U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 01 2008

SRC 07 040 52170

IN RE: Petitioner:
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:

SELF REPRESENTED

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, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an office relocation/moving company with a document imaging section. It seeks to employ the beneficiary permanently in the United States in its document imaging section as a computer scanner operator. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the Department of Labor. 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 2005 priority date of the visa petition. The director also determined that the petitioner also had not establish the beneficiary had the ten years of work experience stipulated on the ETA Form 9089, because the beneficiary acquired this experience prior to the issuance of his baccalaureate degree in 2003. The director 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 May 17, 2007 denial, the two issues in the director's decision are whether or not the petitioner has the ability to pay the proffered wage as of the 2005 priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the petitioner established that the beneficiary is qualified to perform the duties of the proffered position.

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Service].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor (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 Form ETA 9089 Application for Permanent Employment Certification as certified by

the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant matter, the Form ETA 9089 was received by DOL on November 30, 2005. The proffered wage as stated on the Form ETA 9089 is $17.51 an hour or $36,420.80 per year. The Form ETA 750 states that the position requires a bachelor's degree in computer engineering and 120 months of experience in the proffered job.

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). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.[1]

Relevant evidence submitted on appeal includes a statement by [redacted], the petitioner's manager of its document imaging section. [redacted] states the petitioner submitted its annual reports for 2005 and 2006 to the record, but that perhaps the petitioner did not understand the director's instruction in his Request for Further Evidence dated March 6, 2007 with regard to the needed documentation[redacted] submits the petitioner's federal tax return, Form 1120S, U.S. Income Tax return for an S Corporation, for tax year 2006 and a document entitled "Quirk, Inc. Financial Statements Year Ended December 31, 2005." An accountant's Review Report prepared by [redacted], Certified Public Accountants, Fort Lee, New Jersey is included in this document. [redacted] also submits the beneficiary's W-2 Wage and Tax Statement for tax years 2005 and 2006. These documents indicate the petitioner paid the beneficiary $30,488.74 in tax year 2005, and $35,150.82 in 2006.

In response to the director's RFE, [redacted] Archive Manager, submitted a cover letter dated March 19, 2007 and copies of the beneficiary's W-2 statements for 1994 and 2006 that indicated he earned $8,987.74 in 1994 and $35,150.82 in 2006. The petitioner also submitted a copy of the beneficiary's electronic W-2 document for 2006 that indicates the beneficiary's gross pay in 2006 was $36,236.79 and that the beneficiary's gross pay was reduced by his contribution to the petitioner's Cafeteria Plan to $35,150.82.[3] In his cover letter, Mr. [redacted] stated that the beneficiary began working for the petitioner in 1994, and [redacted] explained the beneficiary's current job duties. The petitioner also submitted a two page document from the New Jersey Division of Revenue entitled "On-line Corporate Annual Report." The first page is the filing confirmation for a report on the petitioner for the years 2005 and 2006. The second page is subtitled "Step. 6: Review Information Entered." This page lists the petitioner's name, registered agent, main business address and officer/director information.

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[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).

[2] The AAO did not find the petitioner's annual reports for 2005 and 2006 in the record, although the request for an online corporate annual report search is in the record.

[3] For purposes of these proceedings, the AAO will utilize the beneficiary's 2006 gross pay in its consideration of the petitioner's ability to pay the proffered wage.

