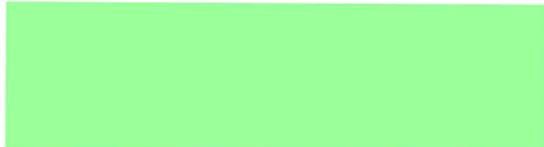




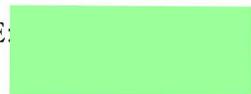
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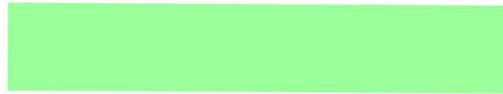


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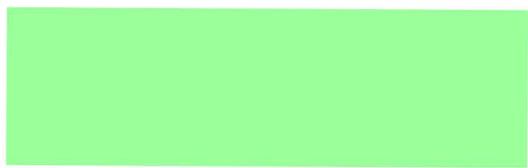


IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director.

The petitioner is a architectural design firm. It seeks to employ the beneficiary permanently in the United States as a architectural project captain. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL) (labor certification), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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.

As set forth in the director's September 18, 2013 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on May 11, 2012. The proffered wage as stated on the ETA Form 9089 is \$87,068.80 per year. The ETA Form 9089 states that the position requires a master's degree in architecture or foreign equivalent, as well as [REDACTED],

¹ Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The record indicates the petitioner is structured as a limited liability partnership (LLP) and filed its tax returns on IRS Form 1065, U.S. Return of Partnership Income.³ On the petition, the petitioner claimed to have been established in 2006 and to currently employ four workers. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on October 31, 2012, the beneficiary claimed to have worked part-time (28 hours per week) for the petitioner as an architectural designer.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967).

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner submitted IRS Forms W-2, Wage and Tax Statements, it issued to the beneficiary in 2012 and 2013, demonstrating that it employed and paid the beneficiary as detailed in the table below.

	<u>Wages Paid</u>	<u>Balance of Proffered Wage</u>
2012	\$17,201.44	\$69,867.36
2013	\$39,904.96	\$47,163.84

² 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).

³ An LLP is a partnership in which some or all of the partners (depending on the jurisdiction) have limited personal liability for certain partnership obligations.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

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. *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).

The record before the director closed on August 13, 2013 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2012 federal income tax return is the most recent return available. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2012, the petitioner's IRS Form 1065 stated net income of \$226,780.⁴

The director, in error, relied upon the figure on Line 22 of page one of the petitioner's 2012 Form 1065 (-\$43,251), rather than the correct figure on Schedule K, which is above the proffered wage. Therefore, for the year 2012, the petitioner established that it had sufficient net income to pay the proffered wage.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary and its net income.

Upon review of the record, we have determined, however, that the director did not fully consider whether the beneficiary meets the education and experience requirements for the proffered position as set forth on the labor certification. Therefore, we will remand the case to the director for further action.

The petitioner must establish that the beneficiary possessed all 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, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 *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).

⁴ For a limited liability partnership, where the LLP's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's IRS Form 1065, U.S. Return of Partnership Income. However, where the LLP 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 or additional credits, deductions or other adjustments, net income is found on page 5 (2008-2012) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed May 21, 2014) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K for has relevant entries for additional income and other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax return.

In the instant case, the labor certification states that the offered position requires a master's degree in architecture or foreign equivalent, as well as "[REDACTED]." On the labor certification, the beneficiary claims to qualify for the offered position based on a master's degree in architecture from [REDACTED] Iran, completed in 2000. The record contains a copy of the beneficiary's master's degree in architectural engineering and transcripts from [REDACTED], Iran, completed in 2000.

The record also contains an evaluation of the beneficiary's degree from [REDACTED] dated March 2007. Mr. [REDACTED] concludes that the beneficiary's master's degree in architectural engineering from [REDACTED] is equivalent to a U.S. master of science degree in architectural engineering.

The ETA Form 9089 states that the proffered position requires a master's degree or foreign equivalent in architecture. No alternate field of study is accepted. The beneficiary's master's degree is in architectural engineering and not architecture, the field required by the Form 9089. The evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

The occupation of the offered position is determined by the DOL and its classification code is notated on the labor certification. The DOL uses the O*NET occupational classification system.⁵ O*NET incorporates the Standard Occupational Classification (SOC) system,⁶ which is designed to cover all occupations in the United States.⁷ In the instant case, the DOL categorized the offered position of "architectural project captain" under the O*NET-SOC code of 17-1011, "Architects, Except for Landscape and Naval."

The job duties of the proffered position of architectural project captain, as listed on the ETA Form 9089, are as follows:

Produce project construction documents including architectural detailing;
interface with project consultants on technical aspects of construction documents.

These job duties appear to be that of an architect and suggest management of architectural projects by the beneficiary. Pursuant to the Architects Practice Act (Cal. Bus. & Prof. Code §5500), architects and the practice of architecture in California requires a license. The record does not demonstrate that the beneficiary possesses a license to practice architecture in California. The petitioner should provide

⁵O*NET, located at <http://online.onetcenter.org>, is described as "the nation's primary source of occupational information... containing information on hundreds of standardized and occupation-specific descriptors." <http://www.onetcenter.org/overview.html> (accessed July 21, 2014).

⁶<http://www.onetcenter.org/taxonomy.html> (accessed July 21, 2014).

⁷<http://www.bls.gov/soc/socguide.htm> (accessed July 21, 2014)(relating to the 2000 SOC); <http://www.bls.gov/soc/home.htm> (accessed July 21, 2014)(relating to the 2010 SOC).

evidence that the proffered position does not require licensure, such as an opinion letter from the California Architects Board, or that the beneficiary is licensed. If the position does not require a license, the petitioner should also demonstrate that, when recruiting for the proffered position in support of the labor certification, it notified U.S. workers that it would accept unlicensed architects for this position.

In view of the foregoing, the director's decision will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.