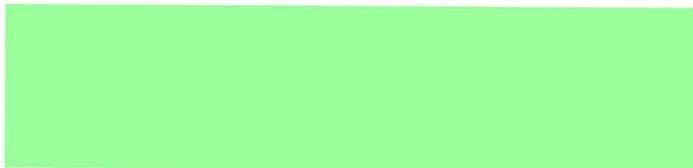




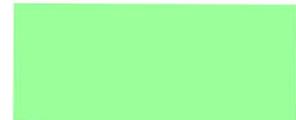
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUN 13 2013 OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

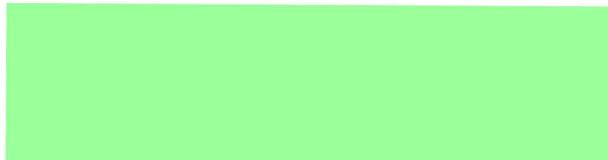
Petitioner:

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner has appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an information technology, consulting and accounting business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor.

The director concluded that the beneficiary did not have the U.S. bachelor's degree or foreign equivalent degree required by the terms of the Form ETA 750. On appeal, counsel asserts that while the ETA 750 indicates that a bachelor's degree is the minimum requirement for the offered position, it does not preclude a combination of degrees from fulfilling the requirements for the position. He contends that the beneficiary's undergraduate and graduate degrees, when combined, meet the educational requirement set forth in the Form ETA 750.

The record shows that the appeal is properly filed and makes specific allegations 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3<sup>rd</sup> Cir. 2004). Accordingly, the entire record will be reviewed and all pertinent evidence considered in reaching a decision on the appeal.

The AAO first turns to a consideration of whether the record on appeal establishes the beneficiary's qualifications for the offered position of programmer analyst.

On Part 2.e. of the Form I-140 petition, the petitioner indicates that it is seeking classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act. Section 203(b)(3)(A)(i) of 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.<sup>1</sup>

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<sup>1</sup> The U.S. Department of Labor (DOL) assigns the occupational code of 15-1121.00, computer systems analyst, to programmer analyst. <http://online.onetcenter.org/crosswalk/DOT?=030.162-014+&g+Go> (accessed May 31, 2013). The position falls within Job Zone Four requiring "considerable preparation" for the occupation type, i.e., several years of work-related experience, on-

In evaluating a beneficiary's qualifications for an offered position, United States Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. It 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A beneficiary must also meet all of the requirements of the position set forth on the labor certification by the priority date of the petition, which in the present case is December 1, 2003. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In the present case, Part A.14. and A.15 of the Form ETA 750 indicate the petitioner's minimum requirements for the offered employment of programmer analyst:

EDUCATION

Grade School: None Required.

High School: None Required.

College Degree Required: Bachelor's.

Major Field of Study: Computer Science, Engineering or Mathematics.

TRAINING: None Required.

EXPERIENCE: One (1) year in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

The petitioner has submitted documentation establishing that the beneficiary attended [REDACTED] in Hyderabad, India from 1991 to 1994, earning a bachelor of science degree, with concentrations in computer science, mathematics and statistics; obtained a diploma from the [REDACTED] in India during the period 1992 – 1997; and received a Post Graduate Diploma in Business Administration in 1997 from the [REDACTED] in Hyderabad, India.

In a Notice of Intent to Dismiss and Derogatory Information (NOID/NODI) issued on September 10, 2012, the AAO asked the petitioner for further information regarding the beneficiary's postgraduate degree, specifically requesting evidence establishing the [REDACTED] in Hyderabad as an accredited university or institution requiring a three-year bachelor's degree for admission. The AAO noted its request was based on information provided by the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions

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the-job training and/or vocational training. The occupation is also assigned a standard vocational preparation (SVP) range of 7-8, indicating that “[m]ost . . . require a four-year bachelor's degree, but some do not.” <http://online.onetcenter.org/link/summary/15-1021.00#JobZone> (accessed March 31, 2013). Based on these requirements, a programmer analyst may be considered either as a professional or a skilled worker.

Officers (AACRAO),<sup>2</sup> which indicated that, under the educational system in India, a Bachelor of Science “represents the attainment of a level of education comparable to two to three years of university study in the United States” and that only a postgraduate diploma that followed a three-year bachelor’s degree would represent the attainment of a level of education comparable to a U.S. bachelor’s degree.

