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File: [REDACTED] Office: TEXAS SERVICE CENTER
SRC-07-104-51885

Date: JUL 09 2008

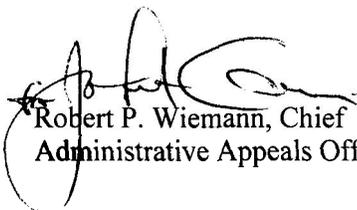
In re: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a music school, and seeks to employ the beneficiary permanently in the United States as an enrichment education teacher (“Music Instructor”). The petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s October 12, 2007 decision, the petition was denied on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage.

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).¹

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 permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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 the Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by the relevant Department of Labor processing center. *See* 8 CFR § 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 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:

¹ 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).

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 9089² with the relevant processing center on December 7, 2006. The proffered wage as stated on Form ETA 9089 is \$19.84 per hour. Based on a 40 hour work week, that amount is equivalent to \$41,267.20 per year.³ The labor certification was approved on December 21, 2006, and the petitioner filed the I-140 on the beneficiary's behalf on February 15, 2007. The petitioner represented the following information on the I-140 Petition: date established: 1977; gross annual income: \$475,600; net annual income: "approx. \$1,000;" and current number of employees: seven.

On August 1, 2007, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit additional documentation regarding the petitioner's ability to pay for the year 2006 in the form of either federal tax returns, audited financial statements, or annual reports. Further, the RFE requested that the petitioner provide evidence of wages paid if the petitioner employed the beneficiary. The petitioner responded. Following review, the director denied the petition on October 12, 2007 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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. On Form ETA 9089, signed by the beneficiary on January 12, 2007, the beneficiary listed that she has been employed with the petitioner since September 2003. The petitioner provided the following evidence of wage payment to the beneficiary: 2006 W-2 statement, which showed wages paid in the amount of \$28,841.45; and Forms 941 showing quarterly wage payments to the beneficiary in the amount of \$9,548.01 for the first quarter of 2007; \$8,632.58 in the second quarter of 2007; and \$3,294.89 in the third quarter, exhibiting 2007 wages for three quarters in the amount of \$21,475.48.⁴

Wages paid to the beneficiary will be considered as partial payment of the proffered wage, although, the wages paid, based on a 40-hour work week would be insufficient alone to document the petitioner's ability to pay the proffered wage.

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 750. 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 On appeal, the petitioner asserts that the position is based on 30 hours per week, and 42 weeks a year. This issue will be addressed later in the decision.

⁴ The petitioner also provided a copy of a pay statement for the time period ending June 23, 2007, which showed earnings in the amount of \$1,355.43 and year-to-date earnings of \$18,180.59 as of June 23, 2007.

The petitioner states on appeal that the position is for 30 hours per week, 42 weeks per year, and that therefore, the wage would be equivalent to \$24,998 per year.⁵

20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself." If full-time is interpreted as 40 hours per week, 52 weeks a year, then the petitioner would be required to pay the beneficiary \$41,267.20, or not less than \$36,108.80 based on 35 hours per week. In the event of a 35 or 40 hour work week, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage based on prior wage payment.

The petitioner submitted a letter from its director. The petitioner's director states that the beneficiary has been employed with the petitioner for four years in H-1B status. Further, the director outlines:

Perhaps the problem arose because we did not detail sufficiently her salary. Because our school year is on a ten-month schedule, her contractual salary is just \$28,500, which is more than the required prevailing wage. [The beneficiary's] wage is based on a ten-month, thirty hour per week schedule. In fact, all our faculty salaries are calculated in this manner, which of course, limits our overall payroll

In a Department of Labor Field Memo, No. 48-94, from Barbara A. Farmer, Administrator, Office of Regional Management, on Standards to Determine Full-Time Employment, dated May 16, 1994, the memo provides:

In response to questions as to how many hours of work must be scheduled in a week for employment to be considered "full-time work," the Division of Foreign Labor Certifications has consistently provided the following guidance with respect to job opportunities involved in nonagricultural labor certification cases:

The Department determines whether a job is full-time or part-time by looking at the prevailing hours of work in that occupation. We have found that full-time work in most occupations ranges from 35 to 40 hours per week. Therefore, we consider a job offer full-time if the week hours or work are within this range. If the hours are less than 35, the employer must document that fewer hours are prevailing for full-time employment in the occupation and area of employment.

Similarly, a September 8, 1993 letter from Robert A. Schaerfl, Director, U.S. Employment Service regarding the definition of full-time employment for nonagricultural workers provides the same information.

⁵ The petitioner's response on appeal raises another issue, that the petitioner will not employ the beneficiary on a full-time basis. 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.

A position for a teacher is generally considered full-time employment despite a ten-month schedule based on payment of wages year round. *See Matter of Dearborn Public Schools*, 91-INA-222 (BALCA Dec. 7, 1993);⁶ *see also in contrast Matter of Police Athletic League*, 2004-INA-129 (BALCA Dec. 5, 2005), where a position for an adult education teacher was found not to be full-time.

