

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

DATE:

MAY 22 2013

Office: NEBRASKA SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is a construction and framing business. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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).

Upon reviewing the petition, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly. On appeal, the AAO agreed with the director's determination and also determined that the petitioner had failed to demonstrate its ability to pay the proffered wage beginning on the priority date of the visa petition.

On motion, the petitioner submitted two employment letters dated April 1, 2011 and October 29, 2009, Forms W-2 for 2001 through 2007, and the petitioner's Forms 1120S tax returns for 2001 through 2008. This constitutes new facts under 8 C.F.R. § 103.5(a)(2). Therefore, the motion is granted.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issues. Therefore, on motion the issues are whether the petitioner has provided evidence to establish that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience, and whether the petitioner has established its ability to pay the proffered wage beginning on the priority date of the visa petition.

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.

On motion, counsel asserts that the AAO's decision is defective and that the employment letters submitted are sufficient to establish that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.

Contrary to counsel's claim, to be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is April 30, 2001, which is the date the labor certification was accepted for

processing by the DOL. *See* 8 C.F.R. § 204.5(d).<sup>1</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on November 18, 2009.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As noted above, the DOL certified the Form ETA 750 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The key to determining the job qualifications is found on Form ETA 750 Part 14. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the alien labor certification must involve reading and applying *the plain language* of the alien labor certification application form. *See id.* at 834. USCIS cannot

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<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

and should not reasonably be expected to look beyond the plain language of the alien labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien labor certification.

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

According to the plain terms of the labor certification in the instant matter, the applicant must have two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The beneficiary stated that he worked for the petitioner in a "carpenter training course" from October 2000 to April 24, 2001, the date he signed the labor certification. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented the following employment experience:

- [REDACTED] as a carpenter from July 1999 to May 2000.

The beneficiary does not provide any additional information concerning his employment background on the labor certification.

The petitioner submitted the following evidence:

- A letter from the office manager of [REDACTED] dated March 7, 2001, who stated that the company employed the beneficiary for one and one-half years in 1999 and 2000. This letter does not list any duties and conflicts with the beneficiary's statement on the ETA 750B that he worked for this company as a carpenter from July 1999 to May 2000 (a period of 10 months, not 18 months).
- A letter from the president of [REDACTED] dated March 29, 2001, who stated that the company employed the beneficiary from February 27, 2000 through September 8, 2000 (a period of 6 months). This letter does not list any duties and conflicts with the dates on the Form ETA 750B.
- A letter from the custodian of records of [REDACTED] dated March 29, 2001, who stated that the company employed the beneficiary as a carpenter from January 17, 2000 through February 3, 2000, and from September 13, 2000 through October 19, 2000 (a period of one month plus one month). This letter does not list any duties and conflicts with the dates on the Form 750B.
- A letter dated March 29, 2001, from the president of [REDACTED] who stated that the company employed the beneficiary from February 7, 2000 through March 24, 2000 (a period of 1½ months). This letter does not list any duties and conflicts with the dates of the Form 750B.

- A translated letter dated October 27, 2009 from [REDACTED] who stated that the beneficiary worked with him as a carpenter from January 1984 through April 1985 (a period of 15 months). This letter was updated on April 29, 2010 to include duties.
- An affidavit of the beneficiary's dated April 29, 2010 outlining his prior employment.
- A declaration of the beneficiary's dated March 30, 2010 indicating the errors made by his previous attorney.

Counsel asserts on motion that the additional employment letters are valid and should not be rejected because the employers were not listed by the beneficiary on the labor certification. Counsel further asserts that the petitioner did not think it necessary to include the additional employment history where the listed employment should be sufficient to establish the beneficiary's two years of experience as required. Counsel states that the letters accurately reflect the beneficiary's experience as a carpenter and substantially comply with the requirements of what a letter should include.

Contrary to counsel's claims, neither the petitioner nor the beneficiary indicated the existence of such employment on the Form ETA 750 or Form G-325A. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the BIA noted in dicta that the beneficiary's experience, without such fact certified by the DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. 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). The AAO notes above the inconsistencies between the letters and the other evidence of record. These inconsistencies have not been resolved on motion. Further, the declarants, with the exception of the second letter from [REDACTED] fail to specify their relation to the beneficiary, the source of their knowledge, a description of the beneficiary's job duties, and whether the beneficiary was employed full-time. Therefore, these letters are not sufficient under the regulations. 8 C.F.R. § 204.5(1)(3)(ii)(A); 8 C.F.R. § 204.5(g)(1). Moreover, the letter from the one employer mentioned by the beneficiary on the labor certification fails to specify the dates of the beneficiary's employment, the beneficiary's job title, the nature of his job duties, and the source of the declarant's knowledge.

The beneficiary failed to indicate on the labor certification application that he was employed by [REDACTED]. The only letter that describes the beneficiary's duties is that of [REDACTED] this is also the only letter that does not conflict with other evidence of record. The AAO will accept this evidence for 15 months of the beneficiary's experience. However, none of the remaining evidence establishes that the beneficiary has the remaining 9 months of experience.

The beneficiary stated on the Form ETA 750B that he worked for the petitioner in a "carpenter training course," however, the petitioner's representative stated in a letter dated April 1, 2011 that the petitioner employed the beneficiary as a "carpenter."