In response, the petitioner submitted an October 5, 2012 academic equivalency evaluation prepared by [REDACTED] for the [REDACTED], which finds the beneficiary’s undergraduate degree from [REDACTED] and post graduate diploma from the [REDACTED] to be the equivalent of a four-year U.S. Bachelor of Science degree, with a major in computer science, mathematics and business administration from an accredited college or university in the United States. The petitioner has also provided printouts of online materials [REDACTED] that indicate individuals who wish to take the [REDACTED] Aptitude Test required for admission must have a bachelor’s degree in the relevant field or its equivalent from a recognized university. The petitioner further submits online printouts [REDACTED] and [REDACTED] to establish the [REDACTED] as a deemed-to-be university under section three of the University Grants Commissioner (UGC) Act, 1956, accredited by the Association of Management Development Institutions in South Asia (AMDISA).<sup>3</sup>

The petitioner also provides a copy of the UGC Act, 1956 that establishes the UGC as a government-appointed commission that regulates educational standards, evaluating Indian universities to determine and maintain standards of teaching, examination and research. Section 2(f) of the UGC Act indicates that an institution may be recognized by the UGC in accordance with the regulations made under the Act. For an institution designated as “deemed,” section three of the UGC Act provides that all of the provisions of the Act “shall apply to such institution as if it were a University within the meaning of clause (f) of section 2.”

In addition to considering the preceding evidence, the AAO has also reviewed “India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institution in the United States,” by Leo J. Sweeney and Ravi Kallur, and published in

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<sup>2</sup> According to its website, [www.aacrao.org](http://www.aacrao.org), AACRAO is “a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.” <http://www.aacrao.org/About-AACRAO.aspx> (accessed on May 31, 2013). Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* According to the registration page for EDGE, it is a “web-based resource for the evaluation of foreign educational credentials.” <http://edge.aacrao.org/info.php>. (accessed May 31, 2013).

<sup>3</sup> Information provided by the UGC [REDACTED] indicates that it has deemed the [REDACTED] to be a university and that it recognizes the [REDACTED] as an institute of the Foundation.

1997 by AACRAO and NAFSA: Association of International Educators. The report offers the following information on [REDACTED]

[REDACTED] was established in 1984 as a non-profit educational society to provide for competent financial analysts and investment managers by setting educational standards in the field of financial analysis, training, conducting examinations . . . . No memberships are awarded . . . . The postgraduate diploma in Financial Management is accredited by the AICTE [All India Council for Technical Education] and recognized for Ph.D. admission by many Indian universities.

The AAO also notes that EDGE indicates in its overview of the Indian educational system that “U.S. equivalent qualifications are . . . awarded by a number of . . . associations, including the . . . Institute of Chartered Financial Analysts of India.” <http://www.aacrao.org/country/overview/India-overview> (accessed May 31, 2013).

Based on its review of the record, the AAO finds the petitioner to have demonstrated that the beneficiary’s bachelor’s degree from [REDACTED] and post graduate diploma from the [REDACTED] in Hyderabad, when combined, represent the attainment of a level of education that is equivalent to a U.S. bachelor’s degree, with a major field of study in computer science, mathematics or business administration. Accordingly, the AAO concludes that the petitioner has established that the beneficiary meets the educational requirements of the offered position.

The record also provides evidence of the beneficiary’s experience as a programmer analyst in the form of a March 30, 2001 statement from [REDACTED] Manager, [REDACTED], Princeton Junction, New Jersey, written on the organization’s letterhead. [REDACTED] indicates that the beneficiary worked for the [REDACTED] as a programmer analyst on a full-time basis from December 1999 to March 2001. He further reports that during his employment, the beneficiary:

- analyzed, designed, developed, tested, implemented and maintained software applications using Java, J2EE, HTML, Java Script, Visual Basic, C++, Oracle, SQL Server, WinRunner and LoadRunner on UNIX and Windows NT/98 platforms; and
- designed, scripted and executed full regression and functionality testing of software applications. Generating test methodology, test plans, etc. and closely interacted with end users to ascertain the requirements to carry out analysis and design and meet their needs.

[REDACTED] also states that the beneficiary was required to be proficient in database analysis, and to possess a comprehensive understanding of all phases of OOAD and OOP, testing scripts and methodology, and the software QA process. Accordingly, the AAO finds the record to establish that the beneficiary has the required year of experience as a programmer analyst.

In that the record demonstrates that the beneficiary has the equivalent of a U.S. bachelor's degree and one year of experience as a programmer analyst, the AAO finds the petitioner to have established that the beneficiary is qualified to perform the duties of the offered position and withdraws the director's decision.

