



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **JUN 21 2012**

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by an Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 October 28, 2008 denial, an issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director determined that the petitioner had not provided documentary evidence supporting the experience he claimed on the Form ETA 750. Thus the petitioner did not establish that beneficiary had the minimum qualifications for the position.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on May 1, 2001.

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 On appeal, counsel submits the following: an untranslated letter; a letter from the petitioner stating that the beneficiary had worked as a carpenter with the petitioner from 1995 to 2001; a pay stub for December 1995 issued by the petitioner to the beneficiary; and, a copy of the beneficiary's employment authorization document.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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).

On appeal, counsel does not submit a brief, but asserts on the Form I-290B that:

As a matter of fact, evidence of prior experience had been submitted at the time of the Labor Certification filing (see copy). However, be that as it may, the petitioner filed Form I-140 on 1/22/08 and while it is not required that the Service requests any additional evidence, it should be noted that the Service never made any requests for evidence of prior experience otherwise, the petitioner and the beneficiary would have promptly provided it...

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The crux of counsel's appeal is that during the initial adjudication of the petition, the director should have asked the petitioner to provide evidence already required by regulation. Counsel implies that the director abused his discretion by not requesting additional evidence after determining that all required evidence was not submitted with the initial petition.

We note that the relevant regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, [United States Citizenship and Immigration Service] (USCIS) in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of the beneficiary's qualifications with the petition, and therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility. Utilizing his discretion, he adjudicated the case on the existing record.

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At the outset, DOL's certification of the Form ETA 750 does not supersede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3). Thus all documentation supporting an application must be provided directly to USCIS by the petitioner. As to counsel's assertion that evidence was initially submitted to DOL when it filed the labor certification application, we note that on the Form ETA 750, Part B, Item 14, which was submitted to DOL on May 1, 2001, it was represented that an experience letter and birth certificate were enclosed. However, the record of proceedings does not reflect that those documents were included with the Form I-140 petition.

On appeal, counsel provided an untranslated letter entitled "[REDACTED]" and dated February 17, 2001. Because the petitioner failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).² Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.³

² *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

³ Although the petitioner did not provide a certified translation for the document entitled "[REDACTED]" and dated February 17, 2001, it is noted that the untranslated letter shows a stamp from [REDACTED] located at [REDACTED].

The signatory of the letter refers to a period between 1986 and 1987. On the labor certification, Form ETA 750, Part B, the beneficiary represented that he worked as a carpenter in [REDACTED] Brazil, from "1/86" until "12/87." In addition, on the beneficiary's Form G325A, Biographic Information, signed by the beneficiary on August 26, 1993, the beneficiary indicated that his last address outside the United States for more than one year was [REDACTED] Brazil, from 1964 to February 1988." A Google search on the address above revealed that [REDACTED] Brazil, [REDACTED] is 381 km (236 miles) away from the city of [REDACTED], in the state of [REDACTED]. *See* [REDACTED] (accessed April 17, 2012). The fact that the beneficiary stated that between 1964 and 1988 he lived in [REDACTED] cannot be reconciled with the assertion that his previous employment had been taken place in [REDACTED] 236 miles away from his residence. These discrepancies cast serious doubt on whether the beneficiary ever acquired the experience represented on the labor certification. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). These discrepancies must be addressed with any further

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On January 12, 2012, the AAO issued a Request for Evidence (RFE), requesting the petitioner to submit evidence that the DOL conducted an analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner, and if no such analysis was conducted, evidence to demonstrate the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. The petitioner was also requested to submit evidence of its ability to pay the beneficiary the proffered wage from the moment the priority date was established in 2001 onward.

In response to the AAO's RFE, Counsel submitted the following evidence:

- Copies of the petitioner's 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 federal tax returns (Form 1120S).
- A copy of the petitioner's 2008 New Jersey Corporation Tax Return (Form CBT100S).
- A letter dated January 30, 2012, signed by [REDACTED] the Mayor of [REDACTED] Brazil, attesting to the beneficiary's employment as a carpenter with the city hall of [REDACTED] located at [REDACTED] from 1983 to 1985.
- An affidavit dated February 13, 2012, from Brian Deegan, stating that the beneficiary has worked with the petitioner in similar carpentry duties.

