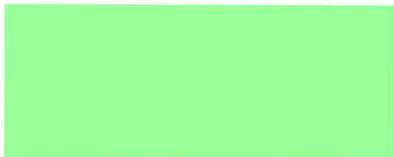


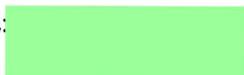
(b)(6)

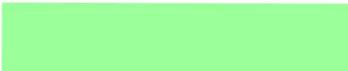
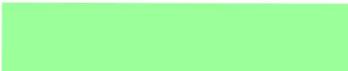
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



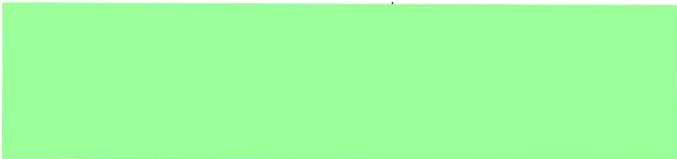
U.S. Citizenship
and Immigration
Services



DATE: **FEB 28 2013** 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,

Rachel Piromo
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a plumbing business. It seeks to employ the beneficiary permanently in the United States as a septic supervisor. 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 or that the beneficiary had the experience required to perform the proffered position as of the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 29, 2009 denial, the first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23.50 per hour (\$48,880.00 per year based on 40 hours per week).¹ The Form ETA 750 states that the position requires between one and two years of training in septic systems in addition to six years of experience in the job offered of septic supervisor.

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

On appeal, counsel submits a brief; a letter dated June 24, 2009 from [REDACTED] president of [REDACTED] copies of the petitioner's U.S. Corporation Income Tax Returns (Forms 1120) for 2001, 2005, 2006, and 2007; copies of pay statements issued to the beneficiary in 2000 and 2001 by [REDACTED] copies of pay statements issued to the beneficiary in 2002 by [REDACTED]; a copy of the U.S. Individual Income Tax Return (Form 1040A) for the beneficiary and his wife for 2001 and 2002; a copy of Internal Revenue Service (IRS) Form W-2 issued to the beneficiary in 2001 by [REDACTED] a copy of IRS Form W-2 issued to the beneficiary in 2002 by [REDACTED] a copy of IRS Form W-2 issued to the beneficiary in 2002 by [REDACTED]; and copies of the supporting documents which were submitted in response to the director's request for evidence (RFE): a copy of Form ETA 750, a letter dated March 19, 2009 from [REDACTED] President of [REDACTED] a second letter dated March 19, 2009 from [REDACTED] copies of pay statements issued to the beneficiary in 2009 from the petitioner, a copy of a newspaper advertisement, a copy of the beneficiary's driver's license, and a copy of the notice, which was posted in support of the labor certification.

¹ Section 12 of Form ETA 750 states that the proffered wage is \$23.00 – \$24.00 per hour. The AAO will use the mid-range of the two figures or \$23.50 per hour.

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). However, in the instant case, as will be explained below, there are reasons to preclude consideration of many of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ The pay statements issued by [REDACTED] identify the client as [REDACTED]. According to its website, [REDACTED] handles human resources functions for construction businesses.

⁴ The AAO could not locate a website for this company. However, according to information gathered from the Internet [REDACTED] appears to be an employee leasing business. The pay statements issued by [REDACTED] identify the client name [REDACTED] which is the petitioner's corporate name.

⁵ According to its website, [REDACTED] is a staffing service. The IRS Form W-2 issued by [REDACTED] does not identify a client name, and the petitioner provided no other evidence showing a relationship between its company and [REDACTED].

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 1997, to have a gross annual income of approximately \$6 million, and currently to employ 45 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 April 26, 2001, the beneficiary claimed to have worked for the petitioner since 1993.

On appeal, the petitioner asserts that it has net current assets, which are equal to or greater than the proffered wage and that it has already been remunerating the beneficiary at a rate equal to or greater than the proffered wage. On appeal, counsel asserts that the director erred in finding the beneficiary unqualified for the proffered position. Counsel asserts that the director erred in claiming that Form ETA 750 required six years of experience in a supervisory capacity.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

With its initial petition submission, the petitioner provided no evidence in support of its ability to pay the beneficiary the proffered wage. On March 4, 2009, the director issued an RFE, asking the petitioner to submit annual reports, U.S. federal income tax returns, or audited financial statements for each year from 2001 through 2007, in addition to 2008, if it was available. In addition, the director requested that the petitioner supply evidence of any compensation paid to the beneficiary, in the form of either IRS Forms W-2 or 1099, for each applicable year from 2001 through 2008, in addition to the three most recent pay statements issued to the beneficiary.

