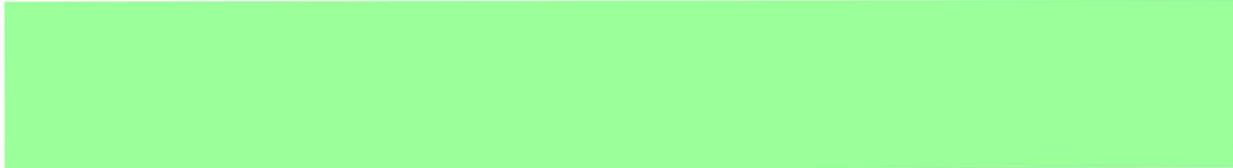




U.S. Citizenship
and Immigration
Services

(b)(6)

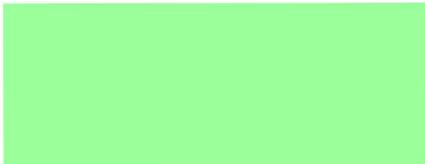


Date: JUN 13 2013 Office: TEXAS SERVICE CENTER FILE:

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 preference visa petition was denied by the Director, Texas Service Center (hereinafter “the director”), and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is an interpretation and translation company. It seeks to employ the beneficiary permanently in the United States as an interpreter. 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 denied the petition, finding that the petitioner failed to establish that the beneficiary met the minimum level of education required on the labor certification.

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 At issue in this case is whether or not the beneficiary has the requisite education and work experience in the job offered before the priority date.

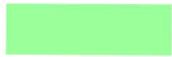
Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring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

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, as of the priority date, the beneficiary had all of the qualifications

¹ The record reflects that the director adjudicated and dismissed the appeal/motion on April 1, 2009 before forwarding it to the AAO. The AAO notes that the director’s action to adjudicate and dismiss the appeal/motion in April 2009 is erroneous. Procedurally, the AAO, not the director, shall have the jurisdiction over a properly filed appeal, pursuant to 8 C.F.R. § 103.3(a)(2)(iv). That regulation states, “If the reviewing official will not be taking favorable action or decides favorable is not warranted, that official shall promptly forward the appeal and the relating record of proceeding to the AAO in Washington, DC.”

However, on July 31, 2009, the director reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5), withdrew the decision to dismiss the appeal/motion, and forwarded the matter to the AAO. In effect, the director’s action in July 2009 corrected the procedural error done earlier in April 2009.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).



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).

Here, the priority date is April 30, 2001. The name of the job title or the position for which the petitioner seeks to hire is "Interpreter." The job description under section 13 of the Form ETA 750A states, "Interpretation and translation for Urdu and Hindi languages."

The minimum education, training, experience and skills required to perform the duties of the offered position are found on the Form ETA 750, part A block 14 and 15, as shown below:

Block 14 (State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13 above):³

Education (Enter number of years):

Grade school:	-
High school:	-
College:	
College Degree Required:	B.A.
Major Field of Study:	Arts

Training: Interpreter

Experience:

Job Offered:	6 years
Related Occupation:	-

³ The AAO sent a letter to DOL on December 2, 2012, asking whether DOL has concerns about the validity of the Form ETA 750, given that the petitioner requested a degree from the In response, DOL states that it does not have any concerns about the validity of the labor certification such that revocation would be warranted. DOL also indicates that "it appears that the employer and the foreign worker completed the Form ETA 750 incorrectly using the foreign worker's qualifications."

Therefore, the AAO will not revoke the certified labor certification, but notes that if the petitioner required a college or university degree specifically from the the position would not have been *bona fide* and open to all U.S. workers. The AAO will assume for purposes of rendering a decision at this time that this was a mistake, and that the petitioner intended to list a college degree requirement from any college or university. In any future proceedings, however, the petitioner must address this issue and provide evidence of its intent and how it apprised U.S. workers of the requirements for the proffered position in its recruitment.

Related Occupation (specify): Clerk, translator, and interpreter

Block 15 (Other Special Requirements):

I worked as [a] clerk and interpreter in [REDACTED], South Africa

In summary, the position in this case specifically requires an interested applicant, including the beneficiary, to have at least a bachelor of arts. Additionally, the applicant is required to have been trained as an interpreter and have, at minimum, six years of work experience in the job offered or in the related occupation as a clerk, interpreter, and translator.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) 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).

To demonstrate that the beneficiary qualifies for the job offered, the petitioner submitted copies of the following evidence:

- A diploma issued on July 20, 1993 by [REDACTED] conferring the beneficiary the degree of Bachelor of Arts;
- A diploma issued on October 10, 1995 by [REDACTED] conferring the beneficiary the degree of Master of Arts;
- Copies of the beneficiary's school reports dated April 27, 1990 and March 20, 1992 from [REDACTED];
- An educational evaluation dated November 26, 2008 and signed by [REDACTED] of the [REDACTED], stating that the beneficiary's Master of Arts from [REDACTED] is equivalent to the U.S. bachelor's degree;
- A printout from the World Education Services (<http://www.wes.org>) showing that someone in Pakistan has to have a total of four years of college/university education to obtain a master's degree;
- A letter of employment verification dated March 13, 1999 from the District Representative, [REDACTED] (South Africa), stating that the beneficiary is a contract worker, and has been employed at the [REDACTED] for the past six years; that he has completed in-service training in the taking of fingerprints; and that "he manned several mobile units on different occasions, visiting the old age homes and applicants;" and

- A letter from the petitioner certifying that the beneficiary received one month in-house training as a professional interpreter and translator in the Urdu and Hindi languages from May 1, 1999 to May 30, 1999.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) (<http://www.aacrao.org>).⁴ According to AACRAO EDGE, the two year Master's degree from a university in Pakistan represents attainment of a level of education comparable to a U.S. bachelor's degree. Therefore, the AAO concludes that the beneficiary possesses the minimum education requirements.