No other evidence was submitted.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of a carpenter. In the instant case, the applicant must have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A, and 8 years of grade school and 4 years of high school. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as a carpenter

filings.

in [REDACTED] Brazil, from "1/86" until "12/87," working forty (40) hours per week. His duties included "construction work; repair roofs; build doors; do carpentry work in all new construction." The photocopy of the Form ETA 750 appears to cut off part of the name of the employer, and the beneficiary did not provide an address for that employer, nor the title of the job. He does not provide any additional information concerning his employment background on that form.

With the appeal, the petitioner submitted a letter dated November 10, 2008, signed by [REDACTED] in the capacity of President of [REDACTED] Mr. [REDACTED] attested to the beneficiary's employment with the petitioner from the "summer of 1995 to December of 2001." Mr. [REDACTED] listed the beneficiary's job duties as follows: "doing carpentry work, setting up equipment for construction sites, preparing wood work at building sites; putting up wooden frames that would be used for certain buildings, constructing the wood frames that would later go up to construction sites, nailing beams and studs, organizing carpentry crew and checking up on supplies." This letter does not state whether the beneficiary was a full-time or part-time employee. As supporting evidence that the petitioner employed the beneficiary, counsel submitted one single pay stub for December 1995.⁴

⁴ Research conducted in all available databases revealed that the Social Security number (SSN) listed on the pay stub for December 1995, as well as on Part 3 of Form I-140, has been used by other individuals.

Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without*

In response to the AAO's RFE, counsel submitted an affidavit dated February 13, 2012, signed by [REDACTED] stating that the beneficiary has worked with the petitioner performing similar carpentry duties to those listed on Form ETA 750. Mr. [REDACTED] states that the beneficiary also gained experience while working for the City Hall of [REDACTED] in the 1980s.

The petitioner also submitted a letter dated January 30, 2012, and signed by [REDACTED], Mayor of [REDACTED]. Mr. [REDACTED] stated that the beneficiary worked as a carpenter at the City Hall of [REDACTED] from 1983 to 1985. This letter does not comply with the requirements of the regulations as it does not state the duties performed by the beneficiary.⁵ Furthermore, as mentioned above, on the Form G-325A signed by the beneficiary on August 26, 1993, the beneficiary indicated his last address outside the United States for more than one year as [REDACTED] from 1964 to February 1988." A Google search of the city of [REDACTED] indicates that this city is located 1551 Km (963 miles) apart from the city of [REDACTED]. See [REDACTED] and [http://\[REDACTED\]](http://[REDACTED]) (accessed April 17, 2012). This inconsistency raises serious questions regarding the beneficiary's representation of his work experience. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). These discrepancies must be addressed with any further filings. Due to the discrepancies mentioned above, the AAO finds that the petitioner has not demonstrated that the beneficiary met the requirements set forth in the labor certification by the priority date.

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

lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

⁵ The beneficiary failed to represent this experience on Form ETA 750, Part B. Without independent and objective evidence of this experience, the AAO will not consider this experience to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. 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.

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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.⁶

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)⁷ 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,⁸ the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require 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

⁶ In a subsequent decision, 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).

⁷ 20 C.F.R. § 656.21(b)(5) [2004].

⁸ 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.

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].⁹ In its letter of November 10, 2008, the petitioner states that it employed the services of the beneficiary for the following duties:

[D]oing carpentry work, setting up equipment for constructions sites, preparing wood work at building sites, putting up wooden frames that would be used for certain buildings, constructing the wood frames that go up on construction sites, nailing beams and studs, organizing carpentry crew and checking up on supplies.

These duties closely match the duties of the offered position of carpenter, as stated by the petitioner in Item 13 of Form ETA 750:

Organize the carpentry crew in the morning for day's work, check supplies needed for the day, set up equipment and supplies at the construction sites, supervise other carpenters, repairs roofs, build doors, install rafters, and construct new roofs.

