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

(b)(6)

DATE: MAR 0 1 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,

Kiera Poulos for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner describes itself as a firm engaged in convenience store acquisition, management and development.[1] It seeks to employ the beneficiary permanently in the United States as a sales manager. On September 29, 2008, the director determined that the petitioner had not filed the petition with a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL) on behalf of the instant beneficiary as is required by statute. The submitted labor certification named as the beneficiary. The regulation at 20 C.F.R. § 656.11(a) prohibits any request to change the identity of an alien beneficiary on any application for permanent labor certification that is submitted after July 16, 2007. All I-140 petitions using a substitute beneficiary on an approved labor certification must have been filed before July 16, 2007. The director indicated that the petition was filed after the July 16, 2007 date.[2]

On November 3, 2008, the petitioner filed a motion to reconsider the director's September 29, 2008 decision. On December 17, 2008, the director granted the motion to reopen, noted that the stated ground for denial had been overcome and withdrew the initial decision. On December 19, 2008, the director issued a decision in which he determined that the beneficiary did not meet the educational requirements set forth on the labor certification. The director also determined that the petitioner 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.

On January 21, 2009, the petitioner filed a motion to reopen the director's December 19, 2008 decision. The director dismissed the motion on January 11, 2010, noting that the motion was untimely and that counsel failed to establish that the untimely submission was beyond counsel's control. The director also noted that the evidence submitted on motion did not overcome the grounds for denial of the petition.

The instant Form I-290B was filed on February 16, 2010. 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.

As set forth in the director's December 19, 2008 denial, at issue in this case is whether or not the beneficiary meets the minimum educational requirements as set forth on the labor certification and 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

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[1] The petitioner's tax returns indicate that its business activity is retail sales of groceries and liquor.

[2] The Form I-140 was filed at the Nebraska Service Center on July 16, 2007 and subsequently transferred to the Texas Service Center on July 18, 2007.

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 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.[3]

Evidence of the Beneficiary's Qualifications

The director determined that the beneficiary did not meet the educational requirements set forth on the labor certification. 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)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The labor certification states that the position requires an Associate Degree in Business Administration and two years of experience as a sales manager. The evidence establishes that the beneficiary has the required work experience. On Part B of Form ETA 750, the beneficiary indicated that he received a Bachelor of Commerce degree from India in 2002, with the field of study listed as accounting. The record contains a photocopy of a diploma indicating that the degree of Bachelor of Commerce was conferred on the beneficiary in 2002. No field of study is specified on the certificate. The record does not contain a statement of marks or transcripts. In his decision, the director found that the beneficiary's Bachelor of Commerce degree does not meet the requirements of the labor certification, noting that the Form ETA 750 makes no provision for "accounting" as an acceptable field of study.[4]

On appeal, counsel indicates that the petitioner meant "Business Administration" to refer to the major school or field of study, as opposed to the specific field of subject matter concentration. No further evidence is submitted on appeal; however, in conjunction with previous motions, counsel submitted general information regarding the Bachelor of Commerce degree and the Associate Degree in Business Administration, pointing out how the curricula are similar.

Additionally, the National Center for Educational Statistics' website[5] indicates that the field of commerce is synonymous with the field of business administration/management. Such a degree:

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[3] 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).

[4] Although the beneficiary's indicates as much on the labor certification, it is noted that none of the submitted documents establish that the beneficiary's area of concentration was accounting.

[5] http://nces.ed.gov/ipeds/cipcode/cipdetail.aspx?y=55&cipid=88877 (accessed on November 29, 2012.)

> [P]repares individuals to plan, organize, direct, and control the functions and processes of a firm or organization. Includes instruction in management theory, human resources management and behavior, accounting and other quantitative methods, purchasing and logistics, organization and production, marketing, and business decision-making.

Taken as a whole, the requirement set forth on the labor certification that the position requires an Associate Degree in Business Administration is met by the beneficiary's Bachelor of Commerce degree. Thus, this ground for denial of the petition has been overcome and is hereby withdrawn.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

The director also determined that the petitioner 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. 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).

