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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6

Date: DEC 27 2011

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

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:

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a tree trimming and landscaping company. It seeks to employ the beneficiary permanently in the United States as a tree trimmer supervisor, O*Net-SOC job code 37-1012 (first-line supervisors of landscaping, lawn service, and groundskeeping workers).¹ 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 denied the petition for lack of initial evidence, pursuant to 8 C.F.R. § 103.2(b)(8)(ii). The director stated that the petitioner did not show that the beneficiary was qualified to perform the duties of the position as of the priority date, and that the petitioner did not establish that it had the ability to pay the beneficiary's wage.

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.

The issues in this case are (a) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and (b) whether the beneficiary has the requisite work experience as of the priority date.

The AAO conducts appellate review on a *de novo* basis. See *Soltune 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

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.

Further, 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

¹ DOT code can be accessed online at <http://www.onetonline.org> (last accessed November 9, 2011).

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).

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).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by the DOL on March 8, 2005. The rate of pay or the proffered wage specified on the Form ETA 750 is \$21 per hour or \$43,680 per year. The Form ETA 750 states that the position requires a minimum of two years of work experience in a related occupation as a tree trimmer or pruner. Other special requirements include the ability to work at tree heights.

To show that the petitioner has the continuing ability to pay \$21 per hour or \$43,680 per year from March 8, 2005, the petitioner submits the following evidence on appeal:

- Copies of Forms 1120, U.S. Corporation Income Tax Return, for the years 2005 and 2006; and
- A copy of the petitioner's financial statements for the period April 2007-March 2008 (unaudited).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. [REDACTED] is the sole stockholder (owner) of the corporation. On the petition, the petitioner claimed to have been established on April 5, 2001, to currently employ 38 people, and to have gross annual income and net annual income of \$2.7 million and \$186 thousand, respectively.

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 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 record contains no Form W-2 or Form 1099-MISC issued to the beneficiary or other evidence showing the beneficiary's employment by the petitioner during any period of the qualifying period from the priority date. Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the full proffered wage of \$21 per hour or \$43,680 per year from March 8, 2005. The petitioner can demonstrate this ability through either its net income or net current assets.

If the petitioner chooses to use its net income to demonstrate the ability to pay, USCIS will 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*, 696 F. Supp. 2d 873 (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 expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (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 AAO closed on October 1, 2008 upon receipt by the AAO of the petitioner's submission of the Form I-290B (Notice of Appeal or Motion) with supporting documentation.³ As of that date, the petitioner's 2007 federal income tax return was not yet available. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income (loss) for the years 2005 and 2006, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)⁴ – in \$</i>	<i>PW – in \$</i>
2005	3,648	42,680
2006	152,028	42,680

Therefore, the petitioner had sufficient net income to pay the beneficiary's proffered wage in 2006 but not in 2005.

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.⁵ A corporation's year-end current assets are

³ Counsel for the petitioner indicated that he would file a brief in support of the appeal within 30 days. However, no brief and no further documentation have been filed.

⁴ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120 (net income before net operating loss).

⁵ 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.

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 the year 2005, as shown below:

<i>Tax Year</i>	<i>Net Current Assets – in \$</i>	<i>PW – in \$</i>
2005	(23,845)	43,680

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2005. Based on the net income and net current asset analysis above, the AAO finds that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

On appeal, to show that the petitioner has the ability to pay the proffered wage, counsel for the petitioner submits a copy of the petitioner's profit and loss statement for the period April 2007-March 2008.

The AAO observes that the financial statement is not audited. 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. An unaudited financial statement consists of the unsupported assertions of management. In this case, the financial statement in the record is unaudited, and is therefore unreliable. In addition, no evidence has been submitted to demonstrate that the figures reported on the unaudited financial statements somehow reflect separate additional net income or net current assets that were not reflected on the petitioner's tax returns. Therefore, the AAO declines to accept the financial statement as evidence of the petitioner's ability to pay.

Finally, 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

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.

We acknowledge that the petitioner is an ongoing business; however, the record is devoid of evidence regarding the petitioner's reputation. Unlike *Sonegawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage particularly in 2005.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence.

The director also found that the record did not reflect that the beneficiary had the requisite work experience in a related occupation as a tree trimmer or pruner as of the priority date.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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, *Madany v. Smith*, 696 F.2d, 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).

Here, as previously noted, the Form ETA 750 was filed and accepted for processing by the DOL on March 8, 2005. The name of the job title or the position for which the petitioner seeks to hire is "Tree Trimmer Supervisor." Under box 13, job description, the petitioner wrote:

Lead tree trimming crew in pruning, maintenance, customer contact, job estimates and employee reports on various tree trimming and pruning projects. Scale trees and perform services according to customer agreement and satisfaction.

Further, the petitioner set the following requirements under box 14 (the minimum education, training, and experience for a worker to perform satisfactory the job duties described in box 13 above):

Education:	0
Training:	0
Experience:	2 years in a related occupation as a tree trimmer or pruner

Under box 15, Other Special Requirements, the petitioner wrote, "Ability to work at tree heights."

To demonstrate that the beneficiary has the requisite two-year work experience as of the priority date, the petitioner submits a copy of a letter of employment dated May 19, 2004 from [REDACTED] [REDACTED] stating that the beneficiary worked as a Grounds Man from November 3, 1998 until July 6, 2001. The letter is consistent with the beneficiary's claim in part B of the Form ETA 750 that he worked for [REDACTED] as a tree trimmer/groundsman from November 1998 to July 2001. The letter also contains information, such as name, address, and title of the writer, but it does not include sufficient description of the experience, as prescribed by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).⁶ Merely stating that the beneficiary was employed as a "Grounds Man" does not establish the reliability of the assertion and does not establish the beneficiary's qualification for the job offered. Therefore, the AAO finds that the beneficiary is not qualified to perform the duties of the position.

The appeal will be dismissed 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.

⁶ 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

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.