The Nebraska Service Center received the petitioner's response on April 13, 2009. In response, the petitioner supplied its U.S. Corporation Income Tax Returns (Forms 1120) for 2001, 2005, and 2006 only. In its response, the petitioner stated that its 2007 and 2008 returns had not yet been prepared, but provided no explanation regarding the reason for the delay in filing either return. Further, the petitioner provided no documentary evidence demonstrating that the petitioner had filed a request for an extension to file either its 2007 or 2008 income tax return. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner provided none of the IRS Forms W-2 or 1099 requested by the director. Rather, the petitioner provided copies of five pay statements, which it issued to the beneficiary in 2009.

Now, on appeal, only two months after responding to the director's RFE, the petitioner submits a copy of its U.S. Corporation Income Tax Return (Form 1120) for 2007 in addition to pay statements issued to the beneficiary in 2000 and 2001 and copies of IRS Forms W-2, which were issued to the beneficiary in 2001 and 2002. The 2007 income tax return does not appear to have been filed, and the copy provided on appeal bears a stamp across the document, which states "Do Not File." The AAO will therefore not accept this tax return as evidence of the petitioner's ability to pay. On appeal, counsel for the petitioner states that the 2008 tax return is still not available.

Further, regarding the documents previously requested, but not submitted, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its 2002, 2003, or 2004 tax returns as well as the IRS Forms W-2, which were issued to the beneficiary in 2003, 2004, 2005, 2006, 2007, and 2008. These documents would have demonstrated the amount of taxable income the petitioner reported to the IRS and the amount of compensation paid to the beneficiary would have further revealed the petitioner's ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Further, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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 claims to have worked for the petitioner since 1993. In his March 19, 2009 letter, [REDACTED] president of [REDACTED] states:

[The beneficiary] has worked for [REDACTED] in the past on a commission and independent contractor basis for about eight years (since February of 1993).

However, in his June 24, 2009 letter, which accompanied the appeal, [REDACTED] states:

[REDACTED] has been in business since 1997 and has paid all payroll expenses each tax year from gross revenues.

In Part 5 of Form I-140, the petitioner also indicated that its business was established in April 1997. 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, 591-592 (BIA 1988).

Whether or not the petitioner has existed since 1993 or 1997 and whether or not the petitioner has employed the beneficiary since 1993 or 1997, the petitioner has only properly submitted two Forms W-2 and five pay statements, which it issued to the beneficiary in 2001, 2002, 2007, and 2009. Therefore, the beneficiary's Forms W-2 and pay statements show compensation received from the petitioner, as shown in the table below.

- For 2001, the beneficiary's Form W-2 shows compensation of \$53,504.09.
- For 2002, the beneficiary's Form W-2 shows compensation of \$20,801.21.⁶
- For 2003, the petitioner has not submitted any regulatory prescribed evidence of wages paid to the beneficiary.
- For 2004, the petitioner has not submitted any regulatory prescribed evidence of wages paid to the beneficiary.
- For 2005, the petitioner has not submitted any regulatory prescribed evidence of wages paid to the beneficiary.
- For 2006, the petitioner has not submitted any regulatory prescribed evidence of wages paid to the beneficiary.
- For 2007, the petitioner has not submitted any regulatory prescribed evidence of wages paid to the beneficiary.
- For 2008, the petitioner has not submitted any regulatory prescribed evidence of wages paid to the beneficiary.
- In 2009, the pay statements reflect compensation of \$11,520.00.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from 2002 through 2009. For 2002 and 2009, the petitioner demonstrated that it paid the beneficiary a portion of the proffered wage, but not the full proffered wage. Therefore, while the petitioner must still demonstrate the ability to pay the full proffered wage for each year from 2003 through 2008, it must only demonstrate the ability to pay the difference between wages already paid and the full proffered wage for 2002 and 2009, that difference being \$28,078.79 and \$37,360.00 respectively.

