



U.S. Citizenship
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FILE: [REDACTED]
LIN 07 198 52069

Office: NEBRASKA SERVICE CENTER

Date: NOV 02 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a construction business, seeks to permanently employ the beneficiary in the United States as a civil engineer. On the petition, 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).¹ As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the Department of Labor (DOL).

As set forth in the director's September 6, 2007 denial, at issue in this case is whether the beneficiary possesses the required experience for the offered position, and whether the petitioner has the continuing ability to pay the proffered wage.

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. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. See *Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

¹Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

²The submission of additional evidence on appeal is permitted by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). On July 9, 2007, the director issued a Request for Evidence (RFE), instructing the petitioner to provide documentation establishing its ability to pay the proffered wage and that the beneficiary possessed the required experience for the offered position. When no RFE response was received by the August 20, 2007 deadline, the director denied the petition. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry is grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). On appeal, counsel

The Beneficiary's Qualifications for the Offered Position

In order to obtain classification in the requested employment-based preference category, the petitioner must establish that the beneficiary possessed the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). U.S. Citizenship and Immigration Services (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 Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires an individual with a bachelor's degree in civil engineering and five years of experience in the job offered.

The record of proceeding contains a copy of the diploma and transcript of the beneficiary's four-year bachelor's degree in civil engineering from Sardar Patel University, India. The record also contains an evaluation of the degree by [REDACTED] of Global Education Group, Inc., stating that the beneficiary's degree is equivalent to bachelor's degree in civil engineering from an accredited U.S. university.

On appeal, counsel provides a letter from [REDACTED], dated January 26, 2000. The letter states that the beneficiary had been employed as a civil engineer in India from March 1980 to January 2000. The letter, which states the name, address and title of the employer, and describes the beneficiary's duties in detail, satisfies the requirements of 8 C.F.R. 204.5(l)(3)(ii)(A).

Therefore, it is concluded that the petitioner has established that it is more likely than not that the beneficiary possesses the foreign equivalent of a bachelor's degree in civil engineering and over five years of experience as a civil engineer. Accordingly, the director's denial of the petition on this ground is withdrawn.

The Petitioner's Ability to Pay the Proffered Wage

The petitioner must also establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

claims that neither he nor the petitioner received the RFE. However, the record contains a confirmation that the RFE was successfully sent via facsimile to the petitioner at the number provided by counsel on Form I-907, Request for Premium Processing Service. Counsel asserts that the director should have sent the RFE via facsimile and mail directly to him instead of sending the RFE to the petitioner via facsimile. Although the record indicates that the director successfully sent the RFE via facsimile to the number provided by counsel, under the circumstances, the AAO will consider all evidence submitted by counsel on appeal. *Id.*

See Matter of Great Wall, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

According to the tax returns and corporate documentation in the record of proceeding, the petitioner is structured as a limited partnership with a fiscal year based on a calendar year. The proffered wage stated on the labor certification is \$65,000.00 per year. On the petition, the petitioner claimed to have a gross annual income of over \$2 million and to employ 8 workers. The petitioner also claims to have been established on April 2, 2004. The record contains a copy of the petitioner's Certificate of Filing with the Texas Secretary of State, confirming the date of establishment.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

The labor certification was originally filed by Newcrest Development, Inc. on December 9, 2002. The record contains a Certificate of Merger stating that Newcrest Development, Inc., a Delaware C corporation, was merged into the petitioner on February 22, 2007. The labor certification was subsequently approved on June 6, 2007. The DOL modified the labor certification approval, listing the petitioner as the sponsoring employer. The evidence in the record is sufficient to establish that, on February 22, 2007, Newcrest Development, Inc. was merged into the petitioner and that the petitioner assumed all of the company's rights and liabilities. The petitioner therefore established that it qualifies as a successor-in-interest to Newcrest Development, Inc. for the purposes of this petition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Further, in the analysis of whether the petitioner has the ability to pay the proffered wage, the AAO will consider the financial information of the predecessor entity, Newcrest Development, Inc., from the priority date up to the date of the February 22, 2007 merger. The petitioner's ability to pay the proffered wage is only relevant for the period following the merger.

On the labor certification, the beneficiary claimed to have worked for Newcrest Development, Inc., the predecessor entity to the petitioner, since March 2000. The record contains the beneficiary's Forms W-2, Wage and Tax Statement, issued to the beneficiary by Newcrest Development, Inc. These documents state the wages paid to the beneficiary, as shown in the table below.

