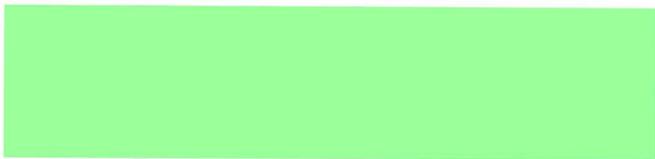


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



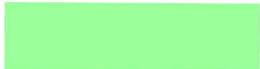
U.S. Citizenship  
and Immigration  
Services



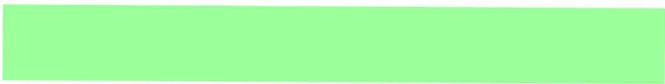
DATE: OFFICE: NEBRASKA SERVICE CENTER

APR 16 2013

FILE:

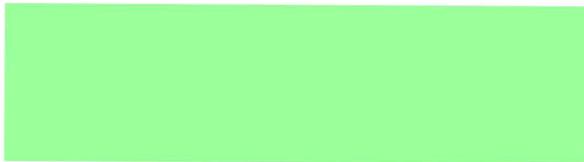


IN RE: Petitioner:  
Beneficiary:



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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center (the director). In connection with the beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner is an IT consulting services business. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary and other beneficiaries for whom it had filed preference visa petitions the respective proffered wages beginning on the priority date of the visa petition. The director revoked the approval of 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 14, 2010 NOR, the issue in this case is whether or not the petitioner has the ability to pay the proffered wages of all beneficiaries for whom it had filed preference visa petitions as of the priority date and continuing until the beneficiaries obtain lawful permanent residence or the petitions were withdrawn or revoked.

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.

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<sup>1</sup> 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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on September 18, 2006. The proffered wage as stated on the ETA Form 9089 is \$75,000.00 per year. The ETA Form 9089 states that the position requires a bachelor's degree in computer science, math, engineering or a related field plus 60 months of experience in the proffered position or 60 months in a relevant IT position.

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>2</sup> On appeal, former counsel<sup>3</sup> submits a brief; copies of 2009 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for employees of the petitioner for whom there is a pending preference visa petition or pending application for adjustment of status based on a preference visa petition; an affidavit from the petitioner; a list of employees on whose behalf the petitioner had filed preference visa petitions; and copies of documentation previously provided.

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 1996 and to currently employ 45 workers. On the ETA Form 9089, signed by the beneficiary on June 25, 2008, the beneficiary did not claim to have worked for the petitioner.

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<sup>2</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>3</sup> [REDACTED] Esq., referred to herein as former counsel, filed the appeal. In response to a request for evidence (RFE) the petitioner substituted [REDACTED] as counsel, herein referred to as counsel.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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).

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, USCIS electronic records show that the petitioner filed several other I-140 petitions which have been pending or approved during the time period relevant to the instant petition. Where, as here, a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, 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 or approved 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. at 144-145 (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 Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

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 beneficiary's Forms W-2, Wage and Tax Statement, stated compensation of \$7,726.53 in 2006; \$61,675.56 in 2007; \$91,977.72 in 2008; and \$87,435.30 in 2009. Therefore, for the years 2008 and 2009, the petitioner established that it paid the beneficiary the full proffered wage; however, for the years 2006 and 2007, the petitioner has not established that it employed and paid the beneficiary the full proffered wage. The AAO withdraws the director's decision to the contrary. As the proffered wage is \$75,000.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2006 and 2007, which is \$67,273.47 and \$13,324.44, respectively.

On appeal, former counsel contends that the director failed to estimate the total proffered wage amount for all petitions filed on behalf of other beneficiaries by the petitioner; however, as discussed below, the petitioner failed to provide the director with the required information to enable such an analysis. In response to the RFE issued by the director, the petitioner submitted a list of individuals

with approved or pending Form I-140 petitions. The petitioner listed most of the dates on which the petitions were filed, as well as the respective receipt numbers; however, the petitioner failed to provide the proffered wage for each individual, as well as copies of the Forms W-2 issued to each individual for all relevant years.<sup>4</sup> The petitioner failed to provide dates and evidence to establish that all those petitions it claimed were withdrawn due to a beneficiary's termination of employment with the petitioner were withdrawn or revoked. The petitioner failed to provide dates and evidence to establish that all those beneficiaries it claims adjusted status, became lawful permanent residents. The petitioner, therefore, prevented the director from determining the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 or ETA 9089 labor certifications.