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

⁶ This figure reflects the amount shown on the IRS Form W-2 which was issued to the beneficiary by [REDACTED]. The record contains a copy of IRS Form W-2 issued to the beneficiary by [REDACTED]. However, unlike the pay statements issued to the beneficiary in 2000, 2001, and 2002 by [REDACTED] and [REDACTED], the sole document issued by [REDACTED] contains no client name and no indication that the funds were issued by the petitioner. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

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 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 April 13, 2009 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 should have been the most recent return available.⁷ However, the most recent tax return, which was properly submitted, was for 2006. The petitioner's tax returns demonstrate its net income for 2005 and 2006, as shown in the table below.

- For 2002, the petitioner did not submit regulatory prescribed evidence of its net income.
- For 2003, the petitioner did not submit regulatory prescribed evidence of its net income.
- For 2004, the petitioner did not submit regulatory prescribed evidence of its net income.
- In 2005, the Form 1120 stated a net loss of \$43.00.
- In 2006, the Form 1120 stated a net loss of \$131,500.00.
- For 2007, the petitioner did not properly submit evidence of its net income.
- For 2008, the petitioner did not submit regulatory prescribed evidence of its net income.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net income to pay the full proffered wage. For 2003, 2004, and 2008, the petitioner did not demonstrate sufficient net income to pay the beneficiary the full proffered wage because it did not submit any regulatory prescribed evidence of its net income. For 2002, the petitioner did not demonstrate sufficient net income to pay the difference between wages paid and the proffered wage, because it did not submit any regulatory prescribed evidence of its net income. For 2007, the petitioner did not demonstrate sufficient net income to pay the full proffered wage, because it did not properly submit evidence of its net income.

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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end

⁷ According to the IRS website, corporation income tax returns for those entities which file based upon a calendar year, are due on March 15. See http://www.tax.ny.gov/help/calendar/general_taxcalendar_2012.htm (accessed September 21, 2012). Therefore, barring a request for an extension to file its tax return, the petitioner's 2007 federal income tax return should have been prepared by March 15, 2008, and the 2008 federal income tax return should have been prepared by March 15, 2009. Both of these documents should have been available by the time the petitioner responded to the director's RFE.

⁸ 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.

current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 and 2006, as shown in the table below.

- For 2002, the petitioner did not submit regulatory prescribed evidence of its net current assets.
- For 2003, the petitioner did not submit regulatory prescribed evidence of its net current assets.
- For 2004, the petitioner did not submit regulatory prescribed evidence of its net current assets.
- In 2005, the Form 1120, Schedule L stated net current liabilities of \$182,515.00.
- In 2006, the Form 1120, Schedule L stated net current liabilities of \$418,543.00.
- For 2007, the petitioner did not properly submit evidence of its net current assets.
- For 2008, the petitioner did not submit regulatory prescribed evidence of its net current assets.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage. For 2003, 2004, and 2008, the petitioner did not demonstrate sufficient net current assets to pay the full proffered wage, because the petitioner did not submit any regulatory prescribed evidence of its net current assets. For 2002, the petitioner did not demonstrate sufficient net income to pay the difference between wages paid and the proffered wage, because it did not submit any regulatory prescribed evidence of its net income. For 2007, the petitioner did not demonstrate sufficient net current assets to pay the full proffered wage, because it did not properly submit evidence of its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner had net current assets, which were equal to or greater than the proffered wage for 2001, 2005, and 2006. In support of his assertion, counsel refers to \$2,702,375.00 in total assets and \$2,238,139.00 in total income for 2001; \$2,227,982 in total assets and \$2,762,940 in total income for 2005; and \$1,563,172 in total assets and \$2,197,579 in total income for 2006.

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.

Further, reliance on the petitioner's total assets is misplaced. 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. 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 because such assets are capable of being converted into cash within the year. The same cannot be said of long-term assets.

On appeal, counsel asserts that the petitioner has already been remunerating the beneficiary at a rate equal to or greater than the proffered wage. In support of his assertion, counsel refers to a letter dated June 24, 2009 from [REDACTED] president of [REDACTED] attesting to the employment of the beneficiary. In his letter, [REDACTED] confirms that [REDACTED] employed the beneficiary, but does not specify the duration for which it employed him.

Further, the petitioner has provided no evidence of any wages paid to the beneficiary for 2003, 2004, 2005, 2006, 2007, or 2008. According to the most recent of the five pay statements submitted by the petitioner for 2009, the petitioner paid the beneficiary \$11,520.00 as of March 20, 2009. This sum is significantly less than the proffered wage.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic

business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not demonstrated its ability to pay based on its net income or net current assets for 2002 through 2008. Further, the petitioner paid no officer compensation during any of the years represented by tax documentation. Therefore, given the evidence provided, the petitioner has not demonstrated the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. 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.