Here, the Form ETA 750 was accepted on March 25, 2005. The proffered wage as stated on the Form ETA 750 is $43,950 per year.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ 15 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 July 12, 2007, the beneficiary did not claim to have worked for the petitioner.

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 Sonegawa*, 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. In the instant case, the petitioner has not established that it ever employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (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).

The petitioner's tax returns demonstrate its net income[6] as shown in the table below.

Tax Year	Net Income
2005	$17,111.00
2006	$17,973.00
2007	$36,584.00

Therefore, for the years 2005 through 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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

[6] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Internal Revenue Service (IRS) Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005) line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 28, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have any additional income, credits, deductions or other adjustments shown on its Schedule K for the relevant years, the petitioner's net income is found on line 21 of page one of its 2005, 2006, and 2007 tax returns.

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 petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

Tax Year	Current Assets	Current Liabilities	Calculation of Net Current Assets
2005	$217,787.00	$257,580.00	-$39,793.00
2006	$216,124.00	$50,289.00	$165,835.00
2007	$236,855.00	$47,393.00	$189,462.00

Therefore, in 2005 the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. In 2006 and 2007, the petitioner established that it had sufficient net current assets to pay the proffered wage.

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 a previously submitted, "corrected" Form 1120S establishes that the petitioner had sufficient net current assets in 2005 to pay the proffered wage. Counsel submits an Account Transcript from the IRS issued on February 11, 2010 that indicates that the tax return was filed on November 13, 2006. The transcript does not indicate that an amended or corrected 2005 Form 1120S was filed. Furthermore, the transcript does not contain the information contained on Schedule L of Form 1120S. Also on appeal, counsel submits an April 8, 2010 letter from of Texas, stating that he prepared the petitioner's 2005 Form 1120S. Finally on appeal, counsel submits an undated letter from the petitioner stating that the information contained in the transcript from the IRS is correct.

The 2005 Form 1120S submitted with the initial petition on July 16, 2007 was signed by Mr. on September 18, 2006, and was signed by the petitioner on September 23, 2006 (initial 2005 tax return). The record also contains a second 2005 Form 1120S, which was submitted in conjunction with the January 21, 2009 motion. This second copy of the 2005 Form 1120S was also

[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.

signed by Mr. on September 18, 2006, and the petitioner on September 23, 2006 (second 2005 tax return). The only differences between the initial 2005 tax return and the second 2005 tax return are on Schedule L. The initial 2005 tax return shows a current liability of $243,556 in "mortgages, notes, bonds payable in less than 1 year." On the Schedule L to the second 2005 tax return, line 17 is left blank and $243,556 is shown on line 20 as a long-term liability. The above-referenced motion contains a January 19, 2009 letter from Mr. that indicates that only $29,028 was a current liability, payable as a note mortgage payment in a year, and the remainder of the $243,556 (amounting to $214,528) should have been reflected as a long-term liability. Also submitted with that letter on motion are unaudited profit and loss statements, a balance sheet and statements of revenues and expenses for years other than 2005.

Counsel's assertion is not persuasive. The submitted IRS Account Transcript establishes only that the IRS processed the petitioner's 2005 Form 1120S on November 13, 2006. There is no evidence to establish that a corrected or amended 2005 Form 1120S was ever submitted to the IRS. Furthermore, the Schedule L to the second 2005 tax return does not reflect the purported error claimed to have been made by Mr. As noted above, Mr. indicates that $29,028 should be reflected as a current liability. However, on the second 2005 tax return, line 17 reflects zero "mortgages, notes, [or] bonds payable in less than 1 year." The full $243,556 is listed on line 20 under "Mortgages, notes, [or] bonds payable in 1 year or more." If Mr. 's assertions are correct, Line 17 should reflect $29,028 and Line 20 should reflect $214,528. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states, "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."[8] Thus, the AAO will only examine the initial 2005 tax return that was initially submitted and not the second 2005 tax return submitted on motion.

Additionally, according to USCIS records, the petitioner has filed six I-140 petitions and eight I-129 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the

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[8] A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). USCIS requires an IRS-certified copy of an amended return to establish that the amended return was actually received and processed by the IRS. The second 2005 tax return submitted by the petitioner is not a certified copy. 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)).

petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* 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 did not establish 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.

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.