



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **DEC 08 2012** OFFICE: NEBRASKA 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:  
[Redacted]

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,

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 gas station and service/repair shop. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (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 or that the beneficiary had the required two years of experience in the job offered as of 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 May 7, 2009 denial, the first 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 23, 2001. The proffered wage as stated on the Form ETA 750 is \$22.60 per hour (\$47,008 per year based upon a 40-hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered: manager.

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.<sup>1</sup>

On appeal, counsel submits a brief; an excerpt from *Barron's Dictionary of Accounting Terms* 140 (4<sup>th</sup> ed. 2005); and a letter dated May 8, 2009 from [REDACTED]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation.<sup>2</sup> On the petition, the petitioner claimed to have been established in 1982. However, the petitioner left blank the fields in Part 5 of Form I-140 in which it would identify the current number of employees, its gross annual income and net annual income. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.<sup>3</sup> On the Form ETA 750B, signed by the beneficiary on August 19, 2002, the beneficiary claimed to have worked for the petitioner since April 1997.

On appeal, counsel asserts that the director erred in limiting his evaluation of the petitioner's ability to pay based upon an assessment of its net income, net current assets and wages paid to the beneficiary. Counsel asserts that the director should have considered the petitioner's long-term assets and depreciation. On appeal, counsel also asserts that one of the petitioner's two officers is willing to forgo a portion of his officer compensation to pay the beneficiary.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial

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

<sup>2</sup> According to tax returns provided as evidence, the petitioner was structured as a C Corporation from 2001 through 2004.

<sup>3</sup> From 2001 through 2004, the petitioner's fiscal year was February 1 until January 31. This fiscal year was modified in 2005 to reflect February 1 until December 31. From 2005, the petitioner's fiscal year has been based on a calendar year.

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'l Comm'r 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. In the instant case, the beneficiary claims to have worked for the petitioner since April 1997. The petitioner provided copies of the IRS Forms W-2 which it issued to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2007 and 2008. The beneficiary's IRS Form W-2, Wage and Tax Statements, show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$16,039.00.
- In 2002, the Form W-2 stated compensation of \$16,080.00.
- In 2003, the Form W-2 stated compensation of \$9,760.00.
- In 2004, the Form W-2 stated compensation of \$8,627.00.
- In 2005, the Form W-2 stated compensation of \$15,631.00.
- For 2006, the petitioner provided no regulatory prescribed evidence of wages paid to the beneficiary.
- In 2007, the Form W-2 stated compensation of \$17,045.00.
- In 2008, the Form W-2 stated compensation of \$17,290.00.

Though the petitioner has demonstrated that it paid the beneficiary a portion of the proffered wage in each year from 2001 through 2008, with the exception of 2006, it has never paid the beneficiary the full proffered wage. Therefore, the petitioner must still demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage for 2001, 2002, 2003, 2004, 2005, 2007 and 2008 that difference being \$30,969, \$30,928, \$37,248, \$38,381, \$31,377, \$29,963 and \$29,718 respectively. The petitioner must still demonstrate the ability to pay the full proffered wage for 2006 since it provided no regulatory prescribed evidence of wages paid to the beneficiary for that year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *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 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 director closed on April 3, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for each year from 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$4,004.00.<sup>4</sup>
- In 2002, the Form 1120 stated a net loss of \$14,020.00.
- In 2003, the Form 1120 stated net income of \$8,195.00.
- In 2004, the Form 1120 stated net income of \$9,653.00.
- In 2005, the Form 1120S stated net income<sup>5</sup> of \$2,573.00.
- In 2006, the Form 1120S stated a net loss of \$6,607.00.
- In 2007, the Form 1120S stated net income of \$1,104.00.
- In 2008, the Form 1120S stated net income of \$2,333.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2007 and 2008, the petitioner did not have sufficient net income to pay the difference between wages already paid and the full proffered wage. For 2006, the petitioner did not have sufficient net income to pay the full proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for each year from 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120, Schedule L stated net current liabilities of \$24,853.00.
- In 2002, the Form 1120, Schedule L stated net current liabilities of \$103,360.00.

