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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

DATE: **MAY 29 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Nebraska Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further action consistent with this decision.

The petitioner describes its business as "Import/Export Manufactured Goods." It seeks to employ the beneficiary permanently in the United States as a Systems Analyst. 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 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 June 18, 2008, denial, the issue in this case is whether or not the petitioner has established 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) and (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) and (ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions or 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 December 15, 2003. The proffered wage as stated on the Form ETA 750 is \$55,724 per year. The Form ETA 750 states that the position requires two years

of experience in the offered job and four years of college with a B.S. (or equivalent) in Computer Science or Information Systems, as well as two years of experience as a systems analyst.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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 1980, to have a gross annual income of \$135 million, and to employ 120 workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the Form ETA 750B, signed by the beneficiary on October 31, 2003, the beneficiary claimed to have worked in the offered job for the petitioner since August 2001 and for [redacted] Taiwan, from July 1999 until June 2001.

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 employed the beneficiary, but did not pay the beneficiary the full proffered wage subsequent to the priority date in December 15, 2003. Financial records provided by the petitioner reflect the beneficiary was paid as follows:

2003	\$34,557.91 <sup>2</sup>
2004	\$41,918.14
2005	\$43,215.52
2006	\$46,091.36
2007	\$50,243.78
2008	\$18,346.10 <sup>3</sup>

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

<sup>2</sup> It is noted that the director, in the May 6, 2003, Request For Evidence, incorrectly informed the petitioner that "since the priority date was for the last 15 days of 2003, all the petitioner must show is the ability to pay 1/26<sup>th</sup> of the annual rate of pay, or \$2,143.23." USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage. If the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, then USCIS will prorate the proffered wage. In this case, however, the petitioner has not submitted such evidence.

<sup>3</sup> The most current documentation submitted of the wages paid to the beneficiary in 2008 is a copy of her Earnings Statement issued by the petitioner on May 16, 2008.

Since the proffered wage is \$55,724 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, that is:

2003	\$21,166.09
2004	\$13,805.86
2005	\$12,508.48
2006	\$9,632.64
2007	\$5,480.22
2008	\$37,377.90

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner’s ability to pay the proffered wage. The regulation further provides: “In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.” (Emphasis added.)

The petitioner submitted a letter dated May 30, 2008, from [REDACTED] Ms. [REDACTED] stated that the petitioner “has over 200 employees” and certified that the petitioner “[has] the ability to pay [the beneficiary] the wage listed on the immigrant visa petition from the priority date to present.”

USCIS records indicate that the petitioner has filed nine Form I-140 petitions for other beneficiaries since the priority date. In addition, the petitioner has also filed 25 Form I-129 nonimmigrant petitions since the priority date. Consequently, USCIS must also take into account the petitioner’s ability to pay the beneficiary’s wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Given the record as a whole and the petitioner’s history of filing petitions, we find that USCIS need not exercise its discretion to accept the treasurer’s letter, alone, as evidence of the petitioner’s ability to pay the proffered wage.

The petitioner submitted its tax returns for 2003 to 2010, and also audited financial statements for 2004, 2005, and 2006. The financial information on the tax returns and the financial statements is inconsistent, and the petitioner has not attempted to explain this inconsistency. 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

As we decline to rely solely on the treasurer’s letter, we will examine the petitioner’s federal income tax returns. The submitted tax returns reflect the following net income:

2003	\$-8,013,696
2004	\$-3,700,950
2005	\$-3,735,244
2006	\$-2,978,880

2007	-\$3,670,370
2008	-\$22,095,328
2009	\$1,265,667
2010	\$1,511,462

Therefore, the petitioner established the ability to pay the proffered wage in 2009 and 2010. However, the petitioner did not establish sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage for 2003 to 2008.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of its corporate tax return. 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. Financial documents submitted by the petitioner demonstrate the following end-of-year net current assets:

2003	\$-7,292,331
2004	\$-11,157,359
2005	\$-18,382,994
2006	\$-22,819,423
2007	-\$31,811,539
2008	-\$39,332,416
2009	-\$38,070,282
2010	-\$34,034,795

Therefore, for the years 2003 to 2010, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL through 2008, 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, its net income or its net current assets.

The petitioner submitted W-3 Forms for 2004 through 2007. Counsel's reliance on the W-3 forms is misplaced, as no evidence was submitted to demonstrate that the funds reported on the petitioner's W-3 Forms somehow reflect additional available funds that were not reflected on its tax returns.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

The petitioner's size, longevity, and number of employees, however, cannot be overlooked. Although United States Citizenship and Immigration Services (USCIS) will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the present case, the petitioner is a business that had been in business for 23 years at the time the ETA 750 was filed. The petitioner had \$103,251,271 in gross receipts and paid out \$8,534,024 in wages and salaries during the year in which the priority date was established. For each subsequent year, with the exception of 2008, the petitioner's gross receipts exceeded \$100 million, and its payroll ranged from \$6,721,337 (2010) to \$10,904,378 (2006) during the relevant years. The petitioner also submitted records which showed that it employed a total of 243 employees in 2008, 162 employees in 2009, and 138 employees in 2010.

Finally, the Form I-140, Immigrant Petition for Alien Worker, indicates that the proffered position is not a new position, thereby implying that the beneficiary will be replacing a previously hired employee. The validity of a job offer is further strengthened if the beneficiary is replacing and assuming the salary of an employee who has left the petitioner's organization. A review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

For these reasons, we reverse the director's denial on these grounds with respect to whether the petitioner had the ability to pay the proffered wage from the priority date. However, other issues must be addressed and therefore, the AAO will remand for the director to consider the following issues.

Beyond the decision of the director, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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 (9<sup>th</sup> 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).

In the instant case, the labor certification requires a Bachelor of Science or equivalent in computer science or information systems. The labor certification states that the beneficiary possesses a Bachelor of Science degree from the [REDACTED] Taiwan, completed in 1999.

The record contains a copy of the beneficiary's Bachelor of Business Administration diploma and transcripts from the [REDACTED] Taiwan, issued in 1999.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for [REDACTED] on May 29, 2003. The evaluation states that the beneficiary's education in Taiwan "is equivalent to the U.S. degree of Bachelor of Business Administration in Management Information Systems awarded by a regionally accredited university in the United States." The record contains a second evaluation from [REDACTED] which states that the beneficiary's education in Taiwan is equivalent to a Bachelor of Science in Management Information Systems.

These evaluations are each based on the same academic credentials for the beneficiary, but yet have different outcomes as to the beneficiary's field of study. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. See *id.* USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000

higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.” See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* EDGE is “a web-based resource for the evaluation of foreign educational credentials.” See <http://edge.aacrao.org/info.php>. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials.<sup>5</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>6</sup>

According to EDGE, a Bachelor’s degree from Taiwan is comparable to “a bachelor’s degree in the United States.” However, the beneficiary’s field of study was in business administration, not computer science or information systems as required by the labor certification. Therefore, the petitioner has not demonstrated that the beneficiary is qualified for the proffered position. For this reason, the petition is being remanded to the director for consideration.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director’s decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

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<sup>5</sup> See *An Author’s Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>6</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.