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



**U.S. Citizenship
and Immigration
Services**



B6

Date: FEB 28 2012

Office: NEBRASKA SERVICE CENTER

FILE:

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 is a web design and hosting company. It seeks to employ the beneficiary permanently in the United States as a Software Engineer. 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 July 1, 2008 and August 11, 2008 denials, the primary 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 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 as certified by the DOL 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 was accepted on November 7, 2002. The proffered wage as stated on the Form ETA 750 is \$27.40 per hour (\$56,992 per year). The Form ETA 750 states that the position

requires a bachelor's degree, or equivalent, in Computer Science and three years 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

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. The petitioner did not list its gross income or number of workers. According to the tax returns in the record, the petitioner's fiscal year is from November 1 to October 31. On the Form ETA 750B, signed by the beneficiary on October 30, 2002, the beneficiary claimed to have worked for the petitioner from June 2002 through the date that the Form ETA 750 was signed.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

The beneficiary's Forms W-2 for 2002 through 2009 shows compensation received from the petitioner as detailed in the table below.

Year	Beneficiary's actual Compensation	Proffered wage	Wage increase needed to pay the proffered wage
2009	\$47,286.57	\$56,992	\$9,705.43

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

2008	\$46,562.22	\$56,992	\$10,429.78
2007	\$30,500	\$56,992	\$26,492
2006	\$24,600	\$56,992	\$32,392
2005	\$24,500	\$56,992	\$32,492
2004	\$19,100	\$56,992	\$37,892
2003	\$18,000	\$56,992	\$38,992
2002	\$9,000	\$56,992	\$47,992

Here, the petitioner has established that it paid the beneficiary less than the full proffered wage from 2002 through 2009. Therefore, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage from 2002 through 2009.

However, because the petitioner files its taxes on a fiscal year basis (November 1 to October 31), the AAO requested evidence of wages paid to the beneficiary on a quarter-by-quarter basis. Specifically, the AAO requested the petitioner's California Forms DE-6, Quarterly Wage and Withholding Reports, beginning with the fourth quarter of 2002. The petitioner complied with the AAO's evidentiary request and submitted its Forms DE-6 on December 27, 2011. The forms reveal that the beneficiary was paid the following wages:

November 1, 2009 to October 31, 2010	\$47,347.20
November 1, 2008 to October 31, 2009	\$47,347.19
November 1, 2007 to October 31, 2008	\$43,064.80
November 1, 2006 to October 31, 2007	\$26,700
November 1, 2005 to October 31, 2006	\$26,000
November 1, 2004 to October 31, 2005	\$24,100
November 1, 2003 to October 31, 2004	\$19,500
November 1, 2002 to October 31, 2003	\$18,000

This data similarly reveals that the petitioner did not pay the proffered wage to the beneficiary in any fiscal year. However, portraying the wage figures in this format is more useful when considering the petitioner's net income and/or net current assets during the same time periods (November 1 to October 31).

If, as in this case, the petitioner has not established that it paid the beneficiary an amount at least equal to the proffered wage during the required 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 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).

On appeal, counsel argues that depreciation should be added back to the net income for 2005. However, 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 July 28, 2008 with the receipt by the director of the petitioner's motion to reopen/reconsider (MTR). As of that date, the petitioner's fiscal year 2006 federal income tax return (November 1, 2006 to October 31, 2007) was the most recent return available. However, more recent returns have been submitted in response to the AAO's request for evidence, which will be considered below.

The petitioner's tax returns show its net income as detailed in the table below.

Year	Net Income
2009 (November 1, 2009 to October 31, 2010)	\$24,753
2008 (November 1, 2008 to October 31, 2009)	\$23,868
2007 (November 1, 2007 to October 31, 2008)	\$32,838
2006 (November 1, 2006 to October 31, 2007)	\$61,280
2005 (November 1, 2005 to October 31, 2006)	\$25,972
2004 (November 1, 2004 to October 31, 2005)	\$126,248
2003 (November 1, 2003 to October 31, 2004)	\$15,770
2002 (November 1, 2002 to October 31, 2003)	\$2,528

The petitioner has established that it had sufficient net income to pay the difference between the wages paid in each fiscal year and the proffered wage for fiscal years 2004 and 2006 through 2009. The petitioner has not established that it had sufficient net income to pay the difference between the wages paid and the proffered wage for 2002, 2003, and 2005. Therefore, USCIS will review the petitioner's net current assets for those years.

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 end-of-year net current assets as shown in the following table.

Year	Net Current Assets
2005	-\$71,379
2003	\$46,619
2002	\$52,568

The petitioner had sufficient net current assets to pay the difference between the wages paid in each fiscal year and the proffered wage in 2002 and 2003. However, the petitioner's net current assets were insufficient to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2005.

² 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.

On appeal, counsel states that “loans to shareholders,” which appears on line 7 of schedule L of the Form 1120, should be treated as a net current asset. Therefore, counsel states, the petitioner had sufficient net current assets to pay the proffered wage in 2005. Counsel’s reliance on the assets of the shareholders is not persuasive. As noted above, a corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. “Loans to shareholders,” appearing on line 7 of Schedule L, is not included in the calculation of net current assets. There is nothing in the record to indicate that the “loans to shareholders” had a life of one year or less.

Moreover, 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). 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.”

Counsel’s final argument is that the petitioner’s available notes and accounts receivable constitute liquid assets and are evidence of the petitioner’s ability to pay the proffered wage. Counsel’s reliance on these assets (or expense as asset) without taking into consideration the petitioner’s current liabilities, is misplaced. The petitioner’s assets must be balanced by the petitioner’s current liabilities for each tax year.

Since the petitioner has 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, USCIS may consider the overall magnitude of the petitioner’s business activities in its determination of the petitioner’s ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612.

The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere.

As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. USCIS may

consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The AAO recognizes that the petitioner has been in business since 1994. Nevertheless, the evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from the priority date. In addition, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 1994. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. 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.

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. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 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. 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 a bachelor's degree, or foreign educational equivalent, in Computer Science and 3 years of experience in the job offered.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). In response to the AAO's RFE, the petitioner submitted an employment verification letter from the State Personal Status Registration Organization dated December 12, 2011. However, this letter is insufficient to support the claimed work experience because it does not include the translation certification required by 8 C.F.R. § 103.2(b)(3).

The labor certification and regulation cited above requires that an applicant for the proffered position have a bachelor's degree. The designated field of study on the Form ETA 750 is Computer Science. The beneficiary has a bachelor's degree in "mathematics as applied in computer" which is not a degree in computer science. His major field of study was mathematics, and the record is devoid of evidence establishing that his degree in mathematics is equivalent to a U.S. degree in computer science. 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)). Therefore, the beneficiary does not meet the requirements of the labor certification.

The record does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In addition, the evidence submitted does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

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.

ORDER: The appeal is dismissed.