The record contains another letter from [redacted] dated November 29, 2007, in which he states the beneficiary is the current manager of Quirk Imagining Center and helped the company recover $89,000 in hidden time sheets from a disgruntled former manager. [redacted] states that the beneficiary is a vital asset to the petitioner. The record reflects that [redacted] with his November 2007 letter also submits a document identified as the petitioner's presentation to a client in which the petitioner traced its business operations from 1902 as a moving company to its present day business operations involving office relocations and document imagining and archives. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on June 12, 1902. The petitioner indicated a gross annual income of $2,000,000, and a net annual income of $350,000, and that it currently employed 40 workers. On the Form ETA 9089 signed by the beneficiary on November 10, 2006, the beneficiary claimed to have worked for the petitioner from February 15, 1994 to November 29, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, the petitioner submits its reviewed financial statement for tax year 2005. However, 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 are reviewed statements, as opposed to audited statements. The unaudited financial statement that counsel submitted with the petition is not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted the beneficiary's W-2 Forms for tax years 1994, 2005, and 2006. The beneficiary's wages as of 1994 are not dispositive in these proceedings, as the priority date for the petition is 2005. Therefore the AAO will not comment further on the beneficiary's 1994 wages. With regard to the wages paid to the beneficiary in tax years 2005 and 2006, the petitioner has not established it paid the beneficiary wages

that were equal to or greater than the $36,420.80 proffered wage. The petitioner cannot establish it had the ability to pay the proffered wage through the wages it paid to the beneficiary as of the 2005 priority date based on the beneficiary's wages. Therefore, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of $36,420.80 from either its net income or net current assets in tax years 2005 and 2006.

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, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang,* 719 F. Supp. at 537.

As previously stated, the record does not contain the petitioner's 2005 tax return. Therefore the AAO cannot analyze whether the petitioner's 2005 net income was sufficient to pay the difference between the beneficiary's actual wages and the proffered wage. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $36,420.80 per year from the priority date:

- In 2006, the Form 1120S stated a net income[4] of $13,016.

[4]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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed

Therefore, for the tax year 2006, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages of $36,236.79 and the proffered wage of $36,420.80, namely, $184.01. Thus, the petitioner established its ability to pay the proffered wage in tax year 2006. However, the petitioner cannot establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2005, the year of the petitioner's priority date.

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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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, CIS 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.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. With regard to the 2005 priority year, since the petitioner did not submit its 2005 tax return to the record, the petitioner cannot establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage, namely, $5,832.06.

Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner identified on the instant I-140 petition had not 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, or its net income or net current assets, except for tax year 2006.

As previously stated, the AAO may also consider the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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

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March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for tax years 2006, the petitioner's net income is found on Schedule K, line 18 for tax year 2006.

[5]According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the instant petition, the petitioner has been in business since 1902. The petitioner's website at www.getquirke.com (accessed on September 16, 2008) established that the company celebrated its 100th year of business in 2002. On the initial petition, the petitioner indicated it had 40 workers and the petitioner's 2006 tax return reflects salaries and wages (line 8 of Form 1120S) of $326,974, and cost of labor expenses (Line 3, Schedule A) of $1,079,321. The petitioner's tax return also reflects subcontracting costs of $116,710 as stated on Statement E, Line 5, Other Costs, Schedule A. The petitioner's longevity and 2006 financial figures do provide some support to the petitioner's being a viable business. However, the petitioner provided no explanation for why it did not submit its 2005 tax return to the record. The petitioner's assertion on appeal with regard to the beneficiary's involvement in revealing bad business practices cannot be concluded to outweigh the lack of evidentiary documentation with regard to the petitioner's ability in the priority year 2005 to pay the proffered wage from the day the Form ETA 9089 was accepted for processing by DOL. The regulation 8 C.F.R. § 204.5(g)(2) clearly requires evidence of the ability to pay at the priority date and continuing. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO will now address the second issue raised in the director's decision, namely, the beneficiary's qualifications to perform the duties of the proffered position.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). As previously stated, the Form ETA 9089 was accepted on November 30, 2005. On appeal, the petitioner submits no further evidence with regard to the beneficiary's qualifications. With the initial petition, the petitioner submitted a copy of the beneficiary's diploma from County College of Morris dated May 27, 1999 for an Associate's Degree in Applied Science and the beneficiary's diploma from the New Jersey Institute of Technology dated January 24, 2003. This second diploma indicates that the beneficiary earned a bachelor of science in engineering technology, computer technology option, from the Newark College of Engineering.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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, 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).