On January 31, 2013, the AAO issued an RFE requesting that the petitioner provide, *inter alia*, the required information for all the beneficiaries for whom the petitioner filed I-140 petitions. In response to the RFE issued by this office, the petitioner submitted a new and expanded list of individuals with approved or pending Form I-140 petitions. As requested, the petitioner listed the priority date and proffered wage for each individual, and provided copies of the Forms W-2 issued to each individual in 2006 and 2007; however, the petitioner did not provide the required information for **all** the approved or pending I-140 petitions. USCIS records reflect that the petitioner had approved or pending I-140 petitions on behalf of at least six (6) other beneficiaries not listed by the petitioner. The AAO, however, will accept the list provided by the petitioner as the only other beneficiaries for whom the petitioner filed I-140 petitions for purposes of the instant adjudication only. In any future filings, if the petitioner wishes to establish its ability to pay it must also submit the required information for the additional beneficiaries.

For both 2006 and 2007, the total proffered wages equaled \$1,626,969.60.<sup>5</sup> According to the Forms W-2 for 2006, the total wages paid to beneficiaries in 2006 by the petitioner was \$999,853.45.<sup>6</sup> The

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<sup>4</sup> On appeal, the petitioner only submitted 2009 Forms W-2 for beneficiaries whose petitions were still pending and are currently employed by the petitioner. The petitioner failed to provide all Forms W-2 for all beneficiaries of pending and/or approved petitions who had not become lawful residents or had their petition withdrawn or revoked during 2006 through 2009.

<sup>5</sup> This figure is the sum of the proffered wages listed by the petitioner for beneficiaries whose petitions it claimed were approved or pending in 2006 and 2007. It is noted that the petitioner seeks to prorate the proffered wage for the portion of the year that occurred after the priority date. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate 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, the petitioner has not submitted such evidence.

<sup>6</sup> This figure is the sum of wages listed on the 2006 Forms W-2 for the listed beneficiaries, including the beneficiary in the instant case.

difference between the proffered wages and wages actually paid for 2006 is \$596,099.63.<sup>7</sup> According to the Forms W-2 for 2007, the total wages paid to the beneficiaries in 2007 by the petitioner was \$1,171,717.60.<sup>8</sup> The difference between the proffered wages and wages actually paid is \$459,588.61.<sup>9</sup> The petitioner must establish its ability to pay the difference between the proffered wages and wages actually paid in 2006 and 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 (1<sup>st</sup> 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

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<sup>7</sup> For purposes of this calculation, where the wages actually paid to a beneficiary exceeded the proffered wage, the difference between the proffered wage and the wages actually paid to the beneficiary were considered to be zero. That is, the excess of the wages actually paid over the proffered wage was not considered in the final calculation. This is because wages already paid to others are not considered to be available to prove the ability to pay the wage proffered to other beneficiaries. These calculations include any deficit for the instant beneficiary.

<sup>8</sup> This figure is the sum of wages listed on the 2007 Forms W-2 for the listed beneficiaries, including the instant beneficiary.

<sup>9</sup> See footnote 6, *supra*.

years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

The record before the director closed on April 8, 2010 with the receipt by the director of the petitioner's submissions in response to the director's NOIR. As of that date, the petitioner's 2010 federal income tax return was not yet due.<sup>10</sup> Therefore, the petitioner's income tax return for 2009 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2006 and 2007, as:

- In 2006, the Form 1120S stated net income<sup>11</sup> of \$102,251.00.
- In 2007, the Form 1120S stated net income of \$107,068.00

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiaries and the proffered wages. Additionally, as discussed above the petitioner failed to provide all of the relevant documentation

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<sup>10</sup> The petitioner submitted tax returns for its business for 2008 through 2009; however, further analysis of these tax returns is not required since the petitioner has already established a *prima facie* ability to pay the proffered wage in these years.

<sup>11</sup> 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 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 12, 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 income deductions and other adjustments shown on its Schedule K for 2006 through 2009, the petitioner's net income is found on Schedule K of its tax return and tax return transcripts.

which would enable the AAO to determine the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner.

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>12</sup> 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 2006 as \$327,057.00 and \$429,149.00 in 2007. For the years 2006 and 2007, the petitioner did not have sufficient net current assets to pay the difference between the wages paid and the proffered wages.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has failed to establish that it had the continuing ability to pay the beneficiaries the difference between the wages paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, its net income or net current assets.

Former counsel asserts on appeal that the petitioner has demonstrated *prima facie* evidence of its ability to pay the proffered wage through paying the beneficiary wages in excess of the proffered wage; however, as discussed above, the petitioner has failed to provide sufficient evidence to establish that it has the ability to pay all of the proffered wages to the beneficiaries of the other petitions filed by the petitioner as of the priority date. Former counsel contends that only ten of the petitions filed by the petitioner over the last twelve years are relevant because these are the only petitions for beneficiaries who remain employed by the petitioner and have not yet adjusted status and that payment of those wages has been established through submission of quarterly wage statements; however, as discussed above, the petitioner must establish the ability to pay *all* of the proffered wages to the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence or the petition was withdrawn or revoked.

