(b)(6)

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: OCT 0 1 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,

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 an advanced computer consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer 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).[1] 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 and 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, 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 5, 2009 denial, the issues in this case are 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 and whether or not the beneficiary is qualified to perform the duties of the proffered 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 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.

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[1] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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 10, 2004. The proffered wage as stated on the Form ETA 750 is $66,500 per year. The Form ETA 750 states that the position requires eight years of grade school, four years of high school, four years of college culminating in a bachelor's degree in computer science or related field, and two years of experience in the job offered as a programmer analyst or two years of experience in a related occupation (software programmer, computer consultant, 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.[2]

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 2002, to have a gross annual income of $13.9 million, and to currently employ 240 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 February 17, 2009, the beneficiary claimed to have worked for the petitioner beginning in August 2007 and continuing at least until the date the form was signed, on February 17, 2009.

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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[2] 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).

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 beneficiary's Forms W-2 for 2007, 2008, and 2009.[3] The beneficiary's Forms W-2 demonstrate that the beneficiary was compensated by the petitioner as shown in the table below.

- In 2007, the Form W-2 stated wages of $19,325.
- In 2008, the Form W-2 stated wages of $58,619.94.
- In 2009, the Form W-2 stated wages of $64,059.92.

The petitioner also submitted the beneficiary's pay stubs from September 17, 2007 through February 13, 2009. The pay stub dated February 13, 2009 indicates that the beneficiary was compensated $5,416.66 for the period beginning January 1, 2009 and ending January 31, 2009.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage as of the priority date. The petitioner must demonstrate its ability to pay the full proffered wage from 2004 through 2006, and the difference between the proffered wage and wages already paid to the beneficiary in 2007, 2008 and 2009.

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 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

[3] The petitioner submitted two Forms W-2 for 2007 and 2008. The wages listed represent the total of both Forms W-2.

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 16, 2009 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 2008 federal income tax return was not yet due.[4] The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120 stated net income of $206,225.
- In 2005, the Form 1120 stated net income of $407,759.
- In 2006, the Form 1120 stated net income of $628,675.
- In 2007, the Form 1120 stated net income of $687,882.
- In 2008, the Form 1120 stated net income of $632,564.

[4] The petitioner's 2008 tax returns were submitted with a subsequent immigrant petition submitted by the petitioner on behalf of the instant beneficiary and will be considered as part of the record of the instant petition.

Although the petitioner's net income from 2004 through 2007 was higher than the proffered wage, USCIS records show that the petitioner has filed over 1,600 petitions. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

On February 2, 2009, the director issued a Request For Evidence (RFE) notifying the petitioner that USCIS records indicated that the petitioner had filed multiple I-140 petitions. The director requested evidence relating to the petitioner's ability to pay all beneficiaries from January 1, 2004. The petitioner's response, received March 16, 2009, did not include the information requested by the director. The director denied the petition on June 5, 2009. In the decision, the director noted that the petitioner failed to provide the requested evidence regarding the multiple petitions and stated that the petitioner had filed 121 I-140 petitions since May 1, 2007.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the Form 1120 stated net current assets of $214,851.
- In 2005, the Form 1120 stated net current assets of $280,094.
- In 2006, the Form 1120 stated net current assets of $462,534.
- In 2007, the Form 1120 stated net current assets of $530,813.
- In 2008, the Form 1120 stated net current assets of $744,280.

As mentioned above, the petitioner has filed multiple petitions and must establish that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful

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

permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner submitted a letter dated March 13, 2009 from President and CEO, stating that the petitioner's tax return for 2008 was not yet available. The letter also stated that the estimated net profit was $695,000 for the company's U.S. operations on an accrual basis. 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 AAO notes that the letter was not written by a financial officer. Further, 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 letter from As we decline to rely on letter, we will examine the other financial documentation submitted.

Counsel also states that the beneficiary's ability to generate income should be considered in determining the petitioner's ability to pay. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel also asserts that the petitioner paid substantial wages to subcontractors for positions "...similar to the proffered job in programming and software engineering services." Further, counsel states, "... the company paid for programmer analyst and software engineer employees who are no more working with a company a grand total of $2,804,325.56 in 2004, $2,767,217,27 in 2005, and $1,067,001 2006... The ex-employees are no more employed by the company and the capacity that was used to pay their salary would have been used to pay this beneficiary." In addition, the petitioner submitted the original beneficiary's Form W-2 from 2005, indicating that the wages should be applied to the instant beneficiary. The 2005 Form W-2 indicated a wage of $35,849.97. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In 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 position of the original beneficiary, subcontractors, or ex-employees involves the same duties as those set forth in the ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the

proffered position. If the employees performed other kinds of work, then the beneficiary could not have replaced them.[6]

Counsel also states that the company has a line of credit with In calculating the ability to pay the proffered salary, 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).