In examining standards for the industry, the National Compensation Survey: Occupational Wages in the United States, dated June 2005, published by the U.S. Department of Labor, U.S. Bureau of Labor Statistics (“BLS”) in August 2006, Bulletin 2581 provides in Table 2.1 that full-time teachers work the following hours: prekindergarten and kindergarten mean weekly hours: 38.3; elementary school teachers: 36.6; secondary school teachers: 37; vocational and educational counselors: 37.6; art drama and music teachers (although listed under teachers, college, and university): 38.5. Accordingly, the mean weekly hours for the occupation and area of employment fall between 35 to 40 hours per week in accordance with the Farmer Memo. Therefore, the petitioner’s offer for employment of 30 hours per week would not be considered full-time employment.⁷

The wage will therefore be calculated on the basis of 35 to 40 hours, which would equate to \$41,267.20 based on 40 hours, or not less than \$36,108.80 based on 35 hours. Therefore, based on the wages paid to the beneficiary, it cannot demonstrate its ability to pay on prior wage payments alone.

Next, we will examine the net income figure reflected on the petitioner’s federal income tax returns. 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 petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner’s ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005 ⁸	\$1,635

⁶ In contrast to positions for gardeners, groundskeepers and similar jobs, which are only performed for ten months of the year or less, and, are, therefore, considered seasonal rather than permanent, full-time employment. *See Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29 1993) (en banc).

⁷ As the petitioner’s offer is not for full-time employment in accordance with the labor certification, and as indicated on Form I-140, the petition should have been denied on this basis as well.

⁸ The petitioner’s 2005 tax return reflects filing for the time period of July 1, 2005 to June 30, 2006. Counsel indicated in her response to the director’s RFE that, as of September 10, 2007, the petitioner’s 2006 federal tax return had not yet been completed as the fiscal year had not ended.

Based on the above, the petitioner's net income would not allow for payment of the beneficiary's proffered wage based on a full-time schedule, even if we added the petitioner's net income to the wages paid to the beneficiary.

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.⁹ 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, or, if filed on Form 1120-A, on Part III. 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, thus, they would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net Current Assets</u>
2005	\$5,755

Similarly, the petitioner's net current assets, separately, or combined with the wages paid to the beneficiary, would be insufficient to demonstrate the petitioner's ability to pay the full-time proffered wage.

On appeal, the petitioner submitted a letter from its certified accountant, which stated that the petitioner had not yet filed its 2006 Form 1020 based on its tax filing year. The accountant did, however, provide a summary of the petitioner's financial activity for the three prior years, including the time periods July 1, 2003 through June 30, 2004; July 1, 2004 through June 30, 2005; and July 1, 2005 through June 30, 2006.

As the priority date is December 7, 2006, the petitioner's income prior to 2006 would not demonstrate the petitioner's ability to pay from 2006 onward, but will be considered generally.¹⁰ The report generally shows that the petitioner's gross receipts have been consistent and increased about \$10,000 each year. The summary further exhibits that the petitioner had negative net income for the time period July 1, 2003 through June 30, 2004 (-\$15,857), and net income of \$8,124 for July 1, 2004 through June 30, 2005.

On appeal, counsel states that the petitioner has employed and paid the beneficiary, and further submitted evidence of positive net income after payment of the beneficiary's wages. The petitioner must demonstrate that it has paid the beneficiary the proffered wage, or that it has sufficient net income or net current assets to pay the proffered wage. Paying the beneficiary an amount less, or having some net income, but insufficient net income to pay the proffered wage, is not enough.

⁹According 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.

¹⁰ 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 summary is a compilation, and, therefore, would not meet the requirements of 8 C.F.R. § 204.5(g)(2).

Counsel states that the “prevailing wage” for the position is \$12.65 per hour, and that if the beneficiary worked 40 hours, 52 weeks per year that her annual salary would be \$26,312 per year. She further states that the beneficiary was paid at a rate higher than the “prevailing wage.”

Form ETA 9089 reflects that the Level II prevailing wage for SOC/O*NET Code 25-3021.00, Enrichment Education Teacher, in the Albany, New York area is \$12.65 per hour. The petitioner listed the “offered wage” to be paid to the beneficiary as \$19.84 per hour. DOL certified Form ETA 9089 with the petitioner’s offered wage of \$19.84 to be paid to the beneficiary. As the petition is for full-time employment, the annual salary would equate to \$41,267.20, or not less than \$36,108.80 based on 35 hours per week. This is the amount that the petitioner is required to pay the beneficiary. As counsel notes, the petitioner could have offered the beneficiary a wage rate of \$12.65. However, it did not. Accordingly, as the Form ETA 9089 has been certified at the higher rate, the petitioner cannot now amend the rate of pay to a lower rate to show that it can pay the proffered wage. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Counsel states that the petitioner is well-established, employs thirteen employees, and that it regularly meets its payroll. The petitioner’s director states that, “we are more than able to handle her salary and those of our entire faculty, as we have done for the past 30 years.”

As the petitioner’s director also states above, its payroll is factored on 30 hour work weeks. The petitioner has not demonstrated that it can pay the beneficiary the proffered wage on a full-time basis.

Based on the foregoing, the petitioner has failed to establish its ability to pay the proffered wage. Further, the petition may also be denied as it is not for full-time employment in accordance with 20 C.F.R. § 656.3. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.