denial, the primary issue in this case is whether the beneficiary possesses the minimum experience required to perform the duties of the offered position. The AAO will also consider whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>1</sup>

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The AAO maintains plenary power to review each appeal on a *de novo* basis. *See Janka v. U.S. Dept. of Transp.*, 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.<sup>2</sup>

The priority date of the instant case is March 14, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The instant petition was filed on July 17, 2006. On September 18, 2006, the director issued a Notice of Intent to Deny (NOID) the petition, instructing the petitioner to submit additional evidence of its ability to pay the proffered wage and of the beneficiary's education and experience; a copy of the notice of job opportunity posted during the labor certification process; a business license; and its Forms W-3, Transmittal of Wage and Tax Statements. The petitioner's NOID response did not include most of the requested evidence, nor did it explain why the requested evidence was not submitted. Accordingly, on October 23, 2006, the director denied the petition.

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<sup>1</sup>An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

<sup>2</sup>The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

The petitioner filed a motion to reopen and reconsider the director's decision on November 20, 2006. After reviewing the newly submitted evidence, the director denied the motion on August 29, 2007. The director's decision states:

Counsel now submits evidence to address the deficiencies which led to the denial of the petition. Counsel has established that the beneficiary meets the educational requirements specified in the ETA-750. However, the evidence is still insufficient in establishing that the beneficiary meets the work experience requirements. The ETA-750 requires that the beneficiary have two years of experience in the job offered. Evidence submitted established that the beneficiary has more than two years of experience as a medical technologist, but in a related occupation and not in the job offered. [The ETA-750 specifies that the job offered] requires two years of experience performing duties such as nerve construction studies like "Electro Encephalography, Evoked Potential, Transcranial Doppler Test, Electromyography, and other Neurophysical monitoring of Lumbar, Cervical, Spine and Craniotomies." There is no indication in any of the work experience letters that the beneficiary has performed all of these duties in previous jobs. As such, the Motion must be denied.

Following the director's denial of the motion to reopen and reconsider, the petition was forwarded to the AAO as an appeal.

Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable 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. While no bachelor's degree is required for this classification, 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual 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. 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. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

Part A of Form ETA 750 sets forth the duties and requirements of the offered position:

9. **Name of Job Title:** medical technician (neuromonitoring).
13. **Describe Fully the job to be Performed (Duties):** performance of nerve construction studies

which includes electro encephalography, evoked potential, transcranial doppler test, electromyography and other neurophysiological monitoring of lumber, cervical, spine and craniotomies.

**14. State in detail the MINIMUM education, training and experience for a worker to perform satisfactorily the job duties described in item 13 above.**

EDUCATION: two years of high school.

TRAINING: none.

EXPERIENCE: two years in the job offered.

**15. Other Special Requirements:** medical educational background preferred; own transportation required.

The record contains employment experience letters from two of the beneficiary's prior employers:

- Letter of [REDACTED] dated September 22, 2007, claiming that the beneficiary was employed as a Medical Assistant from March 1993 to December 1995, where he performed patient histories, "physical examinations, formulating investigations and performing nerve conduction studies on peripheral neuropathy patients." The record also contains two previously executed experience letters from [REDACTED]
- Letter of [REDACTED], dated September 27, 2007, claiming that the beneficiary was employed as a "Medical Technologist in the Neuromonitoring section of the laboratory" from January 1996 through November 2000, where he performed "Nerve Conduction Studies which [included] Neurophysiological monitoring of cervical/lumber spine and craniotomies, [and] also included performing electroencephalography, Evoked potential, Transcranial Doppler Test, and Electromyography."

For the reasons set forth below, the director's conclusion that the submitted letters are not sufficient to establish that the beneficiary possessed two years of experience in the job offered as of the priority date is correct.

