

(b)(6)

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

DATE: **AUG 06 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

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

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 16, 2009 denial, the single issue in this case is 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.

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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

In the instant matter, counsel who initially represented the petitioner filed Form I-290B which was received by the service center on May 15, 2009. Counsel then submitted a brief on June 15, 2009. On appeal, the initial counsel submitted, with his brief, a letter dated May 7, 2009 from [REDACTED] one of the two owners of the petitioning entity; a copy of the director's February 5, 2009 request for evidence (RFE); copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2007 and 2008; and copies of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2007 and 2008.

The record also contains a letter from [REDACTED] and a new G-28 signed by the petitioner, both of which indicate that the petitioner retained [REDACTED] as its new representative as of May 21, 2010. [REDACTED] submitted a second brief and, with that brief, copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2007, 2008 and 2009; and a copy of a pay statement which the petitioner issued to the beneficiary in March 2010; a copy of a Google map showing the distance of Nutley, New Jersey from the World Trade Center in New York; and a report from the United States Government Accountability Office dated March 2005 entitled, "September 11 Recent Estimates of Fiscal Impact of 2001 Terrorist Attack on New York."

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$900,000 and currently to employ four workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary claimed to have worked for the petitioner since December 1994.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) should prorate the proffered wage for 2001 since the petitioner filed the labor certification in April. Counsel also asserts that the petitioner's income in 2001 was adversely affected by the terrorist

¹ 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). In the instant case, however, most of evidence provided on appeal was requested by the director on February 5, 2009. The petitioner failed to respond to that request and instead provides the requested evidence for the first time on appeal. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

attack on the World Trade Center on September 11, 2001. Counsel also asserts that USCIS should include in the petitioner's net income the sum which the petitioner deducted for depreciation for the years 2001, 2002 and 2003. Counsel further asserts that the petitioner has utilized the services of independent contractors and that the wages paid to these workers could have been redirected to pay for the beneficiary in 2001 and 2003. Counsel also asserts that USCIS should consider, rather than net income, the petitioner's gross income less its regular, on-going business expenses which, counsel asserts, amount to the petitioner's disposable income. Additionally, counsel asserts that USCIS should consider officer compensation as available to pay the proffered wage in at least 2001, 2002 and 2003. Finally, counsel asserts that the director erred in failing to consider the totality of the petitioner's circumstances.

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'l Comm'r 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In its initial petition submission, as evidence of its ability to pay the proffered wage, the petitioner provided copies of IRS Form W-2 which it issued to the beneficiary in 2004, 2005 and 2006; and copies of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2001, 2002, 2003, 2004, 2005 and 2006. On February 5, 2009, the director issued an RFE, noting the forms of evidence which the petitioner provided and asking the petitioner to supply copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2001, 2002, 2003, 2007 and 2008; copies of the petitioner's federal income tax returns for 2007 and 2008 or annual reports or audited financial statements for the same years; a copy of the beneficiary's most recent pay voucher and documentation to overcome the deficiency in net income and net current assets which is exhibited on the petitioner's 2001, 2002 and 2003 federal income tax returns. The director also noted that if the requested evidence did not demonstrate the ability to pay, the petitioner should submit "additional evidence to help establish your ability to pay the wage." The petitioner was afforded 45 days to respond to the request but failed to submit a response. On April 16, 2009, the director denied the instant petition based upon the evidence in the record at that time.

As noted above, on appeal, counsel for the petitioner now for the first time submits most of the evidence which was requested by the director in his February 5, 2009 RFE, to wit, copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2007 and 2008; copies of the petitioner's federal income tax returns for 2007 and 2008 and explanations of figures reported on these documents to support the petitioner's assertion that it has the ability to pay the proffered wage for the same years. Further, neither attorney provided an explanation for the failure to respond to the director's RFE.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, though the petitioner claims that it has employed the beneficiary since December 1994, it has only properly submitted copies of IRS Form W-2 for 2004, 2005, 2006 and 2009.² The beneficiary's IRS Form W-2, Wage and Tax Statements, show compensation received from the petitioner, as shown in the table below.

