

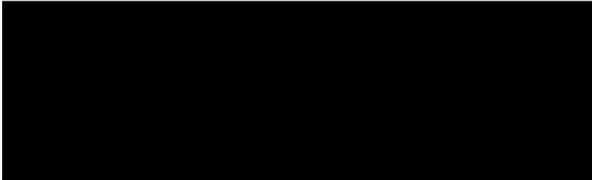
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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DATE:

Office: NEBRASKA SERVICE CENTER



APR 27 2012

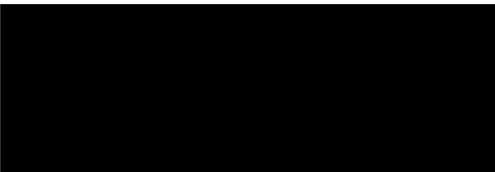
IN RE: Petitioner:

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner provides computer consulting, development and outsourcing services. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. The director also determined the petitioner had not established that the beneficiary qualifies for the offered position.

Section 203(b)(3)(A)(i) of 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. 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 who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 USDOL. 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 as certified by the USDOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 that was accepted for processing on May 9, 2002 shows the proffered wage as \$55,000 per year and that the position requires two years experience in the job offered or two years in the related occupation of senior engineer. The position also requires a bachelor's degree in computer science or in a "related" field.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner is structured as a C corporation and claims to have been established in 2000 and to employ twelve workers when the petition was filed. Its IRS Forms 1120, U.S. Corporation Income Tax Returns, reflect it operates on a calendar year basis.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay the wage. The IRS Forms W-2, Wage and Tax Statement, indicate wages that the beneficiary received from the petitioner as shown in the table below:¹

2005	2006	2007	2008	2009
\$44,000	\$75,750.06	\$85,000.08	\$85,000.08	\$92,500.08

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for the years 2002, 2003, 2004 and 2005.

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.

¹ Five paystubs were also submitted showing the beneficiary had earned \$25,494.89 in 2010 from the petitioner by the end of the pay period ending May 15, 2010.

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*, *supra*, at 1084, the court held that 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 IRS Form 1120. The record before the director closed on January 15, 2009 with the receipt of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 was the most recent return available. The petitioner's IRS Form 1120 tax returns demonstrate its net income for the years of the requisite period below:

<u>Year</u>	<u>Net Income</u>
2002	\$97,665
2003	-\$149,849
2004	-\$196,363
2005	\$30,838

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage. Although the petitioner appears to have had sufficient net income to pay the difference between the proffered wage and the wages actually paid in 2005, the petitioner had at least one other approved Form I-140 pending at that time (SRC 04 158 50813). That beneficiary did not adjust to permanent residence until 2011. Petitioners must demonstrate that they have the ability to pay the proffered wages to all beneficiaries of the pending petitions as of the priority date of each petitioner and continuing until the beneficiary of each petitioner obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec 142, 144-145 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2). As the record does not contain any evidence pertaining to this simultaneously pending petition, the petitioner has also not established its ability to pay the proffered wage 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.² 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 net current assets for the required period, as shown in the table below:

<u>Year</u>	<u>Net Current Assets</u>
2003	-\$16,393
2004	-\$296,168
2005	-\$27,909

Therefore, for the years 2003 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the USDOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered

²According 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.

