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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 28 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. 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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the immigrant visa petition. The director denied the petition after subsequently reopening the matter and serving the petitioner a notice to rebut the ground of the intent to deny. The director certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed and the petition will remain denied.

The petitioner is a digital document equipment retailer. It seeks to employ the beneficiary permanently in the United States as a high volume document specialist. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089) approved by the Department of Labor (DOL), accompanied the petition. After consideration of the response to the director's self-motion to reopen notice, the director determined that the petitioner failed to establish its continuing ability to pay the proffered wage and the beneficiary's qualifications for the proffered position. Accordingly, the petition was denied.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence properly submitted in the record.

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 first issue in the director's July 21, 2010 decision is whether or not the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by 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 January 5, 2006. The proffered wage as stated on the ETA Form 9089 is $13.78 per hour ($28,662.40 per year).

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, U.S. 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 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. The petitioner did not claim to have employed the beneficiary and did not submit any documentary evidence showing that it paid the beneficiary during the relevant years from the priority date. The record contains the petitioner's Form 941, Employer's Quarterly Federal Tax Return. While the Form 941s reflect the amounts the petitioner paid its employees as salaries and wages every quarter, they do not show that the petitioner paid the instant beneficiary any compensation during the relevant years. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Simply showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record contains the beneficiary's W-2 form for 2009 issued by [redacted]. Counsel asserts that the print-out from the company's website shows that the petitioner joined the [redacted] family as of April 26, 2007, as a subsidiary of [redacted] and is essentially the same company. However, the record contains no Certificate of Merger or Agreement and Plan of Merger filed with the State of Florida showing that the petitioner was merged into [redacted] on April 26, 2007, and that Sharp assumed all of the petitioner's rights and liabilities. The language in the website that "As of April 26, 2007 [redacted] joined the [redacted] family" is not sufficient to establish the successor-in-interest status for Sharp. Furthermore, it is noted that the same website states that [redacted] is one of the largest independent [redacted] digital document equipment providers in the United States." The plain meaning of the language implicates that the petitioner is not a subsidiary of [redacted] but an independent provider of [redacted] products. The petitioner therefore failed to establish that Sharp qualifies as a successor-in-interest to the petitioner for the purposes of this petition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Accordingly, the AAO cannot consider wages that Sharp paid the beneficiary in 2009 as wages paid by the petitioner in determining the petitioner's ability to pay the proffered wage. In addition, wages paid in 2009 could not establish the petitioner's ability to pay the proffered wage for the years of 2007 and 2008. Moreover, if [redacted] had been proved to qualify as a successor-in-interest to the

petitioner, it must establish its ability to pay the proffered wage as of the merger date or the date of successor-in-interest status established and continuing to the present and also establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Therefore, the petitioner failed to establish its continuing ability to pay the proffered wage through the examination of wages actually paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the proffered wage from the year of the priority date to the present.

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). 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 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.

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 at 116. "[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* at 537 (emphasis added).

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.[1] 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.

The record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns, or audited financial statements, for 2007 through the present to establish the petitioner's or its successor-in-interest's ability to pay the proffered wage. The record before the director closed on May 3, 2010 with the receipt by the director of the petitioner's submissions in response to the director's service motion to reopen. As of that date the petitioner's federal tax returns for 2007 through 2009 should have been available. However, the petitioner did not submit its tax returns for these years, nor did counsel explain why the tax returns were not submitted. 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 petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its continuing ability to pay the proffered wage because it failed to submit regulatory-prescribed evidence for these relevant years.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly indicated in the notice by the director, the petitioner declined to provide any evidence to establish its ability to pay the proffered wage, such as annual reports, tax returns or audited financial reports for 2007 through 2009. The annual reports, tax returns or audited financial statements would have demonstrated the petitioner's net income or

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[1] 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.

