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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  
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Services**

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER  
LIN 07 104 54056

Date: **MAR 12 2010**

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 Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a billing service. It seeks to employ the beneficiary permanently in the United States as a project business development manager. 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 (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage. 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 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date.

Beyond the decision of the director, additional issues are whether or not the petitioner demonstrated that the beneficiary satisfied the minimum level of experience stated on the labor certification, and whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

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).

Here, the Form ETA 750 was accepted on September 3, 2003. The proffered wage as stated on the Form ETA 750 is \$30.00 per hour (\$62,400.00 per year). The Form ETA 750 states that the position requires two years of experience.

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.<sup>1</sup>

Relevant evidence submitted with the petition is a letter from the petitioner dated January 30, 2006; a Wage and Tax Statement (W-2) issued by the petitioner to the beneficiary for 2006; and the petitioner's Form 1120 federal tax returns for 2003, 2004, and 2005.

On March 10, 2008, the director issued a Request for Evidence (RFE) asking, *inter alia*, for the petitioner to submit additional information regarding the petitioner's ability to pay the proffered wage from the priority date onward. Specifically, the director requested the petitioner's federal tax returns for the years 2006 and 2007. The director also requested copies of the beneficiary's W-2 Statements issued by the petitioner for years 2003, 2004, 2005, and 2007, as well as the beneficiary's most recent pay voucher.

In response counsel submitted, *inter alia*, the beneficiary's W-2 statements for 2003, 2004, 2005, 2006 and 2007; the beneficiary's Personal Earnings Statement; a letter from the petitioner's chief financial officer dated April 11, 2008; the petitioner's bank checking statements for the time period March 1, 2007, to February 29, 2008; a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; the petitioner's Small Business Line of Credit Statement dated March 17, 2008; the petitioner's informational brochure; and a Service Contract.

Counsel submitted "Supplemental Supporting Documentation" on appeal, to wit: the petitioner's bank checking account statements for 2008, 2007, 2006, 2005, and for 2003; the petitioner's Small Business Line of Credit Statement dated March 17, 2003; a copy of a page from an unnamed Bank of America internet website dated July 2, 2008; an appraisal report dated June 26, 2006; and, several "Commercial Guaranty" instruments.

Counsel also submits on appeal other documents: various Old Republic realty title, closing and escrow forms; a letter by [REDACTED] dated June 2, 1999; various U.S. Small

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

Business Administration documents (i.e. Unconditional Guarantee; CDC Certification; Development Company 504 Debenture; Certification of Borrower and Operating Company/Co-Borrower; Authorization for Debenture Guarantee; Note; Schedules A and B); and, a letter dated July 12, 1999.

The evidence in the record of proceeding shows that the petitioner is structured as a personal service corporation. On the petition, the petitioner claimed to have been established in 1984, and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year commences on July 1<sup>st</sup> and ends on June 30<sup>th</sup> of each year. On the Form ETA 750B, signed by the beneficiary on August 28, 2003, the beneficiary did claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of 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). In evaluating whether a job offer is realistic, 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

The petitioner issued the beneficiary's W-2 statements for the following years and wage amounts;

- 2003-\$45,796.08.
- 2004-\$35,701.32.
- 2005-\$39,752.64.
- 2006-\$51,481.65.
- 2007-\$40,692.12.

The petitioner submitted the beneficiary's Personal Earnings Statement for the time period March 29, 2008, to April 11, 2008, in the year-to-date amount of \$18,200.00. The proffered wage is \$62,400.00. In the instant case, 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 2003, 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 (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., 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 expenses were paid rather than net income.

Counsel states on appeal that the director should have considered depreciation when "reviewing [the petitioner's] tax returns and determining [the petitioner's] ability to pay." 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 record before the director closed on April 18, 2008, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date based upon the petitioner’s fiscal year, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 was the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2003, the Form 1120 stated net income of \$14,946.00.
- In 2004, the Form 1120 stated net income of \$32,127.00.
- In 2005, the Form 1120 stated a net income loss of <\$344.00>.<sup>2</sup>
- In 2006, the Form 1120 stated a net income loss of <\$20.00>.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of the petitioner’s net income, or wages paid the beneficiary in 2003, 2005, or 2006. In 2004, the petitioner could 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.<sup>3</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner’s tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2003, the Form 1120 stated net current assets of <\$76,675.00>.
- In 2005, the Form 1120 stated net current assets of \$17,388.00.
- In 2006, the Form 1120 stated net current assets of \$46,607.00.