However, beyond the decision of the director, the AAO observes that the petitioner has not established its ability to pay the beneficiary the proffered wage as of the December 1, 2003, the date on which the U.S. Department of Labor (DOL) accepted the Form ETA 750 for processing.<sup>4</sup>

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 . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In the AAO's September 2012 NOID/NODI, we noted that the record lacked the evidence necessary to establish the petitioner's ability to pay the proffered wage and asked it to submit additional evidence of its financial status, including its tax records for the period 2007 through 2011 and any Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (W-2s) or Form 1099s issued to the beneficiary during this same period. The AAO also noted that USCIS records reflected that the petitioner had filed multiple immigrant (Form I-140, Immigrant Petition for Alien Worker) and nonimmigrant (Form I-129, Petition for Nonimmigrant Worker) petitions and requested information identifying these beneficiaries, the dates of their employment, the wages set forth in the respective labor certifications or labor condition applications, and the actual wages paid the beneficiaries, supported by copies of their IRS Forms W-2 or Forms 1099. The AAO indicated that the combined proffered and prevailing wages would be considered in assessing the petitioner's ability to pay.

In response, the petitioner submitted its tax returns for the years 2007 through 2011; copies of the beneficiary's IRS Forms W-2 for 2007 through 2010; evidence relating to the Form I-140 petitions and Form I-129 petitions it has filed, including IRS Forms W-2 and USCIS approval notices for both

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<sup>4</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

groups; DOL Final Determinations establishing the priority dates for its Form I-140 workers; and charts showing the priority dates, employment dates and wages paid to its Form I-140 workers.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, 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 (6<sup>th</sup> Cir. Filed Nov. 10, 2011).<sup>5</sup> If the petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where a petitioner's net income or net current assets do not establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Turning to the record, the AAO finds it to contain the beneficiary's IRS Forms W-2 for the years 2003 through 2010, which report her income from the petitioner as follows:

- 2003: \$9,500.01<sup>6</sup>

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<sup>5</sup> 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

<sup>6</sup> Counsel requests that USCIS pro rate the proffered wage for the portion of the year that occurred after the priority date and offers a formula for doing so. 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 it would consider 24 months of income towards paying the annual proffered wage. While USCIS will pro rate 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

- 2004: \$28,500.03
- 2005: \$69,666.74
- 2006: \$90,666.72
- 2007: \$110,000.00
- 2008: \$105,000.00
- 2009: \$80,000.00
- 2010: \$45,000.00.

As the petitioner paid the beneficiary at or in excess of the proffered wage of \$80,000/year from 2006 through 2009, it has established its ability to pay in these years. The AAO will, therefore, limit its examination of the petitioner's federal tax returns to the years 2003 through 2005, 2010 and 2011 to determine if either its net income or net current assets in these years establish its ability to pay the proffered wage.

The petitioner's tax returns report its net income as follows:

- 2003: \$134,845.00
- 2004: \$316,645.00
- 2005: \$200,408.00
- 2010: \$165,294.00
- 2011: \$242,613.00

They indicate its net current assets as:

- 2003: \$540,020.00
- 2004: \$226,430.00
- 2005: \$352,317.00
- 2010: \$763,003.00
- 2011: \$1,051,616.00

The AAO notes that the petitioner's net income would have been sufficient to cover the differences between the wages it paid the beneficiary and the proffered wage of \$80,000/year during the period 2003 through 2005 and in 2010. Its reported net income would also have covered all of the proffered wage in 2011, when it was no longer employing the beneficiary. However, neither the petitioner's net income nor its net current assets similarly establish the petitioner's ability to pay the beneficiaries of the multiple Form I-140 petitions and Form I-129 petitions that were pending or approved during these same time periods.

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(and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

In the NOID/NODI, the petitioner was asked to provide the proffered wages for the beneficiaries of the Form I-140 petitions it had filed that were pending or approved as of the priority date through September 10, 2012, the date the notice was issued, as well as the prevailing wages for all of the Form I-129 beneficiaries it had employed during this same period. With regard to the petitioner's ability to pay the beneficiaries of its Form I-140 filings, a review of the record and USCIS data bases indicates that it had three pending or approved Form I-140 petitions in 2003 (not including the beneficiary), which increased to four in 2004. In 2005, one Form I-140 petition filed by the petitioner was approved by USCIS, and in 2010 and 2011, 17 petitions were pending with USCIS or had been approved.<sup>7</sup> Therefore, to establish its ability to pay in this case, the petitioner is required to demonstrate that, in each of these years, it had the ability to pay the proffered wages of all the beneficiaries for whom Form I-140s were approved or pending, regardless of whether these beneficiaries were actually in its employ. However, the petitioner has provided no evidence to establish the proffered wages for any of its Form I-140 filings. Instead, it has submitted documentation of the actual wages paid to the I-140 beneficiaries it has employed or is employing.