The ETA Form 9089, Part H set forth the minimum requirements for the position of computer scanner operator. The proffered position requires a bachelor's degree in computer engineering and 120 months of experience in the job offered. Part H Item 8 indicates that the employer will not accept an alternate combination of education and experience as an alternative. Item 14 of Part H reflects specific skills or other requirements as follows: "The ideal candidate must be familiar with DPUscan and Xscan32 user interface, must know VPN, DIACOM usage. The candidate must have 10 [ten] years experience in document digital imagining. Must be willing to work weekends and make emergency deliveries."

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a bachelor's degree in computer engineering with four years of relevant education completed at the New Jersey Institute of Technology (NJIT), Newark, New Jersey. In corroboration of the ETA Form 9089, the petitioner provided the beneficiary's Bachelor of Science degree from NJIT and from County College of Morris, with no transcripts for either institution.

The beneficiary set forth his credentials on Form ETA-9089 and signed his name under a declaration that the contents of Sections J and K were true and correct. In Section K, Alien Work Experience, the beneficiary represented that he had worked for EBI Medical Systems, Inc. Parsippany, New Jersey, from March 14, 1999 to January 20, 2001 for 24 hours a week, as technical support, MIS. The beneficiary also represented that he had worked for Rumarson Technologies, Inc., Union, New Jersey, from May 22, 1995 to August 11, 1999, for 24 hours a week, as a computer technician. Finally the beneficiary represented that he had worked 40 hours a week for the petitioner from February 15, 1994 to November 29, 2005 as a computer scanner operator. In an attachment, the beneficiary's duties were described as similar to those posted on various job centers in 2005, namely: "The scanner operator is responsible to maintain two commercial 1 scanners,. 1)DPU scan, and 2) X-scan32 for X-rays." The job description explains the difference between the two scanners, and added that "in the multi media part of the business, the scanner operator will use Avermedia software to convert video tapes to DVDs for our customers."

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (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.

The AAO first notes that the director's statement in her decision that the beneficiary's 120 months of work experience had to be completed after the beneficiary's graduation from the New Jersey Institute of Technology in 2003 is incorrect. The petitioner must demonstrate that, on the 2005 priority date, the beneficiary had the qualifications stated on its Form ETA 9089, Application for Permanent Employment Certification, as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Therefore the beneficiary had to possess both the requisite U.S. baccalaureate degree in computer engineering and the requisite ten years of work experience prior to the 2005 priority date. Thus the beneficiary's work experience prior to the 2005 priority date is relevant to these proceedings.

The regulations identified above state that the petitioner must provide evidence that establishes the beneficiary has the education, training or work experience stipulated on the labor certification application. In the instant petition, the petitioner has not submitted a specific letter of work verification to confirm that the beneficiary performed the specific scanning duties outlined on the ETA 9089 for the requisite ten years. For example, in the cover letter submitted with the petitioner's response to the director's RFE, [redacted] described the beneficiary's current duties and did not specify identify the specific scanning duties outlined in the ETA 9089. Further the AAO notes that the beneficiary's salary in 1994 of $8,987.74 for a job that the petitioner states began in February 1994 suggests that beneficiary worked for the petitioner on a part time basis during that year.[6] The AAO also notes that during several parts of the beneficiary's employment history documented on the ETA 9089, he worked for the petitioner for 40 hours a week, worked a second job for 24 hours a week, and also pursued a bachelor's degree, which suggests that perhaps the beneficiary worked less than fulltime for the petitioner during the period 1995 to 2005. The AAO finds that the record does not contain sufficient evidence, such as more complete employment records and/or more explicit details from the petitioner as to the beneficiary's work duties from 1994 to 2005, to establish the beneficiary's fulltime employment with computer scanner operator duties for ten years, as stipulated on the ETA 9089.

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.

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[6] The AAO does acknowledge that tax year 2004 is prior to the stipulated ten years of experience required by the ETA 9089, and that if the beneficiary worked fulltime for the petitioner from 1995 to 2005, he could have fulfilled the work experience requirements listed on the ETA 9089.