As set forth in the director's May 29, 2009 denial, the second issue in this case is whether or not the beneficiary has the experience, which is required to perform the proffered position as of the priority date of the visa petition.

The beneficiary must 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. at 159; see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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 *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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed (e.g., by regulation), USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: None specified

High School: None specified

Collège: None

College Degree Required: None

Major Field of Study: Not applicable

TRAINING: 1-2 years learning about septic systems

EXPERIENCE: Six (6) years in the job offered

OTHER SPECIAL REQUIREMENTS: Class A Driver's License, including tank endorsement.
Septic system specialist. Bilingual (English/Spanish).

The labor certification states that the beneficiary qualifies for the offered position based on experience as a septic operator with the petitioner, [REDACTED] in Ventura, California from 1993 until 2001. No other experience is listed. However, the labor certification also indicates that the beneficiary possesses a class A driver's license and was trained to operate backhoes, heavy machinery and also trained on septic system. The labor certification states that, in addition to work experience, the beneficiary obtained about one year of specific training in the septic system. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) states:

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.

The record contains an experience letter from [REDACTED] president, on [REDACTED] letterhead stating that the company employed the beneficiary in septic tank service from February 1993 until the date of the letter, March 19, 2009.

First, [REDACTED] states that the beneficiary has worked "in the past on a commission and independent contractor basis for about eight years (since February of 1993)." However, in Part 5 of Form I-140 and in a letter dated June 24, 2009, the petitioner states that its business was established in 1997. The 1997 date is corroborated by information contained in the database maintained by the California Secretary of State, Business Entities Division. 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. *See Matter of Ho*, 19 I&N Dec. at 591-592.

Further, the petitioner states:

During those years, he [the beneficiary] has been trained on the job to be thoroughly familiar with the septic system and to operate backhoes and heavy machinery, used in the septic system.

In a second letter dated March 19, 2009, [redacted] attests to the beneficiary's job training, which was provided by [redacted] stating:

[The beneficiary] has been trained from (July of 1993 to December of 1995), to be a septic tank specialist. He was trained in the procedures for certifying septic tanks, in backhoe operations, and in the use of heavy machinery used in the Septic Industry.

[The beneficiary] also has full knowledge in driving and operating Tanker Trailers (18 wheeler's). All of the training was performed by [redacted] who was a General Manager of that branch.

The training, which the beneficiary purportedly received, was supposed to have been conducted by [redacted] at an unidentified branch. However, the evidence in the record, corroborated by public records maintained by the California Secretary of State, does not demonstrate that the petitioner was operational at the time the training was supposed to have been conducted. Further, regarding the specific training which the beneficiary was supposed to have received, the petitioner provided no documentation, which substantiates the beneficiary's qualifications, certifications, or proficiency in any of the areas in which he was supposed to have been trained. The petitioner provided no records documenting the training, what information was conveyed, how the beneficiary's progress or success was measured, or any other information, which would document that he successfully completed the required training.

Further, even if the AAO were to accept the petitioner's claims regarding the training, which the beneficiary was supposed to have completed, and the dates for the training, such evidence would serve to detract from the claims regarding the duration of the beneficiary's claimed experience. First, in Part 5 of Form I-140, the petitioner claims to have been established in April 1997. The tax returns supplied as evidence and the database maintained by the California Secretary of State indicate that the petitioner incorporated on December 23, 1996. Therefore, it is reasonable to believe that the petitioner's business was not operational until April 1997, the date which the petitioner claims in Part 5 of Form I-140. Based upon this information, the beneficiary could not have worked for the petitioner for more than four years as of the priority date of the instant visa petition. However, if the petitioner were to demonstrate that the beneficiary obtained the required training and experience at some other branch of [redacted] the dates claimed for the beneficiary's training and experience would still not correspond to or satisfy the duration of the required experience as stipulated on Form ETA 750.

According to [redacted] in his March 19, 2009 letters, the beneficiary engaged in training from July 1993 until December 1995. If the beneficiary began working as a septic operator immediately after completing his training, he would have begun working in January 1996. Thus, given such

dates, the beneficiary would have been working as a septic operator for five years and four months as of the priority date of the instant visa petition. Form ETA 750 requires that the prospective septic supervisor have six years of experience performing the duties identified in Item 13 of Form ETA 750 prior to the priority date.