Therefore, for the years 2003, and 2005, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of the petitioner’s net income, net current assets, or wages paid the beneficiary.

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<sup>2</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

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

On appeal counsel submits a legal brief and a letter dated April 11, 2008, from the chief executive officer of the petitioner, as well as documentary evidence already submitted.

On appeal, counsel asserts that the director should have taken into consideration the petitioner's "S-corporation" status. There is no evidence in the record that the petitioner elected S corporation status. Based upon the Form 1120 tax returns submitted, the petitioner is a personal service corporation. There are no Schedules K in the record.

Citing a USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004,<sup>4</sup> counsel asserts that the director should have considered the petitioner's bank account statements. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel asserts on appeal that the "liabilities shown on tax returns are in actuality monies shareholders PUT INTO the company, therefore what looks like negative income is actually positive investment." The AAO has insufficient information to analyze and review counsel's contention. Assuming that counsel references shareholder's loans to the corporation found on Schedule L of the tax returns, it is unclear why counsel believes either loans to shareholder or loans from shareholders could be evidence of the ability to pay, but, it is clear that liabilities cannot be evidence of the ability to pay by their very nature.

According to counsel, the "company's assets" for 2003, 2004, and 2005 are evidence of the petitioner's ability to pay the proffered wage. Counsel references a statement dated April 11, 2008, by the petitioner's chief executive officer which contains "charts" of the petitioner's finances. Counsel asserts further that the petitioner's current assets are equal to or greater than the proffered wage based upon the petitioner's "charts." According to the regulation at 8 C.F.R. § 204.5(g)(2), it is audited financial statements, the tax returns, or annual reports, that are evidence of the petitioner's ability to pay. There is no evidence that the financial charts are the result of audited statements, and as already stated, it is the petitioner's net current assets that can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has net income to pay the proffered wage.

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<sup>4</sup> While the internal memorandum does indicate that USCIS may review bank account records, the consideration is not as counsel asserts *in lieu* of tax returns, financial statements or annual reports.

Citing an unpublished decision of the AAO, counsel contends that the normal accounting practices of a company should be considered in the determination of a company's ability to pay. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

According to counsel, the director "must ...consider other sources of income pledged to [the petitioner]" citing *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church's ability to pay. Here, counsel's assertion is that USCIS should treat its line of credit as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See "Barron's Dictionary of Finance and Investment Terms," 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142.

Counsel contends that the amount of money generated, then subsequently expended purchasing another business property, is evidence of the ability to pay. Counsel's logic is unclear since the funds invested in its new business property are not available to pay the proffered wage. By implication counsel is

contending that the owner(s) of the petitioner has or will convert real estate assets to cash and have sufficient cash reserves to pay the proffered wage. Since this additional cash infusion does not appear on the tax returns for 2003, or 2005, it is apparent that the funds were not available from the priority date. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. at 49.

Pursuant to *Matter of Sonogawa, supra*, the AAO notes that the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay despite counsel not setting forth this argument. In the present matter, the petitioner has identified itself on its 2005 IRS Form 1120 as a "personal service corporation." A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners, and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

In the present case, all of the stock of the personal service corporation is held by two individuals<sup>5</sup> according to the tax returns in the record, and together, they hold 100 percent of the company's stock. According to the petitioner's IRS Form 1120, Schedules E, and Form 1120, the officers elected to pay themselves in 2003-\$334,900.00, 2004-\$390,900, and 2005-\$350,900.00 respectively. We note here that the compensation received by the company's owners during these three years was not a fixed salary.

USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

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<sup>5</sup> There is information in the tax returns submitted that two individuals own all the stock of the petitioner, but there is also information that three individuals own the company's stock in the amounts of 37.50%, 37.50% and 25.00%.

Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The AAO has considered the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their personal service corporation. Clearly, the petitioning entity is a profitable enterprise for its owners. According to the tax returns submitted, the petitioner earned a gross profit of in 2003-\$1,361,305.00, in 2004-\$1,492,497.00, and in 2005-\$1,573,905.00. However, the AAO notes that neither the petitioner, nor counsel, is asserting that the officers of the petitioner would be willing to utilize their officers' compensation to pay the proffered wage. Additionally, the petitioner's salary and wages paid to the 15 workers (indicating an average wage of \$25,844.53) are dissimilar to the proffered wage and cast doubt upon the realistic nature of this job offer.

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. 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.

Although as already stated, the gross receipts of the petitioner are substantial for 2003, 2004 and 2005, its net income for those years averages only \$15,576.33, and, its net current assets are on average, negative. Salary and wages plus officers compensation are substantial for each year, and these expenses account for these results. 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.

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 in 2003 and 2005, and did not pay the beneficiary the proffered wage in 2006, 2007, and 2008.

Beyond the decision of the director, additional issues are whether or not the petitioner demonstrated that the beneficiary satisfied the minimum level of experience stated on the labor certification, and, whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of 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(l)(3)(ii)(B) provides:

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on September 3, 2003.<sup>6</sup>

A review of the record demonstrates that the petitioner submitted the following evidence concerning the beneficiary's qualifications and eligibility for the visa preference category of skilled worker: a letter from the marketing director of the petitioner dated January 30, 2006; a credentials evaluation of the beneficiary's credentials and work experience prepared by Morningside Evaluations and Consulting, dated September 24, 2001; a letter of recommendation from the executive editor of [REDACTED], of Mumbai, India, publisher of the magazine 'New Women,' dated August 23, 2001; a certificate of membership of the Bombay Management Association, India, dated April 17, 1995, certifying the beneficiary's membership; a letter of recommendation dated September 2, 2001, from the chief of content of Personalitree, University for People Skills; a letter of recommendation from the editor of the magazine "Savvy," Mumbai, India dated August 28, 2001; a press clipping dated June 20, 2000, from the "Business Times Bureau," mentioning the beneficiary; an undated press clipping entitled "Introducing Business Baron's Distinguished Panel of Monthly Columnists" mentioning the beneficiary;

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<sup>6</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

and, copies of the beneficiary's book chapter "A Thirst for Knowledge, a Step to Business" from the book "A Business of Her Own, Fifty Women in Enterprise in India," by [REDACTED] Chennai, India (1997).

The Form ETA 750 states that the position of project business development manager requires two years experience. The job duties of the job are described as:

Plan, direct coordinate the development of medical billing service and projects to ensure that goal or objectives of the project as accompanists within a prescribed time frame and funding parameters, review the project plan to determine time frame, procedures for accomplishing the project, staffing requirements, and allotment of available resources to various phases of any project.

The labor certification required two years of experience in the offered position, and stated that a related occupation is project manager with no experience time period stated.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she has experience in three employment positions.

According to the Form ETA 750, Part B, the beneficiary stated that she worked for [REDACTED] a publication company, located in Mumbai, India, from December 1997, to March 2001, as a project business manager/director. From 2001 to November 2002, the beneficiary stated she worked for [REDACTED] a business management company, located in Richmond, Virginia, as a project business manager. Finally, the beneficiary stated that she is employed by the petitioner as a project business development manager commencing on November 2002 to "present" (i.e. August 28, 2003).

The AAO notes that the job duties set forth by the beneficiary for each of the positions above described are almost identical with that found in Form ETA 750, Part A, Item 13. The duties performed in each of the three employment positions are described for the petitioner beginning, "Plan, direct, coordinate the development of medical billing service;" for [REDACTED] the duties performed are described beginning as "Plan, direct, coordinate the development of management company service;" and, for "Write World" the duties performed are described beginning as "Plan, direct, coordinate the development of company publication service." The rest of the job duty descriptions for these disparate businesses in each instance are the same as that job description set forth in Form ETA 750, Part A. There is no explanation in the record why the beneficiary's employment experience was exactly the same for three unrelated businesses in different places since December 1997. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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<sup>7</sup> The petitioner submitted a W-2 Statement issued by "Shining Star" to the beneficiary in 2002.