net current assets and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). 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 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, counsel failed to submit sufficient evidence to establish that [redacted] qualifies as a successor-in-interest to the petitioner, and failed to demonstrate that the petitioner paid the beneficiary the full proffered wage from the priority date to the present, and failed to submit regulatory-prescribed evidence to demonstrate that the petitioner had sufficient net income to net current assets to pay the beneficiary the proffered wages for 2007 through 2009. Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL in 2007, the petitioner failed to establish its continuing ability to pay the proffered wage for the years 2007 through 2009. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

The second issue in the director's decision is whether the petitioner has demonstrated that the beneficiary had the qualifications stated on its ETA Form 9089 prior to the priority date.

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).

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The underlying ETA Form 9089 specifically requires 24 months (two years) of experience **in the job offered** (emphasis added) and the proffered position in this matter is high volume document specialist for which DOL designs occupational code of 43-9031.00.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains a letter dated July 8, 1996 from [redacted] as evidence provided by the beneficiary's former employer pertinent to his experience in the job offered. This letter is on the company's letterhead and singed by [redacted] as Director of Human Resources and the letter states in pertinent part that:

> This letter is to certify that [the beneficiary], bearer of Venezuelan ID No. [redacted], has been working in [redacted]. since 02/17/1988, in the following positions:
>
> | Year | Position |
> |---|---|
> | 88 | Commercial Accounts Executive |
> | 90 | Supplies Account Executive |
> | 92 | Assigned Accounts Executive |
> | 94 | High Volume Executive |
> | 95 | High Volume Specialist |
> | 96 | High Volume Docutech Specialist |

This letter does not include a specific description of the duties the beneficiary performed in each of positions during the period of employment with this company as the regulation requires. Without such a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the experience the beneficiary obtained from each of the positions with this employer enables him to perform the duties set forth on the ETA Form 9089 Part H, Line 11 and further qualifies him for the proffered position. Furthermore, without such a specific description of the duties the beneficiary performed in each of the position, the AAO cannot determine which of those positions would provide the beneficiary the required two years of experience in the job offered in this matter, i.e. high volume document specialist. The letter does not verify the beneficiary's full-time employment. Therefore, the AAO cannot accept and consider this letter as primary evidence to establish the beneficiary's requisite experience.

The record also contains a statement from [redacted] Counsel alleged that it is from the beneficiary's ex-colleague. However, the statement does not identify the writer's position from which he can verify the beneficiary's employment with the company, and does not indicate the period of the beneficiary's employment with this company. In addition, while counsel called this statement from [redacted] an affidavit from the beneficiary's ex-colleague, it is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a petition are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Therefore, the AAO cannot accept and consider this statement of Jesus Carmona as primary evidence to establish the beneficiary's requisite experience since it does not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(g)(1).

The record does not contain any other regulatory-prescribed evidence to establish the beneficiary's requisite two years of experience in the job offered. Therefore, the petitioner failed to establish that the beneficiary possessed the qualifying experience for the proffered position prior to the priority date.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

For the reasons discussed above, the AAO finds that the director had good and sufficient cause to revoke the approval of this petition. The AAO concurs with the director's decision that the

petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date and that the petitioner failed to demonstrate with regulatory-prescribed evidence that the beneficiary possessed the qualifying two years of experience in the job offered prior to the priority date. Therefore, the director's July 21, 2010 decision is affirmed and the petition remains denied.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional grounds of ineligibility. 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*, 299 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).

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(C)(2). The underlying labor certification indicates on Part H Job Opportunity Information (Where work will be preformed) that the primary worksite is [redacted] and the labor certification was so certified. However, the petitioner did not provide any address on the Form I-140 despite the requirement in Part 6 Item 4 of an address where the person will work if different from address in Part 1. The petitioner provides its address as [redacted] in Part 1. It seems that the petitioner intends to employ the beneficiary outside the terms of the ETA Form 9089. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment). The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

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 director's decision on July 21, 2010 is affirmed. The petition remains denied.