Without the proffered wage indicated on the labor certification filed with each Form I-140 petition, the AAO cannot determine the difference, if any, between the actual wages paid to an employed Form I-140 beneficiary and the proffered wage required by the labor certification.<sup>8</sup> Moreover, it lacks any wage information on the beneficiaries of approved or pending Form I-140s who were not in the petitioner's employ during a particular year. As the AAO is precluded from determining the petitioner's financial obligations with regard to the Form I-140 petitions that were pending or approved during the period 2003 through 2005 and in 2010 and 2011, the petitioner cannot establish that its net income or current net assets demonstrate its ability to pay the proffered wage during these years.

The AAO further notes that the wage evidence provided by petitioner for its Form I-129 petition beneficiaries is also limited to the wages actually paid these individuals. Its failure to document the

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<sup>7</sup> USCIS records reflect four additional aliens for whom the petitioner filed Form I-140 petitions. Two of these individuals appear to have been the beneficiaries of pending or approved Form I-140s during 2003 and 2004. One of these beneficiaries adjusted status on August 26, 2004 and the Form I-140 benefitting the other was denied in 2006. The remaining two Form I-140s were filed by the petitioner on November 2, 2006 and June 6, 2007 and approved in 2007. Neither beneficiary had adjusted status as of 2011.

<sup>8</sup> An indicator of the potential magnitude of such differences is provided by the Form ETA 750 filed by the petitioner for [REDACTED] who, in 2003 and 2004, was the beneficiary of an approved Form I-140 filed by the petitioner. The Form ETA 750 indicates that the proffered wage for the job offered [REDACTED] was \$80,000. However, the petitioner's wage records indicate that it paid [REDACTED] only \$28,499.95 in 2003 and \$9,499.98 in 2004.

prevailing wages indicated on the Labor Condition Applications underlying its Form I-129 filings,<sup>9</sup> once again, prevents the AAO from reaching any determination regarding its financial obligations to these beneficiaries during the required time periods and, therefore, its ability to pay the proffered wage. Although counsel asserts that the petitioner has paid its nonimmigrant workers the prevailing wage in accordance with DOL regulations and the relating Labor Condition Applications, the assertions of counsel are not persuasive. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO will, therefore, consider whether, pursuant to *Matter of Sonogawa*, the record demonstrates that the totality of the petitioner's circumstances establish its ability to pay the beneficiary the proffered wage. In *Sonogawa*, the petitioning entity had been in business for more than 11 years and routinely earned a gross annual income of approximately \$100,000. However, during the year in which the petition was filed in that case, the petitioner's income declined significantly as a result of changing business locations and paying rent on both the old and new sites for five months. There were also significant moving costs and a period of time when the petitioner was unable to do regular business. The legacy Immigration and Naturalization Service (now USCIS) nevertheless found that the petitioner's prospects for resuming successful business operations had been established as the record demonstrated that she was a fashion designer whose work had been featured in national magazines, that she had a client list that included celebrities and individuals who appeared on lists of the best-dressed California women, and that she was a lecturer on fashion design at design and fashion shows throughout the United States, and at colleges and universities in California.

Here, the record indicates that the petitioner, incorporated in New York as of August 11, 1992, has been in business for at least 20 years. Based on the federal tax returns in the record, the AAO also acknowledges that the petitioner's gross revenues have increased in the past decade (\$1,965,458.00 in 2001; \$2,110,180.00 in 2002; \$2,159,244.00 in 2003; \$2,692,286.00 in 2004; \$2,550,514 in 2005; \$2,743,858.00 in 2006; \$2,925,593.00 in 2007; \$2,540,827.00 in 2008; \$2,322,041.00 in 2009;

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<sup>9</sup> In response to the Notice of Intent to Dismiss and Derogatory Information, counsel for the petitioner contends that the AAO erred in requesting prevailing wage information on the petitioner's nonimmigrant Form I-129 filings as it is obligated only to establish its ability to pay in relation to Form I-140 beneficiaries. In support of his claim, counsel references the May 4, 2004 memorandum signed by William R. Yates, Associate Director for Operations. The Yates memorandum (Memorandum from William R. Yates, Associate Director for Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004)), while it addresses ability to pay issues relating to Form I-140 petitioners, does not indicate that USCIS may not seek such evidence in relation to employment-based nonimmigrant petitions. Accordingly, counsel's assertions are not persuasive.