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.

As already stated, the director issued a request for evidence to the petitioner on March 10, 2008. The director instructed the petitioner to submit, according to the regulation at 8 C.F.R. § 204.5(l)(3), proof of the beneficiary's two-year work experience before the priority date. The director instructed the petitioner to provide evidence of the beneficiary's work experience in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the beneficiary including specific dates of the employment and specific duties. In his decision, the director stated that the employment references evidence submitted demonstrated that the beneficiary's experience as a *writer* was not sufficient to show the beneficiary has at least two years evidence in the offered job.

In response, the petitioner submitted a letter dated April 11, 2008, from the chief executive officer of the petitioner containing a statement concerning the beneficiary's education, training and experience. According to the letter, the beneficiary's "possess [sic] the 3 years experience equals 1 year university level year formula, she by-passes the education level equating to a Bachelor's degree but has an additional ten (10) years experience left over."

The petitioner has submitted a credentials evaluation of the beneficiary's credentials and work experience prepared by Morningside Evaluations and Consulting, dated September 24, 2001. According to the evaluation, the beneficiary has attained the equivalent of a Bachelor of Business Administration from an accredited institution of higher education in the United States based upon the beneficiary's "credentials" and work experience. According to the labor certification, the beneficiary attended the Bombay College of Journalism, India, from January 1986 to 1987, and attained a diploma in the field of study of journalism. No diploma or grades transcript substantiating the beneficiary's education was submitted by the petitioner.

It is evident from the evidence in the record, that the petitioner has confused the requirements of immigrant and non-immigrant visa preference classifications as well as the categories of professional and skilled worker for immigrant petitions. Whereas, the regulations governing non-immigrant visa petitions may allow the substitution of experience for tertiary education<sup>8</sup> (college/university), since the I-140 petition is an immigrant petition, this substitution of experience is not a consideration here.

Further, since the labor certification's sole requirement for the offered job is two years of experience, and education is not mentioned, the question of education equivalency as developed by Morningside Evaluations and Consulting in its report is not a consideration for the skilled worker category here, while it would be for the professional category.<sup>9</sup> Further, the rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h(4)(iii)(D)(5). Further, the petitioner did not state on the labor certification that the beneficiary's education or equivalent education could be a substitute for job experience.

As additional evidence in response to the director RFE, the petitioner submitted an employment reference dated April 2, 2008, from the president of [REDACTED] located in Richmond, Virginia, that the beneficiary was employed from September 2001, to November 2002 as a project manager-business development. According to the letter, the beneficiary's employment duties were to plan, direct and coordinate projects of the company "within a reasonable time frame and [within] the parameters that were given [to] her." Further the letter stated that the beneficiary was concerned with staffing requirements, and "allotment of available resources to various phases of the projects undertaken."

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<sup>8</sup> The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) for the professional category uses a singular description of foreign equivalent degree. A beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. There is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree.

<sup>9</sup> Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The AAO notes that the format and description of the beneficiary's job duties set forth in the letter are more or less identical to the job duties of the labor certification. Since the prior employment reference's job description is almost identical in format as well as content to that found in Form ETA 750, Part A and B, it appears to be pre-prepared by a third party, and presumably, it is not the statement of the president of Shining Star, Inc. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Other than the above letter from [REDACTED], there are no other letters from prior employers as required by the regulation at 8 C.F.R. § 204.5(l)(3), and the director's RFE, to substantiate the beneficiary's prior employment experience. The petitioner has submitted three letters of recommendation from [REDACTED] of Mumbai, India dated April 9, 2008, [REDACTED], dated April 9, 2008, and [REDACTED] Mumbai, India, attesting to her efforts on projects for those organizations. The three organizations were not the beneficiary's employers, and were reviewed generally for what evidence they may provide on the beneficiary's qualifications.

The preponderance of the evidence does not demonstrate that the beneficiary satisfied the minimum level of two years of experience stated on the labor certification, and, does not demonstrate the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.