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. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that it had been employed with the petitioner in any position. Therefore, the DOL was precluded from conducting a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.¹⁰

⁹ 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 carpenter cannot be the actual minimum requirement for the offered position of carpenter.

¹⁰ The fact that the beneficiary's experience with the petitioner was not mentioned on Form ETA 750, Part B also precludes the consideration of this experience to establish that the beneficiary had the qualifications stated on the labor certification application, as certified by the DOL. 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.

Furthermore, on his February 13, 2012 affidavit, Mr. [REDACTED] expressly states that the beneficiary previously worked for the petitioner performing similar carpentry duties as the ones listed on the labor certification. As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

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

There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(D) *Other workers*. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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

Beyond the decision of the director,¹¹ another 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. 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 May 1, 2001. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour (\$41,600 per year, based on a 50-hour work week, as defined on Form ETA 750).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1995 and to currently employ 17 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 3, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application 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

¹¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 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 petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in May 2001 or subsequently.

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). 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 January 22, 2008 with the receipt by the director of the petitioner’s I-140 petition. In response to the AAO’s RFE, counsel submitted copies of the petitioner’s 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 federal tax returns (Form 1120S), and a copy of the petitioner’s 2008 New Jersey Corporation Tax Return (Form CBT100S).¹²

The petitioner’s tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 as shown in the table below.

- In 2001, the Form 1120S stated net income¹³ of \$10,354.

¹² Per the terms of the regulation, evidence of ability to pay shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. The regulation does not allow the petitioner to use state tax returns to establish its ability to pay the proffered wage. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

¹³ 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 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 17, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income,

- In 2002, the Form 1120S stated net income of \$39,551.
- In 2003, the Form 1120S stated net income of \$(18,145).
- In 2004, the Form 1120S stated net income of \$(1,839).
- In 2005, the Form 1120S stated net income of \$56,608.
- In 2006, the Form 1120S stated net income of \$4,425.
- In 2007, the Form 1120S stated net income of \$22,574.
- In 2008, the Form 1120S stated net income of \$22,668.
- In 2009, the Form 1120S stated net income of \$27,707.
- In 2010, the Form 1120S stated net income of \$105,683.

Therefore, for the years 2001, 2002, 2003, 2004, 2006, 2007, 2008, and 2009 the petitioner did not have sufficient net income to pay the proffered wage of \$41,600 per year.

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.¹⁴ 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 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010 as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$(11,142).
- In 2002, the Form 1120S stated net current assets of \$23,446.
- In 2003, the Form 1120S stated net current assets of \$23,000.
- In 2004, the Form 1120S stated net current assets of \$44,915.
- In 2005, the Form 1120S stated net current assets of \$83,901.
- In 2006, the Form 1120S stated net current assets of \$201,166.
- In 2007, the Form 1120S stated net current assets of \$168,748.
- In 2008, the Form 1120S stated net current assets of \$86,650.
- In 2009, the Form 1120S stated net current assets of \$39,878.
- In 2010, the Form 1120S stated net current assets of \$113,182.

deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, and 2010, the petitioner's net income is found on Schedule K of its tax returns.

¹⁴According 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.

Therefore, for the years 2001, 2002, 2003, and 2009, the petitioner did not have sufficient net current assets to pay the proffered wage of \$41,600 per year.

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.

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 figures on the petitioner's 2001, 2002, 2003 and 2009 federal tax returns do not demonstrate the petitioner's ability to pay the proffered wage of \$41,600 per year. No evidence was submitted to establish a basis for expected continued growth. No evidence was provided to demonstrate any temporary or uncharacteristic disruption in the petitioner's business activities during the years that the petitioner has been in business. While the petitioner claimed to be in business since 1995, no evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonogawa*. 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 AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary has the requisite two years of experience from the evidence submitted into this record of proceeding. There is nothing in the record supporting the experience claimed by the beneficiary on the Form ETA 750. Further, the AAO goes beyond the director's

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decision finding that the petitioner has not demonstrated that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.