\$2,254,367.00 in 2010 and \$2,266,463.00 in 2011). Its growth, however, has not been steady and the record contains no evidence of any uncharacteristic business expenditures or losses to account for the reversals in gross income reported in 2005 and from 2008 through 2011. The AAO further notes that the record indicates that the petitioner's business was dissolved on July 28, 2010 and that it took no action to reactivate its status until September 28, 2012. The petitioner has provided no explanation for this break in its payment of franchise taxes. Thus, the AAO does not find the totality of the petitioner's circumstances to establish its ability to pay the proffered wage.

Based on the evidence of record, the petitioner has not established its ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. 204.5(g)(2). Accordingly, the AAO will dismiss the petitioner's appeal on this basis. The appeal will also be dismissed based on the petitioner's failure to submit evidence of the proffered wages to be paid to the beneficiaries of the Form I-140 petitions filed by the petitioner. 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).

The AAO also concludes that the record does not establish the petitioner as the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. In the September 2012 NOID/NODI, the AAO specifically informed the petitioner that New York State Department of State (NYSDOS) records indicated that it, as well as [REDACTED] had been dissolved<sup>10</sup> and that to continue with its appeal, it must demonstrate its continued existence, operation and good standing. The AAO also asked the petitioner for an explanation of its use of the name [REDACTED] – [REDACTED] on the Form I-140 petition rather than [REDACTED] as well as evidence of its authority to operate under the name of [REDACTED] – [REDACTED] in the State of New York.

In response, the petitioner provided copies of September 28, 2012 notices from the New York State Department of Taxation and Finance indicating that it had paid "all franchise taxes, penalties, and interest charges accrued against it" and that the Commissioner of Taxation and Finance had consented to the petitioner's reinstatement. An October 2, 2012 notice from the Office of the Professions, New York State Education Department reflects that the petitioner had paid the \$322 renewal fee and was licensed for the period July 2, 2012 through June 30, 2015. Accordingly, based on the record, the AAO finds the petitioner to have established its continued existence, operation and good standing. However, a May 31, 2013 search of NYSDOS records finds that [REDACTED] remains dissolved.

The petitioner has also submitted an October 5, 2012 statement regarding its use of [REDACTED] – [REDACTED] on the Form I-140 petition, indicating that [REDACTED] is a division of its accounting firm specializing in providing information technology and accounting services in the United States and front office services for off-shore consulting companies. A Certificate of

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<sup>10</sup> On the date that the AAO issued the NOID/NODI, NYSDOS records indicated that [REDACTED] and [REDACTED] were dissolved on July 28, 2010 and January 25, 2012 respectively.

Assumed Name, dated March 18, 1999, reflects that [REDACTED] is authorized by the State of New York to conduct business as [REDACTED] at the petitioner's address.

The AAO acknowledges the petitioner's statement and the Certificate of Assumed Name. However, the NYSDOS record for [REDACTED].<sup>11</sup> indicates that as of January 26, 2005, when it filed as a domestic business corporation with the State of New York, [REDACTED] was no longer a division of [REDACTED], but a separate legal entity (ID# [REDACTED]). Therefore, the AAO cannot conclude that [REDACTED] – [REDACTED] was to be the actual employer of the beneficiary at the time the Form I-140 was filed in 2007 and that the offered position of programmer analyst with [REDACTED] – [REDACTED] was or continues to be a *bona fide* job offer.

Should the petitioner wish to pursue this matter, it will need to establish itself, pursuant to the regulation at 20 C.F.R. § 656.3,<sup>12</sup> as the beneficiary's employer at the time it filed the Form I-140, specifically addressing its relationship with [REDACTED] as of January 26, 2005. Further, the petitioner will need to demonstrate that its job offer to the beneficiary was *bona fide* at the time it filed the Form I-140, i.e., that it was employment with [REDACTED] – [REDACTED] rather than [REDACTED] and that it continues to be *bona fide* job offer. A petitioner has the burden, when asked, to show that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545(BALCA October 15, 1987).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.

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**ORDER:** The appeal is dismissed.

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<sup>11</sup> This record lists [REDACTED] as the chairman or chief executive officer of [REDACTED]

<sup>12</sup> The regulation at 20 C.F.R. § 656.3(1) provides in relevant part:

Employer means a person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ full-time employee at a place within the United States . . . .