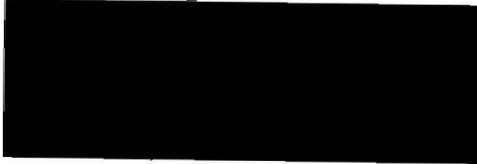




U.S. Citizenship
and Immigration
Services

PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



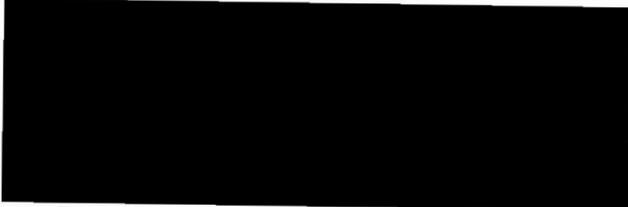
B6

File: [REDACTED] Office: TEXAS SERVICE CENTER Date: OCT 18 2007
WAC-06-012-50448

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:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (“director”), denied the immigrant visa petition.¹ The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The AAO will remand the decision back to the director for further consideration in accordance with the instructions below.

The petitioner operates a business related to custom computer configuration and fabrication, and seeks to employ the beneficiary permanently in the United States as an electrical and electronic equipment assembler (“Computer Technician”). As required by statute, the petition filed was submitted with Form ETA 9089,² Application for Permanent Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s June 1, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 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).³

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 petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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.

The petitioner must establish that its ETA 9089 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form ETA 9089 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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

¹ The petitioner initially filed its petition with the California Service Center. The petition was transferred to the Texas Service Center for decision in accordance with new procedures related to bi-specialization.

² On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 9089. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

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).

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).

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 9089 with the relevant state workforce agency on August 16, 2005. The proffered wage as stated on Form ETA 9089 is \$13.39 per hour based on a 40-hour work week, which is equivalent to an annual salary of \$27,851.20. The labor certification was approved on March 5, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on September 21, 2005. On the I-140, the petitioner listed the following information: date established: 1986; gross annual income: not listed; net annual income: not listed; and current number of employees: three.

On April 6, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit evidence of its ability to pay the proffered wage, including the petitioner's full 2004 and 2005 federal tax returns, annual reports, or audited financial statements. Additionally, the director requested that the petitioner provide copies of its W-2 Forms for all employees, and the petitioner's Forms 941 for each quarter in 2005 and 2006. The petitioner responded. Following consideration of the petitioner's response, on June 1, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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 case at hand, on Form ETA 9089, signed by the beneficiary, but not dated, the beneficiary did not list that he was employed with the petitioner. The petitioner did not submit any evidence that it employed or paid the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). From the documentation submitted, the petitioner lists only income from its business in 2005 and, thus, CIS evaluates the petitioner's net income based on line 21. In year 2004, the petitioner lists a small amount of income from other sources, and we will evaluate the petitioner's income based on its Schedule K:

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2005	\$25,038
2004	\$33,221

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in 2005, where the petitioner's net current assets are \$2,813.20 less than the proffered wage. We note that the petitioner's 2004 net current assets would be sufficient to pay the proffered wage, but the priority date is in 2005 so that the 2004 return is not directly relevant, but will be considered generally.

⁴ As the priority date is August 16, 2005, the petitioner's 2004 tax return would not be used to determine the petitioner's ability to pay from the date of August 2005 onward, but will be considered generally.

The petitioner additionally submitted Forms 941 for the quarters ending March 31, 2005, June 30, 2005, September 30, 2005, December 31, 2005, and March 31, 2006. The Forms 941 show quarterly wages paid to three employees in the amount of \$18,000, equivalent to \$72,000 for 2005.⁵ While the Forms 941 do exhibit wage payments, payments made to other workers generally cannot be considered to demonstrate the petitioner's ability to pay the proffered wage. The petitioner also submitted Forms W-2 for 2005 evidencing wages paid to other employees: \$30,000 as compensation for the corporate officer; \$24,000 to another employee, and \$18,000 to the petitioner's "manager." The petitioner's 2004 W-2 statements reflected payments to the same individuals for the same amounts. Similarly, while the Forms W-2 reflect wage payments to other workers, the W-2 Forms would not demonstrate the petitioner's ability to pay the beneficiary the proffered wage.

On appeal, counsel provides that CIS failed to consider the totality of the circumstance as provided by *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel further cites to the May 4, 2004 [REDACTED] Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo [REDACTED] in support of this premise. [REDACTED] provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary.

Counsel provides that CIS based its determination on a "detailed analysis of the petitioner's net current assets and net income. We do not challenge the Service's method of calculating the net current assets of the petitioner. However, we do assert that the petitioner does possess the ability to pay based on the overall financial health of its business."

Counsel summarizes *Matter of Sonogawa*, 12 I&N Dec. 612 that the Regional Commissioner determined that the petitioner could pay the proffered wage as the petitioner had been in business for over 11 years, and routinely earned a gross annual income of around \$100,000. However, during the year that the petition was filed, the petitioner changed business locations, paid rent in two locations for a period of time, incurred moving costs, and was unable to conduct its regular business for a period of time. The Regional Commissioner found that the petitioner could pay the proffered wage despite the petitioner's lower net income.