In his decision, the director determined that the petitioner had not demonstrated that the beneficiary worked in a supervisory capacity for six years prior to the priority date, and this fact formed the basis of the director's finding the beneficiary unqualified for the proffered position. However, the AAO does not concur with this aspect of the director's findings. The beneficiary must 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. at 159; *see also Matter of Katigbak*, 14 I&N Dec. at 49. The petitioner is required to demonstrate that the beneficiary performed the required duties for the period of time which is stipulated on the labor certification, regardless of the position title under which the qualifying experience was performed.

In Item 13 of Form ETA 750, the labor certification states that the proffered position involves performing the following duties:

Does all plumbing services and repair as well as operates a backhoe. Needs to be a septic system specialist who is knowledgeable of city and county codes. Will be responsible for pulling county and city permits, estimating projects, dealing with customers and willing to be on call.

According to [REDACTED] while receiving training with and working for the petitioner, the beneficiary has:

... been trained on the job to be thoroughly familiar with the septic system and to operate backhoes and heavy machinery, used in the septic industry.

[The beneficiary] has several years of experience in obtaining the necessary permits from county and city offices.

Therefore, according to the information provided by the petitioner, the beneficiary, regardless of the title he has held, has been performing the types of duties, which are associated with the proffered position. However, the issue remains the duration for which the beneficiary has been performing such duties. According to the information provided as evidence (e.g., letters attesting to the beneficiary's training and work experience), the beneficiary has not worked as a septic operator, performing the required duties for the six years, which are required on the labor certification as of the priority date of the visa petition.

Further, according to the evidence, and as attested to by the petitioner, the beneficiary has only ever worked as a septic operator for the petitioner where he also received his training in the proffered field.⁹

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

The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.¹⁰

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)¹¹ in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-

⁹ In Item 8 of Form ETA 750B, the petitioner identifies the name and address of the prospective employer as [REDACTED]. In Item 15 of Form ETA 750, the beneficiary identifies the name and address of the employer with which he gained his qualifying experience as [REDACTED].

¹⁰ In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. See *E & C Precision Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

¹¹ 20 C.F.R. § 656.21(b)(5) [2004].

BALCA decisions,¹² the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are six years of experience in the job offered, after required training. Experience in an alternate occupation is not acceptable. As the actual minimum requirements are six years of experience, the petitioner could not hire workers with less than six years of experience for the same position. See 20 C.F.R. § 656.21(b)(5) [2004].¹³ In its letters of March 19, 2009, the petitioner enumerated the duties performed by the beneficiary as articulated above. These duties are identical to the duties associated with the proffered position, as stated by the petitioner in Item 13 of Form ETA 750.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, the petitioner provided no documentary evidence demonstrating that the DOL performed a *Delitizer* analysis of the dissimilarity of the offered position and the position occupied by the beneficiary which afforded him all of his qualifying experience.

Furthermore, on his employment letters, [REDACTED] expressly states that the beneficiary previously worked and still works for the petitioner performing the same duties as the ones listed on the labor certification. In order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. See *Delitizer Corp. of Newton* at 88-INA-482. The petitioner failed to establish the

¹² See *Frank H. Spangfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

¹³ In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than six years of experience, it is evident that the job duties of the offered position can be performed with less than the six years of experience listed on Form ETA 750. Therefore, six years of experience as a septic operator cannot be the actual minimum requirement for the offered position of septic supervisor.

dissimilarity between the position the beneficiary holds with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

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

Therefore, while the AAO cannot concur with the director's findings related to the supervisory aspect of the required experience, the AAO finds that the beneficiary does not have the experience required by the labor certification, which is necessary to perform the proffered position, as of the priority date.

On appeal, counsel asserts that the director erred in finding that the beneficiary was not qualified for the proffered position based upon the fact that the beneficiary had not worked in a supervisory capacity for the requisite period of time. Again, the AAO concurs in part with counsel's assertion. The petitioner is only required to demonstrate that the beneficiary has the requisite experience as stipulated on Form ETA 750, not that the beneficiary worked under a specific position title for the requisite period of time. The AAO still finds that the petitioner has not demonstrated that the beneficiary worked for the requisite six years in the proffered position, as explained above, or that the beneficiary obtained his claimed experience with an employer other than the petitioner or in a position which was substantially dissimilar to the proffered position.

The AAO affirms the director's decision that 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. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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.