- For 2001, the petitioner provided no regulatory prescribed evidence of wages paid.
- For 2002, the petitioner provided no regulatory prescribed evidence of wages paid.
- For 2003, the petitioner provided no regulatory prescribed evidence of wages paid.
- In 2004, the Form W-2 stated compensation of \$17,760.00.
- In 2005, the Form W-2 stated compensation of \$20,800.00.
- In 2006, the Form W-2 stated compensation of \$20,240.00.
- For 2007, the petitioner did not properly submit evidence of wages paid.
- For 2008, the petitioner did not properly submit evidence of wages paid.
- In 2009, the Form W-2 stated compensation of \$29,604.00.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 through 2003. In 2004 and 2006, the petitioner provided evidence of having paid the beneficiary a portion of the proffered wage. For 2007 and 2008, the petitioner did not properly submit evidence of wages paid to the beneficiary. In 2005 and 2009, the petitioner demonstrates that it paid the beneficiary the full proffered wage. Therefore, the petitioner must still demonstrate the ability to pay the beneficiary the full proffered wage for 2001, 2002, 2003, 2007 and 2008. However, the petitioner must demonstrate the ability to pay only the difference between wages paid to the beneficiary and the full proffered wage for 2004 and 2006, that difference being \$3,040 and \$560 respectively.

² The copy of IRS Form W-2 which the petitioner issued to the beneficiary in 2009 was provided on appeal but was not requested in the director's February 5, 2009 RFE.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 the Service 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on April 16, 2009, the date upon which the director denied the instant petition, having received no response to his RFE. As of that date, the petitioner’s 2008 federal income tax return would probably have been available and the director requested both the 2008 and 2007 federal income taxes in his RFE. However, having failed to respond to the RFE, the petitioner’s income tax return for 2006 is the most recent return included in the record. The petitioner’s tax returns demonstrate its net income for 2001, 2002, 2003, 2004 and 2006, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$8,747.00.
- In 2002, the Form 1120 stated net income of \$19,594.00.
- In 2003, the Form 1120 stated a net loss of \$13,596.00.
- In 2004, the Form 1120 stated net income of \$20,795.00.
- In 2006, the Form 1120 stated a net loss of \$23,155.00.³
- For 2007, the petitioner did not properly submit evidence of its net income.
- For 2008, the petitioner did not properly submit evidence of its net income.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net income to pay the full proffered wage. For 2007 and 2008, the petitioner did not demonstrate sufficient net income to pay the full proffered wage because it did not properly submit evidence of its net income. For 2006, the petitioner did not demonstrate sufficient net income to pay the difference between wages already paid and the full proffered wage. However, for 2004, the petitioner demonstrated sufficient net income to pay the difference between wages already paid and the full proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁴ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end

³ The petitioner submitted its U.S. Corporation Income Tax Return (Form 1120) for 2005. The net income reflected on that document is \$46,188 which is sufficient to pay the beneficiary the proffered wage for that year. The return was not included in the tabulation above because the petitioner provided documentary evidence, by way of IRS Form W-2 for 2005, which demonstrates that it paid the beneficiary the proffered wage for that year.

⁴ 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.

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 2001, 2002, 2003 and 2006, as shown in the table below.

- In 2001, the Form 1120, Schedule L stated net current liabilities of \$9.00.
- In 2002, the Form 1120, Schedule L stated net current assets of \$7,302.00.
- In 2003, the Form 1120, Schedule L stated net current liabilities of \$18,349.00.
- In 2006, the Form 1120, Schedule L stated net current assets of \$25,251.00.
- For 2007, the petitioner did not properly submit evidence of its net current assets.
- For 2008, the petitioner did not properly submit evidence of its net current assets.

Therefore, for the years 2001, 2002, 2003, the petitioner did not have sufficient net current assets to pay the full proffered wage. For 2007 and 2008, the petitioner did not demonstrate sufficient net current assets to pay the full proffered wage because it did not properly submit evidence of its net current assets. For 2006, the petitioner demonstrated sufficient net current assets to pay the difference between wages already paid and the full proffered wage.

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

On appeal, counsel asserts that USCIS should prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

On appeal, counsel also asserts "that the economy of New York City and other adjoining areas crashed precipitously after the terrorist attacks of September 11, 2001." Counsel asserts that many of the petitioner's customers lost their jobs in Manhattan and, therefore, has less disposable money for luxuries such as renovations. Therefore, counsel asserts that the events of September 11, 2001 had a direct impact upon the petitioner's business.

However, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing

ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001.

On appeal, counsel also asserts that USCIS should add the amount which the petitioner deducted for depreciation back into the petitioner's net income because, counsel asserts, "depreciation is a deduction for tax purposes only."

With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

On appeal, counsel also asserts that in 2001 and 2003 the petitioner compensated subcontractors and that the funds paid to these workers could have been used to pay the beneficiary. Counsel also asserts that the petitioner would replace a subcontractor with a full-time employee, presumably the beneficiary.

The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position performed by any of the subcontractors involves the same duties as those set forth in the ETA 750. The petitioner has not documented the position, duty,

and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.⁵

It should also be mentioned that the petitioner states that it has employed the beneficiary since 1994. On appeal, the petitioner would claim that funds used to pay subcontractors in 2001 and 2003 only could have been used to pay the beneficiary. The petitioner also states that it would have replaced one of the subcontracted workers with a full-worker, intimating that it would have been the beneficiary. However, as already stated, the petitioner claims to have been employing the beneficiary at the same time that it was also paying the subcontractors. The petitioner has provided no evidence demonstrating that the beneficiary could have assumed the duties which were performed by the subcontracted worker or workers.

On appeal, counsel also asserts that the director erred in considering net income as the primary means of determining the petitioner's ability to pay. Counsel asserts that, rather than net income, the director should have considered the petitioner's disposable income. Counsel asserts that disposable income is a figure which reflects the petitioner's gross income less its regular, on-going business expenses. Counsel asserts that disposable income does not include discretionary expenses such as depreciation.

However, as explained above, if the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the period from the priority date until the time that the beneficiary obtains lawful permanent residence, 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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 the Service 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).

Further, the AAO has explained above why we would not consider adding the depreciation deduction to the net income, to wit, it is a real expense. *River Street Donuts* at 118.

⁵ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

With the brief received by this office on June 15, 2009, counsel supplied a letter dated May 7, 2009 from [REDACTED] one of the two equal shareholders of the petitioning entity. In his letter, [REDACTED] asserts that the officer compensation which he receives:

are moneys that may be treated as net income if I chose not to collect them...This means that whatever income I draw from my business are monies that I may apply toward the net income of the business in order to meet expenses necessary to maintain the operations of the company...I therefore consent that my company's net income for the years specified above be increased by amounts representing the proffered wage of \$20,800.00 per year.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 50 percent of the company's stock and devotes 100 percent of his time to the business operations. According to the petitioner's 2001, 2002 and 2003 IRS Form 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$20,873, \$39,550 and \$57,800 respectively.⁶ However, these figures are not supported by [REDACTED] W-2 Forms or his U.S. Individual Income Tax Return (Form 1040) for any of the three years. We also note here that the compensation received by the company's two owners during these three years was not a fixed salary and did not exceed \$103,100 in total for any year.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their general construction company. The petitioner's sole argument in support of using officer compensation consists of a letter from one of the two equal shareholders. [REDACTED] asserts that he consents "that my company's net income for the years specified above be increased by amounts representing the proffered wage of \$20,800.00 per

⁶ In his letter, [REDACTED] makes the argument regarding the ability to forgo officer compensation for 2001, 2002 and 2003 only.

year.” However, in 2001, the petitioner must demonstrate the ability to pay the difference between its net income (\$8,747) and the proffered wage (\$20,800) or \$12,053 which is 58 percent of [REDACTED] compensation for that year. In 2003, the petitioner must demonstrate the ability to pay the full \$20,800, an amount which is 36 percent of [REDACTED] compensation for that year. Further, according to Schedule E of the petitioner’s U.S. Corporation Income Tax Return, [REDACTED] devotes 100 percent of his time to the operations of the business. Thus, according to the Internal Revenue Code (IRC), the compensation which he received is considered his income.⁷ [REDACTED] provided no evidence, such as his personal, federal income tax returns, evidence of household expenses and personal assets, demonstrating that he is able to forgo that sum of money for 2001, 2002 and 2003.

Additionally, the petitioner has two equal shareholders: [REDACTED] and [REDACTED]. The petitioner provided no documentary evidence demonstrating that [REDACTED] is either willing or able to forgo any portion of his officer compensation for purposes of paying the beneficiary.