In addition, the AAO determines that beneficiary does not have the training needed to qualify for the position offered. The regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(B) specifically state that evidence relating to qualifying training shall come from former or current employer. Based on the evidence submitted, the beneficiary appeared to have received a month-long training from the petitioner.

In addition, the AAO finds that the beneficiary did not have the requisite work experience in the job offered or in the related occupation as either a clerk or translator/interpreter before the priority date. Specifically, the proffered position requires the beneficiary to have at least six years of experience in the job offered or in the related occupation as a clerk, translator, or interpreter.

The letter from the [REDACTED] does not include any experience or training in translating or interpreting. The beneficiary, according to the letter of employment verification, received training in taking fingerprints and visited the homes of the elderly to help with their various applications. Nowhere in the letter from the [REDACTED] does it state that the beneficiary's duties include translating or interpreting. Thus, even though the letter of employment verification includes the name, address, and title of the writer and has a specific description of the duties performed by the beneficiary, in compliance with the regulations at 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A), the AAO finds that the petitioner has failed to demonstrate that the beneficiary has at least six years of work experience in the job offered or in the alternate occupation as a clerk, translator, or interpreter as of the priority date.

Beyond the director's decision, the AAO further finds that the petitioner has failed to establish by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date. 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

⁴ The AAO considers information from the AACRAO website to be reliable.

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.

Consistent with the regulation above, the petitioner must therefore demonstrate the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary receives her lawful permanent residence. The record shows that the rate of pay or the proffered wage, as listed on the Form ETA 750, is \$25 per hour or \$52,000 per year.

Therefore, in order for the petitioner to be eligible for the benefit sought, the petitioner must demonstrate that it has the ability to pay \$25 per hour or \$52,000 per year from April 30, 2001 and continuing until the beneficiary receives his lawful permanent residence. To show the ability to pay, the petitioner submitted the following evidence:

- Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return for 2007;
- IRS Form 1120X Amended U.S. Corporation Income Tax Return for the years 2001 through 2007;
- A spreadsheet prepared and signed by the petitioner's certified public accountant showing the total available funds for the petitioner as of September 2001, September 2002, September 2003, September 2004, and September 2005;
- A spreadsheet prepared and signed by the petitioner's certified public accountant showing the total assets as of September 2001, September 2002, September 2003, September 2004, and September 2005; and
- A paystub dated October 31, 2008 issued to the beneficiary by the petitioner showing a gross pay of \$4,333.33.

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 on November 27, 1997 and to have gross annual income and net annual income of \$236,927 and \$15,131, respectively.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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).

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 \$4,333.33 in 2008; however, that amount is \$47,666.67 less than the proffered wage of \$52,000 per year.⁵ No other evidence has been submitted showing that the beneficiary was employed or received payment from the petitioner during the relevant period.

Where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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:

⁵ The petitioner stated in response to the director's Request for Evidence (RFE) dated November 17, 2008 that the beneficiary was not hired as an employee from the priority date because he did not have an employment authorization document (EAD). The beneficiary was hired in August 2008 after he received his EAD.

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).

The record before the director closed on December 11, 2008 with the receipt of the petitioner’s submissions in response to the director’s Request for Evidence (RFE) dated November 17, 2008. As of that date, the petitioner’s 2007 federal income tax return was the most recent return available. The petitioner’s tax returns demonstrate its net income (loss) for the years 2002 through 2007, as shown below:⁶

Tax Year	Net Income (Loss) – in \$	Proffered Wage – in \$
2001	24,650	52,000
2002	23,275	52,000
2003	20,455	52,000
2004	23,825	52,000
2005	25,281	52,000
2006	13,156	52,000
2007	10,198	52,000

Therefore, the petitioner did not have sufficient net income to pay the beneficiary’s proffered wage in any of the relevant years as shown above.

⁶ 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.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record does not include Schedule L of the petitioner's federal tax return; and therefore, the AAO cannot conclude that the petitioner has sufficient net current assets to cover the beneficiary's proffered wage during the relevant period.

The AAO further cannot consider the two spreadsheets prepared and signed by the petitioner's certified public accountant showing the total available funds (cash flows) and total assets. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements *must* be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. An unaudited financial statement consists of the unsupported assertions of management. In this case, the spreadsheets do not appear to have been audited, in accordance with the generally accepted accounting principles/standards.

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

⁷ 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 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.

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. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage particularly from 2001 to 2007.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving 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 receives permanent residence.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.