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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: JUL 31 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 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,

Elizabeth McCormack

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 computer development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a computer 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 April 3, 2008 denial, the 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. On appeal, we have identified an additional issue and find that the petitioner submitted insufficient evidence to establish that the beneficiary had the education and special requirements for the position as specified on the labor certification.

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 March 28, 2005. The proffered wage as stated on the Form ETA 750 is \$78,000 per year. The Form ETA 750 states that the position requires an Associate's degree or its equivalent in Computer Science, CIS, Business, or Engineering and four years of experience as a software engineer or in the related occupation of programmer analyst or other position with similar duties as described in the Form ETA 750.

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 an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ 60 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 15, 2005, the beneficiary claimed to have begun working for the petitioner in May 2004.

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 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 submitted the following Forms W-2:

- The 2005 Form W-2 states that the petitioner paid the beneficiary \$46,000.01.
- The 2006 Form W-2 states that the petitioner paid the beneficiary \$46,000.08.
- The 2007 Form W-2 states that the petitioner paid the beneficiary \$45,733.38.

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).

As none of these amounts exceed the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which was \$32,000 in 2005 and 2006 and \$32,267 in 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross 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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on December 26, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 was the most recent return available before the director. The petitioner submitted its 2007 tax return on appeal and its 2008 tax return in conjunction with a second Form I-140 filed by the petitioner for the beneficiary. The petitioner’s tax returns demonstrate its net income for 2005 through 2008, as shown in the table below.

- In 2005, the Form 1120S stated net income² of \$102,697.³
- In 2006, the Form 1120S stated net income of \$128,753.
- In 2007, the Form 1120S stated net income of \$401,454.
- In 2008, the Form 1120S stated net income of \$292,306.

If the instant petition were the only one filed by the petitioner, the petitioner would have sufficient net current income to pay the beneficiary the difference between the full proffered wage for the wage already paid for 2005 through 2007, and to pay the full proffered wage in 2008. As discussed below, however, the petitioner has filed 101 immigrant visa petitions and must be able to show the ability to pay the wage not only of the current beneficiary but of the other sponsored beneficiaries as well.

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

² 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 (2005) and line 18 (2006-2008) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 29, 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 adjustments shown on its Schedule K for each year, the petitioner’s net income is found on Schedule K of its tax returns.

³ The petitioner submitted an amended tax return for 2005 as submitted to the IRS. The amended tax return is considered here.

petitioner's current assets and current liabilities.⁴ 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 2005 through 2008, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of -\$145,370.
- In 2006, the Form 1120S stated net current assets of -\$291,084.
- In 2007, the Form 1120S stated net current assets of -\$44,577.
- In 2008, the Form 1120S stated net current assets of -\$12,348.

USCIS records indicate that the petitioner has filed 656 immigrant and nonimmigrant visa petitions since the petitioner's establishment in 1999, including 555 Form I-129 applications, and 101 Form I-140 petitions. The petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner is obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The director requested evidence concerning the other workers sponsored by the petitioner in the Request for Evidence. In response, the petitioner submitted a statement that it had 19 currently pending Form I-140 petitions and that it wished to withdraw 8 of those petitions. As noted by the director in his decision, the RFE did not request evidence on the pending petitions, but requested evidence for all Form I-140 petitions filed by the petitioner. The director noted that the petitioner is obligated to establish that it has the ability to pay the proffered wage from the priority date continuing until a beneficiary obtains lawful permanent residence for all beneficiaries. The petitioner submitted no additional evidence concerning the other sponsored workers on appeal. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Counsel asserts on appeal that the amounts paid to subcontractors should be considered in determining its ability to pay the proffered wage since the subcontractors would have been unnecessary if the sponsored workers were available to do the work. The record does not, however, name the subcontractors, specify the amount paid to the subcontractors per position, specify the sponsored workers who would replace the subcontractors, or provide evidence that the petitioner has replaced or will replace them with the current beneficiary and the beneficiaries of the other petitions. In

⁴According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the work done by the subcontractors involves the same duties as those set forth in the labor certifications. Without further evidence concerning the scope of the work assigned to the subcontractor and evidence of a sponsored worker being able to do such work, the wages paid to the subcontractors may not be considered in determining the petitioner's ability to pay the proffered wage to each sponsored worker.

Without evidence of the proffered wage to each sponsored worker and the wages actually paid to those workers, it is unclear whether the petitioner's net income would be sufficient to demonstrate the petitioner's ability to pay the difference between the actual wage paid and the proffered wage to the instant beneficiary.

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 tax returns prepared on an accrual-based accounting system should be considered. The petitioner's tax returns that were submitted to the IRS were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. *See* <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed June 29, 2012). This office would, in the alternative, accept tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.⁵ The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments.