In response to the AAO's RFE, counsel contends that the use of the petitioner's ability to pay the wages to all beneficiaries of I-140 petitions approved or pending during the period in question is arbitrary and capricious and does not reflect that the petitioner ultimately did not pursue some of those petitions. However, as discussed above, the calculation of the deficit in proffered wages is the same standards set forth for calculating the payment of the proffered wage for the instant beneficiary and have only been applied during years in which the petitioner has failed to establish that it actually

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<sup>12</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.

paid the proffered wage to the instant beneficiary. Moreover, whether these petitions were ultimately pursued is irrelevant, as the petitioner must establish the ability to pay the proffered wages for all beneficiaries for whom it had approved or pending I-140 petitions until such time that the beneficiary becomes a lawful permanent resident or the I-140 petition is revoked or withdrawn. The petitioner failed to establish that any of the relevant I-140 petitions were revoked or withdrawn prior to the years in question or that said beneficiaries had become lawful permanent residents during 2006 or 2007.

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 ETA Form 9089 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 *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.

On appeal, former counsel contends that the petitioner has met its ability to pay due to gross revenues greater than \$4 million, annual salaries paid over \$2 million and current net assets greater than \$400,000.00. However, in the instant case, the petitioner failed to submit required evidence pertaining to other petitions, precluding the AAO from making a full determination as to whether it has the ability to pay all of the proffered wages since the priority date. The documentation submitted by the petitioner reflects that the petitioner consistently underpays the proffered wage or prevailing wage to its workers. The record contains copies of various agreements between the petitioner and its customers; however, the contracts provide no information concerning the monetary value of the contracts and all of the contracts appear to be temporary and at-will. In addition, the gross receipts of the business reflect a recent downward trend despite stable salary payments and there is no evidence

in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the proprietor's reputation within its industry. 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 not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires 60 months of experience in the proffered position or 60 months of experience in a relevant IT position. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a senior consultant with [REDACTED] in Dubai, United Arab Emirates, from August 21, 2002 until November 9, 2006; and as an assistant manager with [REDACTED] in Mumbai, India, from March 1, 2001 until August 20, 2002.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains an experience letter, dated January 11, 2007, from [REDACTED], Director-People Services on [REDACTED] letterhead which states that the company employed the beneficiary from March 1, 2001 until August 20, 2002, and was designated as an assistant manager at the time of departure. The record also contains an experience letter, dated May 23, 2008, from [REDACTED], Senior Director-Human Resource on [REDACTED] letterhead stating that the company employed the beneficiary as an assistant manager from March 1, 2001 until August 20, 2002, and was designated as an assistant manager at the time of departure. The petitioner also submitted an experience letter, dated June 23, 2008, from [REDACTED], General Manager-Human Resources on [REDACTED] letterhead indicating that the company employed the beneficiary as an assistant manager from March 1, 2001 until August 20, 2002. While not all of the experience letters submitted provide sufficient details in regard to the beneficiary's job duties, the June 23, 2008 letter, does provide sufficient detail and meets the other requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A); however, this

experience letter only accounts for 17 months of relevant experience.

The record also contains an experience letter, dated March 7, 2007, from [REDACTED], HR Manager on [REDACTED] letterhead stating that the beneficiary worked with [REDACTED] from August 21, 2002, until November 9, 2006, and was employed as a senior consultant at the time of departure.<sup>13</sup> However, the letter does not state if the job was full-time and does not provide a detailed description of the beneficiary's job duties, instead only providing a list of the beneficiary's skill sets. *Id.*

The record contains an experience letter, dated February 20, 2001, from an unknown signatory, Senior Manager, on [REDACTED] letterhead stating that the company employed the beneficiary from May 1, 1998 until February 20, 2001, as an executive. However, the letter does not state if the job was full-time, provide the name of the signatory or provide a detailed description of the beneficiary's job duties. Additionally, this experience is not listed on the ETA 9089. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

In its January 31, 2013 RFE, the AAO requested that the petitioner provide, *inter alia*, evidence that the beneficiary is qualified for the offered position. In response to the RFE, counsel submits a new experience letter, dated March 6, 2013, from [REDACTED] Finance Director, on [REDACTED] letterhead stating that the beneficiary worked with [REDACTED] from August 21, 2002, until November 9, 2006, and was employed as a senior consultant at the time of his resignation. The letter provides detailed job duties for the beneficiary in the role of senior consultant that meets the qualifying experience requirements. However, the letter does not indicate the specific length of time the beneficiary was employed as a senior consultant and performed the described job duties for that position or list the other positions in which the beneficiary was employed and the corresponding job duties for those positions.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.

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<sup>13</sup> The AAO acknowledges that [REDACTED] merged with [REDACTED] in 2003 and that [REDACTED] acquired [REDACTED] in 2004.