U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 16 2009

SRC 08 069 51342

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed a motion to reopen and reconsider the director's decision. The director granted the motion and found that the grounds originally stated in the denial had been overcome. However, the director denied the petition on other grounds. The petitioner then filed an appeal of the director's decision. The director erroneously treated the appeal as a motion to reopen, which the director denied. The director's decision treating the appeal as a motion will be withdrawn. However, the appeal will be dismissed.

The petitioner is a metal framing and drywall company. It seeks to employ the beneficiary permanently in the United States as a drywall installer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director initially 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. The director denied the petition accordingly. The petitioner filed a motion to reopen and reconsider the director's decision along with additional evidence. The director issued a decision on November 13, 2008, finding that the evidence submitted by the petitioner established its ability to pay the proffered wage. However, the director found that the petitioner had not demonstrated that the beneficiary had the qualifications stated on the ETA Form 9089 as certified by the DOL and submitted with the instant petition. The director denied the petition accordingly.

The petitioner filed an appeal of the director's decision on December 12, 2008. The director erroneously treated the appeal as a motion and, on January 8, 2009, denied the petitioner's "motion." The petitioner clearly indicated on the Form I-290B, Notice of Appeal or Motion, that it was filing an appeal of the director's decision. Therefore, the Administrative Appeals Office (AAO) had jurisdiction over the appeal. As the director did not have jurisdiction to issue an adverse decision on the appeal filed by the petitioner, the director's decision of January 8, 2009 will be withdrawn.

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 will exercise its *de novo* review in its consideration of the entire record of proceeding in this matter.

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.

In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the alien 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 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 an ETA Form 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).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the 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 (Act. Reg. Comm. 1977).

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.

In the instant case, the ETA Form 9089 states that the position requires two years of experience in the job offered. The ETA Form 9089 indicates that the beneficiary was employed as a drywall installer by [redacted] from July 1, 1998 to August 30, 2001.

In support of this appeal the petitioner has submitted a letter from [redacted], owner of [redacted] The letter confirms that the beneficiary was employed by [redacted], Inc. from July 1998 until August 2001 as a full-time drywall installer.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The letter submitted by the petitioner is sufficient to meet that burden. The petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position with two years of experience in the job offered.

As noted above, the director, in his November 13, 2008 decision, found that the petitioner had established its ability to pay the proffered wage. The director based his decision on the evidence submitted by the petitioner in support of its motion to reopen and reconsider. Specifically, the evidence submitted by the petitioner included the following: partial copies of the petitioner's corporate tax returns for 2005 and 2006,[1] a copy of the Wage and Tax Statement issued to the beneficiary by the petitioner for the year 2007, copies of the petitioner's payroll records from April 26, 2007 to May 23, 2007 and from August 28, 2008 to October 22, 2008, copies of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2006 and 2007, and copies of pay stubs issued to the beneficiary from October 26, 2006 to October 22, 2008. For the reasons discussed below, the AAO finds that this evidence is insufficient to establish the petitioner's ability to pay the proffered wage. Therefore, the director's decision regarding the petitioner's ability to pay the proffered wage will be withdrawn, and the petition will be denied.

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.

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 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 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on May 18, 2007. The proffered wage as stated on the ETA Form 9089 is $17.02 per hour ($35,401.60 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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.

[1] The priority date in this case is May 18, 2007, the date that the ETA Form 9089 was accepted for processing by the DOL. Therefore, the petitioner is not required to establish its ability to pay the proffered wage in 2005 or 2006. However, the information contained in these returns will be considered generally in determining the petitioner's ability to pay the proffered wage.

Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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 a copy of the 2007 W-2 Wage and Tax Statement issued to the beneficiary. The W-2 Wage and Tax Statement shows that the petitioner paid the beneficiary $33,128.75 in 2007. The W-2 statement exhibits partial payment of the proffered wage to the beneficiary in 2007. Since the proffered wage is $35,401.60 per year, the petitioner must establish that it had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is $2,272.85.

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. 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 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 USCIS 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. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner did not submit a tax return for 2007.[2] The petitioner also failed to submit audited financial statements or annual reports. *See* 8 C.F.R. § 204.5(g)(2). Therefore, the petitioner has failed to establish that it had sufficient net income to pay the proffered wage in 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] 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. As noted above, the petitioner did not submit a tax return for 2007 or any other required evidence. Therefore, the petitioner has not established that it had sufficient net current assets to pay the proffered wage in 2007.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage in 2007 through wages paid to the beneficiary, net income, or net current assets.

Counsel stated in her brief in support of the motion to reopen that the petitioner's ability to pay had been established based on the "totality of the circumstances." *See Matter of Sonegawa,* 12 I&N Dec. 612. The decision in *Sonegawa* related to a petition filed during uncharacteristically unprofitable or difficult years 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 $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in 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.

---

[2] As noted above, the record contains a copy of the petitioner's corporate tax returns for 2005 and 2006. However, as the priority date is May 18, 2007, the petitioner is not required to establish its ability to pay the proffered wage in 2005 or 2006. In any event, the petitioner's tax returns from 2005 and 2006 did not show sufficient net income to pay the proffered wage, as the net income was $8,719.00 in 2005 and $5,606.00 in 2006.

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

In this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner did not establish a pattern of profitable or successful years, that 2007 was uncharacteristically unprofitable or difficult for some reason, or that it has a sound business reputation. Instead, as noted above, the record is entirely insufficient to establish eligibility for the benefit sought. The petitioner has not established that it has the ability to pay the proffered wage.

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.