The beneficiary indicated on the Form ETA 750 that he was employed by the petitioner since October 2000; however, in a letter submitted on motion by the petitioner's president and dated

April 1, 2011, the declarant stated that the petitioner employed the beneficiary since 2001. The inconsistencies and contradictions cast doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The record of proceeding contains two affidavits written by the beneficiary who lists [REDACTED] as his former employers and describes his work experience as a carpenter. The beneficiary's affidavits are self-serving and do not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). The declarant also explains that although he informed the assistant at his former attorney's law office of his employment at the companies listed above, she failed to include them in his labor certification application. 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)).

In addition, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

A second issue in this matter is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On motion, counsel asserts that the evidence submitted establishes the petitioner's ability to pay the proffered wage and submits a copy of IRS Forms W-2 and the petitioner's tax returns for 2001 through 2008.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner indicates that it was established in 1996, and that it currently employs 500 workers. The proffered wage as stated on the Form ETA 750 is \$20.90 per hour based upon a 40 hour work week (\$43,472.00 per year). The priority date in this matter is April 30, 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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. Comm. 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. Comm. 1967).

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

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.

The record of proceeding contains evidence of wages paid to the beneficiary as shown in the table below:

- In 2001, the Form W-2 stated total wages of \$37,773.00 (a deficiency of \$5,699.00).<sup>2</sup>
- In 2002, the Form W-2 stated total wages of \$47,362.25.
- In 2003, the Form W-2 stated total wages of \$45,244.50.
- In 2004, the Form W-2 stated total wages of \$41,653.50.
- In 2005, the Form W-2 stated total wages of \$45,396.50.
- In 2006, the Form W-2 stated total wages of \$18,568.00.<sup>3</sup>
- In 2007, the Form W-2 stated total wages of \$5,461.00.

Although the Forms W-2 wage amounts for 2002, 2003, and 2005 are in excess of the proffered wage amount, the social security number that appears on the Forms W-2 [REDACTED] differ from the beneficiary's social security number [REDACTED] that is found on the pay stubs issued to the beneficiary by the petitioner. In addition, the record of proceeding contains a letter dated March 29, 2001 from [REDACTED] in which she states that the company employed the beneficiary as a carpenter in 2000, and lists the beneficiary's social security number as [REDACTED]. Although the inconsistencies were noted by the AAO on appeal, the petitioner fails to address this issue on motion. These inconsistencies call into question the petitioner's claimed employment of the beneficiary since 2001, and the credibility of the Forms W-2. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms W-2 as persuasive evidence of wages paid to the beneficiary.

Assuming the persuasiveness of the Forms W-2, which the AAO does not, the evidence demonstrates the petitioner's ability to pay the proffered wage in 2002, 2003, and 2005. However, for the years 2001, 2004, 2006, and 2007, the petitioner has not established that it paid the beneficiary the full proffered wage, even assuming the persuasiveness of the Forms W-2.

If, as in this case, 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

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<sup>2</sup> The petitioner also submitted a copy of pay stubs that its company issued to the beneficiary in 2000 and 2001 which contained the beneficiary's name as employee and social security number [REDACTED]

<sup>3</sup> The petitioner indicated that the wage amounts paid to the beneficiary for 2006 and 2007 were for his employment as a part-time worker.

<sup>4</sup> Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. See *Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8<sup>th</sup> Cir. 2010).

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 (1<sup>st</sup> 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:

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 proffered wage is \$43,472.00. The petitioner's 1120S<sup>5</sup> tax returns demonstrate its net income as shown in the table below:

- In 2001, the Form 1120S stated net income of \$268,530.00.
- In 2002, the Form 1120S stated net income of \$1,021,991.00.
- In 2003, the Form 1120S stated net income of -\$547,529.00.
- In 2004, the Form 1120S stated net income of \$1,257,991.00.
- In 2005, the Form 1120S stated net income of \$9,593,621.00.
- In 2006, the Form 1120S stated net income of \$3,873,389.00.
- In 2007, the Form 1120S stated net income of \$334,301.00.
- In 2008, the Form 1120S stated net income of -\$2,343,904.00.

Although the net income amounts for 2001, 2002, 2004, 2005, 2006, and 2007 exceeds the proffered wage amount, USCIS electronic records indicate that the petitioner has filed additional immigrant petitions since it was established in 1996. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would need to establish that it has the ability to pay combined salaries of the beneficiaries.

The petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). It is noted that the petitioner fails to address this issue on motion.

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<sup>5</sup> 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 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 18 of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

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 in an S corporation are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> 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 net current assets as shown in the table below:

- In 2001, the Form 1120S stated net current assets of \$827,003.00.
- In 2002, the Form 1120S stated net current assets of \$727,220.00.
- In 2003, the Form 1120S stated net current assets of -\$35,591.00.
- In 2004, the Form 1120S stated net current assets of \$795,336.00.
- In 2005, the Form 1120S stated net current assets of \$7,636,989.00.
- In 2006, the Form 1120S stated net current assets of \$4,378,685.00.
- In 2007, the Form 1120S stated net current assets of \$4,428,487.00.
- In 2008, the Form 1120S stated net current assets of \$3,122,922.00.

As noted above, although the net current asset amounts for 2001 through 2002 and 2004 through 2008 exceed the proffered wage amount, USCIS electronic records indicate that the petitioner has filed additional immigrant petitions since it was established; and therefore, the petitioner's ability to pay the proffered wage for all beneficiaries must be assessed. This issue was not addressed by the petitioner on motion.

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 and other beneficiaries 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.

The petitioner has failed to demonstrate its ability to pay the proffered wage. In addition, the beneficiary does not qualify for a visa classification as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. 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 AAO's prior decision, dated March 3, 2011, is affirmed. The petition remains denied.

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<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.