<u>Year</u>	<u>Wages Paid (\$)</u>	<u>Remaining Amount (\$)</u>
2002	40,000.00	25,000.00
2003	40,000.00	25,000.00
2004	40,000.00	25,000.00
2005	40,000.00	25,000.00
2006	60,000.00	5,000.00

For the years 2002 through 2006, the beneficiary did not receive a salary equal to or greater than the proffered wage.³

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary the proffered wage during the required 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). 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. 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 sales and wage expense is misplaced. Showing that the petitioner's gross sales 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*, 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 the Service should have considered income before expenses were paid rather than net income.

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

³The record also contains copies of paychecks issued to the beneficiary by the petitioner from April 7, 2007 to June 15, 2007. The paychecks indicate that the beneficiary was receiving a gross salary of \$2,307.69 per two-week pay period, which, when annualized, amounts to \$60,000 per year. However, there is no evidence in the record that the paychecks were cashed by the beneficiary, therefore, they are not reliable evidence of wages actually paid.

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 116. “[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 priority date of the instant petition is December 9, 2002. The petition was filed on June 29, 2007. As of that date, Newcrest Development, Inc.'s 2006 tax return would have been due. The record contains Newcrest Development, Inc.'s Forms 1120-A, U.S. Corporation Short-Form Income Tax Return, for 2003 and 2004. No tax returns were provided for Newcrest Development, Inc. for 2002, 2005, or 2006.⁴ The record contains the petitioner's Forms 1065, U.S. Return of Partnership Income, for 2005 and 2006. As is explained above, the petitioner must demonstrate Newcrest Development, Inc.'s ability to pay the proffered wage from the priority date until the date of the

⁴The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). The petitioner's failure to provide this evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). If all required initial evidence is not submitted with the petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007).

merger. The petitioner's ability to pay the proffered wage prior to the date of the merger is not relevant.⁵ The submitted tax returns demonstrate Newcrest Development, Inc.'s net income as shown in the table below.⁶

<u>Year</u>	<u>Net Income (\$)</u>
2002	Not provided
2003	28,822.51
2004	736.10 ⁷
2005	Not provided
2006	Not provided

Accordingly, the petitioner only established that Newcrest Development, Inc. had sufficient net income to pay the difference between the wage paid and the proffered wage in 2003.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ If

⁵Even if the petitioner's tax returns were considered in the instant case, its 2005 federal tax return indicated net income of -\$22,762.00 and net current assets of -\$1,239,504.00; and its 2006 return indicated net income of -\$455,612.00 and net current assets of \$530,360.00. Therefore, only the petitioner's 2006 return established that it had sufficient net income or net current assets to pay the proffered wage.

⁶For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120 or Line 24 of Form 1120-A. For a Limited Partnership, USCIS considers net income to be the figure shown on Line 22 of Form 1065.

⁷Line 24 of Form 1120-A was left blank. The figure at Line 26, entitled "Taxable Income," was used instead, as the return did not list any net operating loss or special deductions on Line 25.

⁸According 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

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 for the required period, as shown in the table below.⁹

<u>Year</u>	<u>Net Current Assets (\$)</u>
2002	Not provided
2003	16,463.20
2004	6,201.30
2005	Not provided
2006	Not provided

The petitioner did not establish that Newcrest Development, Inc. had sufficient net current assets to pay the difference between the wage paid and the proffered wage.

Therefore, except for 2003, the petitioner has not established the continuing ability to pay the proffered wage as of the priority date.

The record contains the petitioner's bank statements for the period from December 30, 2006 through May 31, 2007. Counsel's reliance on the balances in the petitioner's bank account is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

The record also contains the petitioner's compiled financial statements for the years ended December 31, 2005 and December 31, 2006. 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's

salaries). *Id.* at 118.

⁹On Form 1120-A, USCIS considers current assets to be the sum of Lines 1 through 6 on Part III, and current liabilities to be the sum of Lines 13 through 14.

business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been 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 claims to have been in business since 2004 and to employ eight employees. The petitioner's 2006 tax return shows gross sales of over \$2 million. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonogawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

Thus, assessing the totality of the circumstances in this case, it is concluded that 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.