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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B6

DATE: AUG 16 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be remanded to the director for further action, consideration, and the entry of a new decision.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer. 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 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 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 April 16, 2009, denial, the 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 director found that the petitioner did have the ability to pay the proffered wage during 2008, however, the petitioner failed to demonstrate its ability to pay the proffered wage to the beneficiary during 2007. Therefore, at issue is the petitioner's ability to pay the proffered wage for calendar year 2007.

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. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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 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, Application for Permanent Employment Certification, 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 August 29, 2007. The proffered wage as stated on the ETA Form 9089 is $44,200 per year. The ETA Form 9089 states that the position requires a bachelor's degree in mechanical engineering and 12 months of work experience in the job offered, or 12 months of work experience in a related position of project engineer; in the alternative, the employer would accept a candidate with a master's degree and no experience.

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 in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in June 2002, to have a gross annual income of $360,568, and to currently employ five (5) workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the ETA Form 9089, signed by the beneficiary on September 26, 2007, the beneficiary did claim to have worked for the petitioner beginning in 2004 and continuing to the date of filing.

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 Sonegawa*, 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

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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).

petitioner's ability to pay the proffered wage. The petitioner has submitted documentation[2] to establish that it paid the beneficiary above the proffered wage in 2008 ($49,460) and that it has paid partial wages of $43,652.07 to the beneficiary during 2007, which is $547.93 less than the proffered wage. However, as the petitioner has provided the biweekly pay statements documenting the beneficiary's wages beginning on the priority date, August 29, 2007, and continuing to December 31, 2007, the record contains evidence to prorate the proffered wage[3] to evaluate whether or not the petitioner paid the beneficiary an amount equal to at least the proffered wage. The prorated proffered wage for an equivalent period of time, eight (8) pay periods, is $13,600.[4] The statements provided indicate that the beneficiary was paid $16,020 by the petitioner for that period.[5] Based on this new evidence, the petitioner has established that it paid the beneficiary at least the prorated amount of the proffered wage beginning on the priority date, August 29, 2007, and continuing forward.[6]

Therefore, 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. Based on the foregoing analysis, the AAO determines that the petitioner has overcome the grounds for denial in the director's decision. Accordingly, the director's decision of April 16, 2009, denying the petition, will be withdrawn.

However, the petition is not approvable as the record does not contain evidence of the beneficiary's qualifications for the offered position to establish that the beneficiary has the required one year of experience. 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)(l),

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[2] The petitioner provided seven (7) pay statements issued by the petitioner to the beneficiary during 2007, and an eighth pay statement issued on January 4, 2008, for the final pay period of 2007 (December 15, 2007, to December 31, 2007). The petitioner did not submit the beneficiary's W-2 statement for 2007.

[3] USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. USCIS will, however, prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, which here the petitioner has submitted.

[4] The prorated wage is calculated by multiplying the annual proffered wage ($44,200) by the ratio of relevant pay periods to the full amount of pay periods in a year (8/26), resulting in the following equation: $44,200 x 8/26 = $13,600.

[5] The amount noted includes a payment of $1,679.88 made on January 4, 2008, for work performed December 15, 2007, to December 31, 2007. Even excluding that amount, the petitioner paid the beneficiary $14,340.13 from the priority date until December 31, 2007, which is sufficient to document its ability to pay the prorated amount of the proffered wage.

[6] The petitioner's 2008 tax return also reflects sufficient net income to establish the petitioner's ability to pay the beneficiary the prevailing wage in that year.

(12). *See Matter of Wing's Tea House,* 16 I&N at 159; *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 Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 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).

In the instant case, the labor certification states that the offered position requires a bachelor's degree and 12 months of work experience in the position offered, mechanical engineer, or 12 months of work experience in a related position of project engineer; in the alternative, the employer would accept a candidate with a master's degree and no experience. On the labor certification, the beneficiary claims to qualify for the offered position based on a foreign bachelor's degree in mechanical engineering, and 12 months of work experience as a project engineer.

To document the beneficiary's qualifications, the petitioner provided copies of the beneficiary's bachelor's degree from the Maharaja Sayajirao University of Baroda in Gujarat, India, issued on December 13, 1999.[7] The degree evaluation provided with the beneficiary's foreign degree indicates that his degree is the "equivalent of a bachelor's degree in mechanical engineering from a regionally accredited college or university in the united States." The AAO has also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php. Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[8] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[9]

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[7] The record contains copies of the beneficiary's transcripts for this degree. The record also contains a transcript from the University of Oklahoma, indicating that the beneficiary was enrolled in courses during 2001 to 2003, and previously enrolled at the University of Arkansas during the 2000 to 2001 academic year. The transcript does not indicate that the beneficiary was enrolled in a degree program, or that a degree was ever issued.

[8] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx (last accessed August 7, 2012).

[9] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court

EDGE states that a Bachelor of Engineering or Bachelor of Technology from India is awarded upon completion of four years of tertiary study beyond the Higher Secondary Certificate (or equivalent). The Bachelor of Engineering/Technology represents attainment of a level of education comparable to a bachelor's degree in the United States. Therefore, the beneficiary possesses the foreign equivalent to the primary education required on the labor certification, a bachelor's degree in mechanical engineering.

The beneficiary's qualifying experience must be supported by a letter from the employer giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). On the labor certification, the beneficiary indicates he obtained work experience in the acceptable alternate position of project engineer beginning June 1, 1999 and continuing to June 1, 2000. However, as the petitioner has not provided a letter from the prior employer, the record does not contain any objective documentation of the beneficiary's claimed experience to establish that he gained one year of full-time experience as a mechanical or project engineer in this position. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Therefore, the petitioner has not demonstrated that the beneficiary possessed the required experience, or experience in the alternate position, as of the priority date.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the certified position.[10] Specifically, in response

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determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

[10] 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .
>
> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
> (ii) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for

the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
(ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 12 months of experience in the job offered is required. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[11] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a mechanical engineer, and the job duties are similar to the duties of the position offered. Therefore, the experience gained with the petitioner appears to be in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

The evidence in the record does not establish that the beneficiary possessed the required experience or the experience in an alternate occupation as 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. As the petitioner has not had an opportunity to address this issue, the petition will be remanded to the director in consideration of the foregoing.

In summary, the AAO determines that the petitioner has overcome the grounds for denial in the director's decision related to the petitioner's ability to pay the beneficiary the proffered wage. Accordingly, the director's decision of April 16, 2009, denying the petition, will be withdrawn. However, the petition is not approvable as the record does not contain evidence of the beneficiary's qualifications for the job offered to show that he has the required 12 months of experience. Therefore, the petition will be remanded to the director for the consideration of this issue, and any other issue the director deems appropriate. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361.

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[11] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
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> . . .
>
> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

ORDER: The director's decision of April 16, 2009, is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.