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<sup>4</sup> From 2001 through 2004, the petitioner was structured as a C Corporation. For a C Corporation, net income is reported on line 28 of the first page of Form 1120.

<sup>5</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 19, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions and other adjustments shown on its Schedule K for 2005, 2006, 2007 and 2008, the petitioner's net income is found on Schedule K of its tax returns for those years.

<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2003, the Form 1120, Schedule L stated net current liabilities of \$81,186.00.
- In 2004, the Form 1120, Schedule L stated net current liabilities of \$77,086.00.
- In 2005, the Form 1120S, Schedule L stated net current liabilities of \$77,322.00.
- In 2006, the Form 1120S, Schedule L stated net current liabilities of \$111,242.00.
- In 2007, the Form 1120S, Schedule L stated net current liabilities of \$127,091.00.
- In 2008, the Form 1120S, Schedule L stated net current liabilities of \$141,906.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2007 and 2008, the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the full proffered wage. For 2006, the petitioner did not have sufficient net current assets to pay 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 the director erred in assessing the petitioner's ability to pay based solely upon an analysis of the petitioner's net income, net current assets and wages already paid to the beneficiary. Counsel asserts that the director should have considered the petitioner's long-term assets.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets because such assets are capable of being converted into cash within the year. The same cannot be said of long-term assets.

On appeal, counsel also asserts that the director should have considered the petitioner's deduction for depreciation as capable of being added back to the petitioner's net income and, thus, available to pay the beneficiary the proffered wage.

With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009), noted:

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<sup>7</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 one of the petitioner’s two officers is willing to forgo a portion of his officer compensation to pay the beneficiary.

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 and on the Form 1120S U.S. Income Tax Return for an S Corporation. 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 operation of the business. The documentation also indicates that [REDACTED] holds 50 percent of the company’s stock and devotes 100 percent of his time to the operation of the business. According to the petitioner’s IRS Form 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay themselves \$59,400 and \$54,738, respectively in 2001; \$56,100 each in 2002; \$57,200 each in 2003; and \$65,721 each in 2004. From 2005 through 2008, the petitioner was structured as an S Corporation and, therefore, specific officer compensation would have been enumerated on Schedule K-1 and Statement 1. The petitioner did not provide such itemization for 2005. However, the total amount paid in officer compensation for that year was \$127,298. In 2006, [REDACTED] elected to pay themselves \$82,129 and \$78,531, respectively. In 2007, [REDACTED] elected to pay themselves \$87,226 and \$88,350 respectively. In 2008, [REDACTED] elected to pay

themselves \$82,976 and \$84,063 respectively. These figures are not, however, supported by W-2 Forms for either officer for any of the years between 2001 and 2008. We note here that the compensation received by the company's two owners during these eight years was not a fixed salary and amounted to between \$112,200 and \$175,576 per 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 gas station and service facility. In the instant case, in response to the director's RFE, the petitioner provided a letter from [REDACTED] in which Mr. [REDACTED] stated that he was willing to forgo an unspecified portion of his officer compensation to go towards paying the beneficiary. In his letter, [REDACTED] confirmed having received \$54,738 in 2001, \$56,100 in 2002, \$57,200 in 2003, \$65,721 in 2004, \$63,649 in 2005, \$80,330 in 2006, \$88,350 in 2007 and \$82,976 in 2008. [REDACTED] figures correspond with those reflected on the petitioner's federal income tax returns for most years, with the exception of the years 2005, 2006 and 2008.