Counsel finds the situation in *Sonogawa* analogous to the present matter as he provides that the petitioner has been in business since 1986, and its gross annual income increased from 2004 to 2005. Further, on appeal, the petitioner provided bank statements to exhibit that the petitioner has adequate funds in its bank account to pay the proffered wage.

The petitioner submitted bank statements for the time period August 31, 2005 through April 28, 2006. First, we note that bank statements, and funds in bank accounts are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Form 1120S Schedule L and included in net current assets analysis above. The petitioner did not provide evidence to show that the funds in the petitioner's account represent funds beyond those listed on the petitioner's Forms 1120S federal tax returns.

⁵ The petitioner's 2005 tax return provides that the petitioner paid \$30,000 in compensation to officers, and \$42,000 in salaries.

If we examined the statements, the statements showed variation in the petitioner's account. The statements reflected a low balance of \$14,002.13 (as of November 30, 2005), and a high balance of \$36,483.60 (as of August 31, 2005).

In examining the totality of the circumstances, we find that the petitioner can pay the proffered wage. The petitioner is an established business in operation for over twenty years; the petitioner's gross revenues are over \$700,000 each year and show increase; the petitioner has demonstrated consistent and fairly substantial cash resources; Forms W-2 exhibit consistent wage payments to other workers; and the petitioner's net current assets were only \$2,813.20 less than the proffered wage in 2005. Examining the petitioner's circumstances in their totality, we conclude that the petitioner can pay the proffered wage.

Further, although not raised in the director's denial, the petitioner failed to adequately document that the beneficiary has the experience required for the position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁶

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS 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. 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 9089 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 9089, the "job offer" position description provides:

Responsible for installation and assembly of computer systems according to customized orders. Install and assemble networking equipment and test for reliability.

The job offered listed that the position required prior experience of: 2 years in the job offered, computer technician. The petitioner did not list any other special requirements.

On the Form ETA 9089, the beneficiary listed his relevant experience as: (1) Club One Casino, Fresno, California, from September 1, 2003 to (no end date), "Prop player;" and (2) Shenyang Fangzheng Computer Service, Shenyang, Liaoning, China, from March 1, 1995 to April 1, 1997, computer technician.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

⁶ *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [REDACTED] dated March 15, 2005;
Position title: not listed;
Dates of employment: March 1995 to April 1997;
Description of duties: "install, assemble, maintain and test of computer systems."

The letter fails to identify the beneficiary's job title, and whether he was employed on a full-time, or a part-time basis. Further, the petitioner submitted a copy of the original letter written in Chinese and a translation of the letter. The submitted translation of the beneficiary's work experience, however, does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation, which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In the present case, it is unclear who translated the document, the translator failed to certify that the translation is complete and accurate, and that he or she is competent to translate from the foreign language in question into English.

Further, the work experience that the beneficiary listed on Form ETA 9089, and verified in the letter, directly conflicts with other documents contained in the record of proceeding. The beneficiary filed an I-485 Adjustment of Status application to adjust to permanent residence based on the pending I-140 petition.⁷ On Form G-325 completed and filed with Form I-485, the beneficiary listed his prior employment as: Liaoning Liming Real Estate Company, occupation: Agent, from May 1996 to June 2001.⁸ The beneficiary signed and dated the form on March 7, 2005.⁹ The experience listed on Form G-325 conflicts with the beneficiary's listed dates of employment as a computer technician from March 1995 to April 1997.

⁷ On July 31, 2002, CIS published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485. *See*: 67 Fed. Reg. 49561 (July 31, 2002).

⁸ The form requires that the applicant list their "last five years of employment."

⁹ We note that the record contains two additional Forms G-325 completed by the beneficiary and filed with other applications. On both of the other Forms G-325, dated March 25, 2004, and September 13, 2002, the

While the beneficiary's employment might have overlapped, it would be critical for the petitioner to document that the beneficiary's two years of employment as a computer technician was full-time experience to satisfy the requirement for two prior years of experience as a computer technician before the priority date. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, February 13, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.* at 591.

The petitioner must provide reliable evidence, primary and secondary, that the beneficiary's claimed work experience is valid, and that he did not misrepresent his prior experience to obtain the labor certification. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* INA Section 212(a)(6)(c), [8 U.S.C. § 1182], regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

As the petitioner can establish its ability to pay the proffered wage, and was not afforded an opportunity to address the issue related to the beneficiary's work experience previously, we will remand the petition to the director to issue an RFE to obtain documentation that the beneficiary has the required work experience listed on Form ETA 9089. The petitioner should provide additional evidence that the beneficiary was employed abroad as a computer technician on a full-time basis, and resolve any conflict with his experience listed for the same time period as an "agent," in addition to any other documentation that the director may request. The petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which is to be certified to the AAO for review.

beneficiary lists that he was employed by Liaoning Liming Real Estate Company, occupation: Agent, from May 1996 to June 2001.