In examining a petitioner’s ability to pay the proffered wage, the fundamental focus of the USCIS’ determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg’l Comm’r 1977). Accordingly, after a review of the petitioner’s federal tax returns and all other relevant evidence, we conclude that the petitioner has not established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

Counsel’s assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonegawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may consider such factors as the

⁷ <http://www.irs.gov/pub/irs-pdf/p15a.pdf> (accessed June 27, 2012).

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 properly submitted financial documentation for six years of business operations. In that time, the petitioner's gross sales remained consistent. Officer compensation and payroll remained consistent and modest. The petitioner has not established the historical growth of its business, the overall number of employees, the specific occurrence of any uncharacteristic business expenditures or losses associated with its business, or the petitioner's reputation within its industry. Further, contrary to the petitioner's assertion, it has not demonstrated that the beneficiary would be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed 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, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered: carpenter. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a carpenter. However, the only claimed experience identified on Form ETA 750B is experience gained with the petitioning entity, from December 1994 through April 21, 2001, the date upon which the beneficiary signed Form ETA 750B.

The record of proceeding contains a single letter, attesting to the beneficiary's qualifying experience as a carpenter. However, the letter dated November 30, 2006 is from [REDACTED] Manager of [REDACTED]. This experience is not included on Form ETA 750B.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The petitioner provided no objective, independent, verifiable evidence to substantiate the experience purported in the letter from [REDACTED]. Further, the letter itself does not comply with the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter is not written on company letterhead and does not bear the name and address of the business. Though [REDACTED] states that the beneficiary worked for [REDACTED] from May 20, 1983 until May 20, 1993, he does not specify whether the beneficiary worked in a part-time or full-time capacity. Given these deficiencies and the lack of objective corroborating evidence, this letter does not satisfy the burden of proof.

Therefore, the only experience which may be considered, since it is set forth on Form ETA 750B, is the experience gained with the petitioning entity. According to Form ETA 750B, the experience gained with the petitioner is experience in the same position, performing the same duties. For example, on Form ETA 750B, the beneficiary indicates that from December 1994 until April 21, 2001, he worked for the petitioner, as a carpenter, performing the following duties:

Construct, erect, install, and repair structures and fixtures of wood, plywood and wallboard, using carpenter's handtools and power tools, in compliance with local building codes and blueprints, sketches, or building plans. Select specified type of lumber or other materials. Prepare layout using rule, framing square and calipers. Shape materials to prescribed measurements, using saws, chisels and planes. Erect framework for structures and lays subflooring. Build stairs and lay out and install...

[description of duties ends abruptly without completing sentence.]

In Item 13 of Form ETA 750, the petitioner describes the duties associated with the proffered position, stating:

Construct, erect, install, and repair structures and fixtures of wood, plywood, and wallboard, using carpenter's handtools and power tools, in compliance with local building codes and blueprints, sketches, or building plans. Select specified type of lumber or other materials. Prepare layout using rule, framing square and calipers. Shape materials to prescribed measurements, using saws, chisels, and planes. Erect framework for structures and lays subflooring. Build stairs and lay out and install partitions and cabinet work. Lay hardwood, parquet, and wood-strip-block floors. Install windows, doors, doorframes, interior and exterior trim and finish hardware.

Construct forms for concrete. Construct and erect scaffolding and ladders for assembling structures above ground level.

Both lists of duties are identical.

Regarding the claimed experience with the petitioner, 20 C.F.R. § 656.21(b)(5) [2004] states:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

(Emphasis added.)

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.⁸

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)⁹ in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,¹⁰ the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require

⁸ In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. See *E & C Precision Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

⁹ 20 C.F.R. § 656.21(b)(5) [2004].

¹⁰ See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13,

that employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are two years of experience in the job offered and that experience in an alternate occupation is not acceptable. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. See 20 C.F.R. § 656.21(b)(5) [2004].

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner.

Furthermore, the description of the duties which the beneficiary has been performing for the petitioner are identical to the duties associated with the proffered position, as indicated in Item 13 of Form ETA 750. As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary’s experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary’s experience gained with the petitioner was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary’s experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

There is no objective, verifiable regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(1)(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.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered 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.