While [REDACTED] expresses his willingness to forgo a portion of his officer compensation, the AAO must consider whether or not he is able to forgo the portion of his compensation which is necessary to pay the beneficiary the difference between the wages already paid and the full proffered wage. In 2001, the difference between the wages already paid and the full proffered wage is \$30,969, a sum which represents 56 percent of the compensation received by [REDACTED] for that year. In 2002, the difference between the wages already paid and the full proffered wage is \$30,928, a sum which represents more than 55 percent of the compensation received by [REDACTED] for that year. In 2003, the difference between wages already paid and the full proffered wage is \$37,248, a sum which represents more than 65 percent of the compensation received by [REDACTED]. In 2004, the difference between wages already paid and the full proffered wage is \$38,381, a sum which represents more than 58 percent of the compensation received by [REDACTED]. In 2005, the difference between wages already paid and the full proffered wage is \$31,377, a sum which represents more than 49 percent of the compensation received by [REDACTED]. For 2006, the petitioner provided no evidence of having paid the beneficiary any wages. Therefore, the petitioner must demonstrate the ability to pay the beneficiary the full proffered wage of \$47,008 for that year, a sum which represents more than 58 percent of the compensation received by [REDACTED]. In

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<sup>8</sup> According to Statement 1 of the petitioner's Form 1120S for 2006, [REDACTED] received \$78,531 in officer compensation. The wages owed to the beneficiary for that year (\$47,008) represent more than 59 percent of the compensation reflected on the tax return.

2007, the difference between wages already paid and the full proffered wage is \$29,963, a sum which represents 34 percent of the compensation received by [REDACTED]. In 2008, the difference between wages already paid and the full proffered wage is \$29,718, a sum which represents 36 percent of the compensation received by [REDACTED].

Therefore, for each year but 2005, 2007 and 2008, the wages still owed to the beneficiary represent a large majority of the officer compensation received by [REDACTED]. For 2005, 2007 and 2008 even though the wages owed to the beneficiary do not represent a majority of the compensation received by [REDACTED] they still represent a significant portion of such compensation, between 35 and 49 percent. According to the Internal Revenue Code, if the officers of a corporation devote 100 percent of their time to the operation of the business, officer compensation is considered wages or a salary.<sup>10</sup> Though [REDACTED] expressed his willingness to forgo a portion of his officer compensation to pay the beneficiary, he has not demonstrated his ability to do so. Such a demonstration would require that [REDACTED] provide evidence such as his own individual federal income tax returns for each year (Form 1040) in addition to an itemized list of his personal, recurring, household expenses. This would be required to demonstrate that [REDACTED] is capable of supporting his own household in addition to forgoing the amount which would still be owed to the beneficiary. The petitioner has provided no such evidence.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the petitioner has two corporate officers. [REDACTED] the other officer has not expressed a willingness to forgo any portion of his officer compensation and the petitioner has provided no evidence demonstrated that he is willing to do so.

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.

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<sup>9</sup> According to Statement 1 of the petitioner's Form 1120S for 2008, [REDACTED] received \$84,063 in officer compensation. That wages owed to the beneficiary for that year would represent more than 35 percent of that sum.

<sup>10</sup> <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Paying-Yourself> (accessed September 19, 2012).

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

In the instant case, the petitioner's gross sales, officer compensation and payroll have all remained relatively consistent. However, for the period from 2001 through 2008, the petitioner has either been unprofitable or only marginally profitable. The petitioner has not demonstrated the number of years it has been doing business. Further, the petitioner has not established the historical growth of its business operation, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is 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.

As set forth in the director's May 7, 2009 denial, the second issue in this case is whether or not the beneficiary possessed the two years of experience in the job offered, which are required to perform the proffered position, as of the priority date of the visa petition.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: Not specified

High School: Not specified

College: None required

College Degree Required: Not Applicable

Major Field of Study: Not Applicable

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a manager with the petitioner, [REDACTED] from June 1999 until the priority date, April 23, 2001. The labor certification also states that the beneficiary worked as a gas attendant with the petitioner from April 1997 until June 1999. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The record contains an experience letter from [REDACTED] letterhead stating that the company employed the beneficiary as a manager since June 1999 and that it employed her as a gas attendant from April 1997 until June 1999.

According to [REDACTED] as a manager, the beneficiary:

...manages our gasoline dispensing station operations, including sale of gasoline, other petroleum products and merchandise. She keeps records of sale transactions. She reconciles cash with gasoline pump meter readings, sales slips and credit card charges. She manages employee's activities and schedule. She manages maintenance of facility.