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 checked box "C" indicating that "No supplemental brief and/or additional evidence will be submitted." On Page 2, Part 3 of Form I-290B, Notice of Appeal or Motion, counsel states, "We are filing an appeal on the denial decision of our petition." No further

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[6] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

explanation or evidence was provided regarding the petitioner's ability to pay the instant beneficiary and the beneficiaries of the other petitions.

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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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, the petitioner has been in business since 2002 and employs 240 workers.[7] Although the petitioner's net income and net current assets are higher than the proffered wage, the petitioner has filed multiple petitions. The petitioner submitted no evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. The petitioner submitted a letter dated August 2008 from the Editor in Chief of Inc. 5000, which states that Inc. 5000 celebrates the fastest growing private companies in America. The letter

[7] The AAO notes that there are inconsistencies in the record. The petition indicates that the petitioner employs 240 workers. The letter from counsel dated March 12, 2009 states, "It has more than 800 employees and consultants working throughout the world." Further, the Quarterly Wage Reports submitted by the petitioner lists 538 employees. It is incumbent on 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 (BIA 1988).

states that the petitioner earned the rank of in 2008. The letter does not provide a review of the petitioner or discuss its reputation. No explanation or evidence was provided regarding Inc. 5000's significance in the petitioner's industry. No other evidence of the historical growth of the petitioner's business or of the petitioner's reputation within its industry was submitted. 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.

In addition, 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 March 10, 2004.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (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).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as a programmer analyst or two years of experience in a related occupation (software programmer, computer consultant, analyst). On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience:

- As a Programmer Analyst with in Clearwater, Florida from November 2006 to June 2007.
- As a Programmer Analyst with in Teaneck, New Jersey from March 2006 to November 2006.
- As a Programmer Analyst with in Frisco, Texas from October 2004 to January 2006.
- As a Programmer Analyst with in Bangalore, India from June 1999 to September 2001.

The beneficiary also listed experience as a Programmer Analyst with the petitioner, in Arlington Heights, Illinois beginning in August 2007 and continuing at least until the date the form was signed, on February 17, 2009. No other experience is listed.

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.
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> (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 record contains an experience letter dated November 3, 2000 from Manager, on letterhead, stating that the beneficiary began employment in June 1999 and served "…at various positions. Currently he is working as a Software Engineer." The letter does not include the company's address, does not include the beneficiary's specific dates of employment, does not include the beneficiary's job duties, and does not indicate whether the beneficiary was employed full- or part-time. The record also contains an additional letter from dated September 10, 2001 indicating that the beneficiary was employed from June 6, 1999 to September 5, 2001 on a full-time basis as a Software Programmer Analyst. The letter does not list the company's address.

The record includes an acknowledgement of resignation letter dated December 20, 2006 from Talent Manager, on letterhead, stating that the beneficiary was employed with the company from March 20, 2006 to November 2, 2006. The letter states, "… at the time of resignation, your title/designation was Senior Associate." The letter does not include the beneficiary's job duties, does not indicate when the beneficiary became a Senior Associate or what other positions he may have occupied, and does not indicate whether the beneficiary was employed full- or part-time. The record includes an additional letter from dated February 20, 2009 certifying that the beneficiary was employed from March 20, 2006 to November 2, 2006 on a full-time basis. The letter states that, at the time of resignation, the beneficiary was a Senior Associate. The letter lists the beneficiary's job duties as a Senior Associate, but does not indicate when the beneficiary became a Senior Associate or what other positions he may have occupied. The AAO also notes that the experience was accrued in 2006, which is after the March 10, 2004 priority date.[8] Therefore, the experience from

[8] 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).

cannot be used to establish that the beneficiary met the minimum experience requirements listed on the labor certification.

The AAO notes there are inconsistencies in the record. The Form ETA 750 and the letter dated September 10, 2001 from indicate that the beneficiary was employed with from June 1999 to September 2001. A review of the record shows that the petitioner filed a subsequent ETA Form 9089 on behalf of the beneficiary on October 12, 2009. The beneficiary signed the labor certification on September 22, 2010, indicating that he worked at from June 6, 1999 to May 9, 2001. The dates of employment listed on the ETA Form 9089 cannot be reconciled with the information the beneficiary listed on the Form ETA 750B. Further, the record shows that the petitioner submitted a letter dated September 17, 2009 from President, on letterhead in conjunction with a subsequent Form I-140 filed on behalf of the beneficiary. The letter indicates that the beneficiary was employed with the company from March 2005 to January 2006. The dates of employment listed in the letter cannot be reconciled with the information the beneficiary listed on the Form ETA 750B. It is incumbent on 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 (BIA 1988).

The petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date.

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

ORDER: The appeal is dismissed.