The letter of [REDACTED] is not sufficiently reliable evidence of the beneficiary's prior employment experience. [REDACTED] letter claims that the beneficiary was employed by [REDACTED] from January 1996 through November 2000. However, the labor certification makes no mention of the beneficiary's employment at [REDACTED], and this letter was not included with the initial submission of the petition. A beneficiary's claim of prior employment experience is less credible if the experience is not stated on the labor certification. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). Further, the labor certification states that the beneficiary was employed 48 hours per week as a surgical assistant by [REDACTED] from March 1993 until August 2000. This directly contradicts the period of employment stated in [REDACTED] letter, thereby calling into question the veracity of both letters. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. It is also noted that [REDACTED] letter, which was only executed after the director's denial of the motion to reopen and reconsider, states that the beneficiary performed duties that closely correspond to the duties of the offered position as set forth on Item 13, Part A of Form ETA 750. Therefore, the letter of [REDACTED] is not sufficiently reliable evidence that the beneficiary has two years of relevant experience working at [REDACTED]

The record also contains three separate letters from [REDACTED]. The first letter, dated January 14, 2000, states that the beneficiary has been employed "since March, 1993 as Assistant in my Operation Theatre and OPD. He is very obedient, honest, & hard working boy." The second letter, dated October 10, 2000, states that the beneficiary served as an assistant at the hospital, where he took patient histories, performed physical examinations, formulated investigations, performed nerve conduction studies on peripheral neuropathy patients, and assisted in the operation room. The third letter, executed after the director's denial of the motion to reopen and reconsider, is set forth in detail above. However, the third letter states that the beneficiary's employment ended in December 1995, which contradicts the labor certification and the prior two letters. Further, the beneficiary's duties at [REDACTED] described in the letters do not describe a position in the same occupation of the offered position, but instead describe experience in a related occupation.<sup>3</sup>

Therefore, the submitted experience letters do not credibly establish that it is more likely than not that the beneficiary possessed two years of experience in the job offered as of the priority date of the petition.

Beyond the decision of the director, the petitioner has also not established that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In order to obtain classification the requested employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the

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<sup>3</sup>It is noted that the director's decision states that the submitted employment experience letters must establish that the beneficiary possessed experience in *all* of the duties set forth at Part A, Item 13 of Form ETA 750. This is incorrect. As is stated above, the instant labor certification states that an individual must possess two years of experience in the job offered in order to perform the duties of the offered position. Part A, Item 14 of Form ETA 750 also permits the sponsoring employer to specify whether the offered position requires experience in a "related occupation." Accordingly, when the labor certification requires experience in the job offered, it is interpreted as requiring experience in the same occupation as the offered position, not an identical position. Therefore, if Part A, Item 14 of Form ETA 750 requires experience in the job offered, there is no requirement that the beneficiary must have experience in all of the duties listed at Part A, Item 13 of Form ETA 750. Further, such a requirement would discourage employers from providing a detailed description of the duties of the offered position on the labor certification.

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

*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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the March 14, 2001 priority date.

The proffered wage stated on the labor certification is \$32.17 per hour (\$66,913.60 per year). On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$3.5 million, and to employ 20 workers. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, the beneficiary did not claim to have worked for the petitioner. The record does not contain any Forms W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner.

If, as in the instant case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales 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*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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 116. “[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 petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.<sup>4</sup>

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<sup>4</sup>For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 17e (2004 and 2005) or Line 23 (1997 to 2003). When the two numbers differ, the number reported on Schedule K is used for net income. It is noted that, for 2001 through 2005, the director incorrectly used the number reported on Line 21 instead of the lower number reported on Schedule K.

<u>Year</u>	<u>Net Income (\$)</u>
2001	25,447.00
2002	6,711.00
2003	-6,367.00
2004	56,390.00
2005	-14,858.00

For the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage.

If the petitioner's net income does not meet the proffered wage, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. 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.<sup>5</sup> 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 net current assets for the required period, as shown in the table below.<sup>6</sup>

<u>Year</u>	<u>Net Current Assets (\$)</u>
2001	32,942.00
2002	7,395.00
2003	-18,722.00
2004	34,882.00
2005	-13,731.00

For the years 2001 through 2005, the petitioner did not have sufficient net current assets to pay the difference between the wage paid, if any, and the proffered wage.

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<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.

<sup>6</sup>On Form 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

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.

The record also contains the petitioner's unaudited financial statements for the years ended 2001 through 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition to the preceding analysis, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 2000 and to employ 20 employees. However, there is no evidence in the record that supports the petitioner's claim that it employs 20 workers. Assertions without documentary evidence will not satisfy the petitioner's burden of proof. The unsupported assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner's tax returns show gross sales ranging from \$1,577,038.00 to \$3,374,439.00. Although significant, this, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. It is also noted that the petitioner

has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.