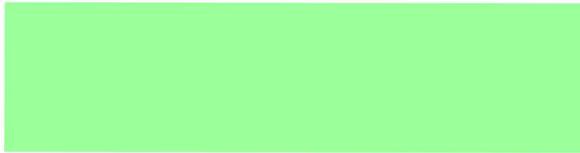
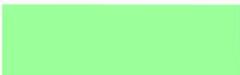




U.S. Citizenship
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Services

(b)(6)

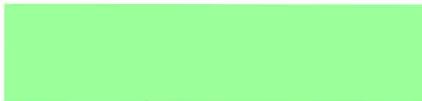


Date: Office: NEBRASKA SERVICE CENTER FILE: 
JAN 24 2013

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

(b)(6)

DISCUSSION: This case comes before the Administrative Appeals Office (AAO) on certification for review pursuant to 8 C.F.R. § 103.4(a).¹ Upon review, the AAO affirms the decision of the Director, United States Citizenship and Immigration Services (USCIS), Nebraska Service Center.

The petitioner is a mortgage brokerage firm. It seeks to permanently employ the beneficiary in the United States as a trilingual mortgage representative, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the preference visa petition is submitted along with an Application for Alien Employment Certification, Form ETA 750, approved by the U.S. Department of Labor (DOL). The Director, Nebraska Service Center (the director), denied the petition and certified the decision to the AAO. The director in the Notice of Certification dated August 24, 2012 (NOC) concluded that the petitioner had failed to establish 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 had the requisite work experience in the job offered before the priority date.

As set forth in the director's NOC, the issues in this case are (a) 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 (b) whether or not the beneficiary possessed the requisite work experience in the job offered before the priority date.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

a) The Petitioner's Ability to Pay.

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.

¹ Under 8 C.F.R. § 103.4(a)(1) allows certifications by district directors to the AAO for review "when a case involves an unusually complex or novel issue of law or fact."

Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Comm. 1967).

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 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by DOL on September 29, 2003. The rate of pay or the proffered wage specified on the Form ETA 750 is \$17.47 per hour or \$36,337.60 per year. To show that the petitioner has the continuing ability to pay \$17.47 per hour or \$36,337.60 per year from September 29, 2003, the petitioner submits the following evidence:

- Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2003 through 2006;
- Internal Revenue Service (IRS) Forms W-2 issued by the petitioner to the beneficiary for 2003-2005;
- A list of the petitioner's employees in 2004; and
- The petitioner's bank statements for 2004.

The evidence submitted shows that the petitioner was initially incorporated on April 4, 1995 and elected to be an S Corporation as of August 1, 1995. On the petition, the petitioner claimed to currently employ 40 workers and to have a gross annual income and net annual income of \$2,473,575 and \$349,168, respectively.

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.

Based on the evidence submitted, the beneficiary received the following compensation from the petitioner from 2003 to 2005:

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2003	\$57,500	\$36,337.60	Exceeds the PW
2004	\$3,100	\$36,337.60	(\$33,237.60)
2005	\$3,500	\$36,337.60	(\$32,837.60)

Thus, the petitioner has established the ability to pay in 2003, but not in 2004, 2005, or from 2006 onwards until the beneficiary receives lawful permanent residence.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at

881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

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

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

River Street Donuts 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).

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.² 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.

² 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.

Based on the evidence submitted above, the petitioner's net income and net current assets for the years 2003-2006 are shown below:

<i>Tax Year</i>	<i>Net Income (Loss)³</i>	<i>Net Current Assets</i>	<i>Remainder of the Proffered Wage</i>
2003	\$349,168	\$323,873	\$0
2004	(\$16,621)	\$520,128	\$33,237.60
2005	\$84,332	\$512,872	\$32,837.60
2006	79,258	\$0	\$36,337.60

Therefore, the petitioner has established that it had the ability to pay in 2003, 2004, 2005, and 2006, but not from 2007 onwards until the beneficiary receives his lawful permanent residence.

Finally, 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. 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

³ For an S Corporation, 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 if the S corporation's income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2005, at <http://www.irs.gov/pub/irs-prior/i1120s--2005.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income is found on line 21 of page one of the Form 1120S.

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.

Unlike *Sonegawa*, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Thus, we agree with the director that the petitioner has not established by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

The director sent a Request for Evidence (RFE) on March 23, 2012 advising the petitioner to submit specific additional evidence to show the ability to pay from 2007 to 2011. The petitioner was accorded 84 days to respond and provide additional evidence, however, the petitioner did not respond or submit additional evidence.

b) The Beneficiary's Qualifications for the Job Offered.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. at 158, the petitioner must demonstrate that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

As noted earlier, the priority date here is September 29, 2003. The name of the job title or the position for which the petitioner sought to hire is "trilingual mortgage representative." Under the job description, section 13 of the Form ETA 750, the petitioner wrote:

Attend clients, receive financial information, data entry; use Word and Excel; analyze customer's financial background for loan application, [be able] to speak Portuguese, Spanish, and English.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, the director must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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, 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).

As set forth by the petitioner, the proffered position requires the beneficiary to have a minimum of two (2) years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on September 25, 2003, he represented that he worked for a real estate brokerage firm called [REDACTED] as a trilingual sales representative from June 1999 to November 2001. Submitted along with the approved Form ETA 750 and the Form I-140 petition was a sworn statement dated April 18, 2006 from [REDACTED]. In the sworn statement, the author described the beneficiary's position as a trilingual sales representative from June 1999 to November 2001 as follows:

His duties [referring to the beneficiary] consisted of retrieving financial information from clients and assisting them in their capability of purchasing a new home. He was required to speak Portuguese, Spanish, and English.

Mr. Pinto [the beneficiary] would sell homes as well as use computer programs such as Word and Excel.

From this letter, it appears as if the beneficiary was previously employed in real estate. However, the position offered in this case specifically requires two years of experience in analyzing customers' financial backgrounds for loan application eligibility.

As indicated above, the director sent an RFE on March 23, 2012 advising the petitioner to send additional evidence to demonstrate that the beneficiary has at least two years of work experience in the job offered before the priority date. The director accorded the petitioner 84 days to respond. However, the petitioner did not respond or submit additional evidence. Thus, the director denied the petition as abandoned, pursuant to 8 C.F.R. § 103.2(b)(13).

We agree. 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 director's decision to deny the petition is affirmed.