Counsel also argues that the balance in the petitioner's bank accounts should be considered. As stated by the director in his decision, bank statements are not among the three types of evidence,

⁵ Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. *See* <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed June 29, 2012).

enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. In addition, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Lastly, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also asserts that the lines of credit should be considered in determining the petitioner's ability to pay the proffered wage. As stated by the director in his decision, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Despite notification by the director that additional information would be necessary to accept the lines of credit as evidence of the ability to pay the proffered wage, the petitioner submitted no additional evidence as outlined above.

Counsel also states that overseas assets should be considered in determining the petitioner's ability to pay the proffered wage. Specifically, counsel notes that the petitioner has invested in an Indian company [REDACTED]. The petitioner submitted a statement from an accountant verifying its investment as well as evidence of stock ownership in the Indian company and a valuation of the stock ownership. The petitioner also submitted a valuation of [REDACTED] real property assets. First, we note that 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 this case, counsel seems to be arguing not that Qualitree Solutions would provide funding to meet the petitioner's wage obligations, but instead that the amount invested [REDACTED] by the petitioner would be available to meet the wage obligations. No evidence was submitted to demonstrate that the funds invested [REDACTED] somehow reflect additional available funds that were not reflected on the petitioner's tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets. Nor did the petitioner submit evidence that the assets invested in [REDACTED] would be readily available to it to meet its wage obligations. The information submitted regarding [REDACTED] assets demonstrates that it holds certain real property in India, however, those assets are not liquid assets that would be available immediately to remit to the petitioner as real property may not be sold immediately and [REDACTED] presumably needs that property in order to conduct its business activities. As a result, the petitioner submitted insufficient evidence that the money invested in [REDACTED] should be considered separate and apart from the information provided on its tax returns in determining the ability to pay the proffered wage.

Counsel cited three unpublished cases of the AAO in support of the petitioner's claim of the ability to pay the proffered wage. Those cases concerned petitioners which the director found to have not demonstrated the ability to pay the proffered wage but which the AAO found on appeal to have established the ability to pay. While 8 C.F.R. § 103.3(c) provides that precedent decisions of United States Citizenship and Immigration Services (USCIS), formerly the Service or INS, are binding on all USCIS employees in the administration of the Immigration and Nationality Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, the decisions cited by counsel did not involve petitioners who sponsored multiple beneficiaries, but instead petitioners who sponsored the one beneficiary and whose net income and/or net current assets demonstrated the ability to pay the proffered wage to the beneficiary named. The petitioner here has made no such showing.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the 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, although the petitioner's net income exceeds the proffered wage of the instant beneficiary, the petitioner has sponsored 101 immigrant workers for whom it did not submit evidence concerning its ability to pay the proffered wage from each priority date onward despite being specifically requested to do so by the director in the RFE. The petitioner cites a January 11, 2006 letter from [REDACTED] stating that a petitioner's claim that is "probably true" should be accepted as evidence that the petitioner satisfies the burden of proof. In the instant case, the lack of liquefied, available assets as reflected on the petitioner's tax returns does not lead to such a finding. Instead, the petitioner submitted evidence of its bank account balances, line of credit, and overseas investment, which the petitioner did not demonstrate to be additional funds available beyond those assets reflected on the tax returns. The petitioner submitted no evidence regarding its reputation or that it incurred uncharacteristic expenses in any year to liken its situation to the one presented in *Sonegawa*. 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), (2). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires an associate's or equivalent degree in Computer Science, CIS, Business, or Engineering as well as four years of experience in the position offered as a software engineer or in the related field of programmer analyst or other experience including the skills required. The Form ETA 750 states that the position duties are as follows:

Design and implement innovative technology solutions. Responsible for the full product life cycle including software design, system architecture development, code implementation, testing, integration, and documentation of systems operations for various business applications systems in a multi-hardware and multi-software environment using the following advanced and cutting edge technologies: C, C++, VC++, Visual Basic, Oracle, HTML, PL/SQL, WinRunner, LoadRunner. Express complex technical concepts in business terms.

On the labor certification, the beneficiary claims to qualify for the offered position based on a Bachelor's degree in Commerce/Business from New Delhi University, New Delhi, India completed in 1989 and a Diploma in Computer Networking from NIIT, New Delhi, India, completed in 1999. The record contains a copy of the beneficiary's Bachelor of Commerce diploma and statement of marks from University of Delhi, India, issued in 1990.

In support of the beneficiary's credentials, the petitioner submitted a credential evaluation by Pratap Reddy on Ites Inc. letterhead stating that the beneficiary's Bachelor's degree in Commerce is equivalent to an Associate Degree in Business. The evaluation does not examine the courses completed by the beneficiary nor does it state any reasoning behind the conclusion that the beneficiary completed courses expected of a student at a U.S. accredited college or university pursuing a degree in business. As a result, the petitioner has not established that the beneficiary has an Associate's degree in the required field.

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.