According to [REDACTED] as a gas attendant, the beneficiary:

...performed various duties including: pumped and dispensed gasoline into customers' vehicles. She also cleaned the station and its premises.

According to Section 13 of Form ETA 750, the duties associated with the proffered position are as follows:

Manage gasoline dispensing station operations, including sale of gasoline, other petroleum products and merchandise. Keep records of transactions. Reconcile cash with gasoline pump meter readings, sales slips and credit card charges. Manage employees' activities and schedule. Manage maintenance of facility.

Therefore, the duties which the beneficiary has been performing since June 1999 are exactly the same duties as those associated with the proffered position as described on Form ETA 750.

With the initial petition submission, as evidence of the beneficiary's qualifications for the proffered position, the petitioner provided the letter referenced above. On February 20, 2009, the director issued an RFE, asking the petitioner to supply additional evidence of the beneficiary's qualifying experience since the experience claimed amounted to less than two years. In his response, counsel for the petitioner provided no new evidence of the beneficiary's qualifying experience but merely referenced the letter provided with the initial petition submission. The director denied the petition, finding that the beneficiary obtained less than two years of qualifying experience with the petitioner prior to the priority date of the instant visa petition.

However, even according to Form ETA 750, the only qualifying experience claimed by the beneficiary is experience which she gained while working for the petitioner in the same position for which she is being petitioned. While even the duration of the claimed experience is not sufficient to satisfy the two year requirement which is stipulated on Form ETA 750, the fact that the claimed

experience was gained with the petitioner alone must be addressed as the director did not do so in his decision.

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.<sup>11</sup>

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)<sup>12</sup> 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,<sup>13</sup> the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require

<sup>11</sup> 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).

<sup>12</sup> 20 C.F.R. § 656.21(b)(5) [2004].

<sup>13</sup> 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, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

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].<sup>14</sup> In its letter of April 4, 2007, the petitioner states that it employed the services of the beneficiary in the position of manager performing those specific duties which it included on Form ETA 750 in Item 13. These duties are enumerated above and those which are attributed to the beneficiary in the letter are identical to those included on Form ETA 750.

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. The petitioner provided no evidence demonstrating that the DOL performed such an analysis. Therefore, the petitioner failed to establish the dissimilarity between the position the beneficiary currently holds 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.

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<sup>14</sup> In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than two years of experience, it is evident that the job duties of the offered position can be performed with less than the two years of experience listed on Form ETA 750. Therefore, two years of experience as a manager cannot be the actual minimum requirement for the offered position of manager.

On appeal, counsel submits a letter purported to be from the beneficiary's previous employer in Mexico. The letter is dated May 8, 2009 and is from [REDACTED]. According to [REDACTED], his company employed the beneficiary as a manager of its general merchandise store from August 1993 until September 1995.

First, the experience purportedly described in this letter 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.

Further, there is no independent, objective evidence such as tax documentation or pay statements which would substantiate the experience claimed in this letter. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Second, there are additional irregularities with the actual letter which cast doubt upon its veracity. For example, the letter is purported to have been written by [REDACTED]. However, the petitioner did not submit a document written in Spanish with an English translation. Rather, the only letter submitted as evidence is written in English with [REDACTED] signature at the bottom and there is no indication, on the letter, that it represents a translation of Spanish language document. Further, the beneficiary's husband's name is [REDACTED]. It would appear that the individual who wrote the letter in support of the beneficiary may be related to the beneficiary through her husband.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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

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<sup>15</sup> The record contains the beneficiary's Application to Register Permanent Residence or Adjust Status, Form I-485. In Part 3, Item B of Form I-485, the beneficiary identified her husband as [REDACTED]. The beneficiary also included her marriage certificate in which her husband is identified as [REDACTED] and his parents are identified as [REDACTED]. USCIS records indicate that [REDACTED], with the date of birth included on the beneficiary's I-485, also uses the last name [REDACTED] and includes the social security number provided by this individual to USCIS. A search of public records, using the social security number for [REDACTED] yields the name of the same individual whose home address matches that of the beneficiary in the instant case.

(b)(6)

**ORDER:** The appeal is dismissed.