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 since the petitioner has paid the beneficiary at the proffered wage rate since he became employed by the corporation in 2005, according to the language in a memorandum dated May 4, 2004, from ██████████ Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Interoffice Memo. from ██████████ Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The ██████████ Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the ██████████ Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the ██████████ Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 9, 2002. Thus, the petitioner must show its ability to pay the proffered wage not only in 2005, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002, 2003 and 2004. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel acknowledges that the record contains no evidence of wages being paid to the beneficiary during 2003 and 2004, years when the petitioner showed negative net income and current assets, because the beneficiary began work for the corporation in 2005. Counsel states that the position that the beneficiary occupied beginning in 2005 was occupied in 2003 and 2004 by another alien named ██████████. Counsel submits Forms W-2 for Mr. ██████████ showing that he was paid \$59,100 in 2003 and \$146,820 in 2004, above the proffered wage of \$55,000 per year. Counsel argues that because the salaries paid during 2003 and 2004 were higher than the proffered wage, the petitioner has established it possessed the ability to pay the proffered wage during those years. The record contain no evidence to establish that the work that the beneficiary performed in 2005 was identical to that performed by Mr. ██████████ in 2003 and 2004, or that the work that the beneficiary began completing in 2005 even existed in earlier years. In general, wages paid to others are not available to pay the

proffered wage to the beneficiary. There is no evidence that Mr. [REDACTED] was performing the same duties described in the Form ETA 750. It is noted that 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 continuously from the day the Form ETA 750 was accepted for processing by the USDOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage during the requisite period.

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*. The petitioning entity in *Sonogawa* had been in business for over 11 years. 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.

The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonogawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry or that the beneficiary will be replacing a former employee or an outsourced service. As indicated in the tax returns, the petitioner's profits have widely fluctuated over the years showing the corporation to lack the stability required to pay the beneficiary's during the requisite period. Therefore, the AAO concludes that the petitioner has not demonstrated adequate financial strength through its net current income, net current assets, or any other means to demonstrate its ability to pay the beneficiary the proffered wage beginning on the priority date.

The last issue is whether the petitioner has established that the beneficiary is qualified for the proffered position. 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). The priority date of the petition is May 9, 2002, which is the date the labor certification was accepted for processing by the USDOL. See 8 C.F.R. § 204.5(d).³ The Form I-140 was filed on May 1, 2007.

The job qualifications for the certified position of systems analyst are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

Plan, develop, test and document web technologies and java technologies for technology assisted web sales and B2C solutions. Should have working knowledge of upcoming Microsoft web technologies. Use functional knowledge in Enterprise Resource Planning modules for technical administration. Integrate Enterprise Application for Business Object Repositories.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	X
High school	X
College	X
College Degree Required	Bachelor's
Major Field of Study	Computer Science Or Related

Experience:

Job Offered	2
(or)	
Related Occupation	2

Related Occupation	Senior Engineer
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Block 15:

Other Special Requirements none

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the United States 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.

As set forth above, the proffered position requires 2 years of experience in the job offered or the related occupation of senior engineer and a bachelor's degree in computer science or "related."

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the USDOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The regulation at 8 C.F.R. § 204.5(g)(1) requires:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

See also 8 C.F.R. § 204.5(l)(3)(ii)(A).

To document the beneficiary's experience, the petitioner submitted a Service Certificate dated May 18, 2000, from [REDACTED] Bangalore, India, who states the beneficiary joined the company on October 26, 1998, was designated as a software engineer, and left on March 30, 2000. The petitioner also submits a letter dated December 8, 2000 from [REDACTED] in Bangalore, India, which states it engaged the beneficiary as a consultant from December 15, 2000 until February 2001. Finally, the petitioner submits a letter from [REDACTED] which states that the beneficiary worked as a software architect from February 2001 to January 2005. These experience verification letters do not meet the regulatory requirements because they fail to provide a specific description of the duties performed by the alien or of the training received. Additionally, the letter from [REDACTED] does not provide the title of the writer. Therefore, it cannot be concluded that the beneficiary had at least two years of experience in the job offered on the priority date of May 9, 2002. The appeal is dismissed for this additional reason.

Furthermore, the record indicates that the beneficiary has a foreign equivalent degree to a U.S. bachelor's degree in mechanical engineering. The Form ETA 750, however, requires a bachelor's degree in computer science or "related." The record does not establish that a mechanical engineering degree is related to computer science. The appeal is dismissed for this additional reason.

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

ORDER: The appeal is dismissed.