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

[redacted]

DATE: DEC 14 2012 OFFICE: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider and the AAO granted the motion and affirmed its previous decision on February 27, 2012. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be dismissed.

The petitioner is an individual who runs a dairy farm. He seeks to employ the beneficiary permanently in the United States as a milker. As required by statute, the petition is accompanied by an 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 he 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 motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 April 12, 2008. The proffered wage as stated on the ETA Form 9089 is $9.80 to $11.00 per hour ($20,384 to $22,880 per year).[1] The ETA Form 9089 states that the position requires a high school education and the specific skills of "assist[ing] in [the] birthing process for bovines, [the] ability to identify sick cows, and [the] ability to recognize injured cows.

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.[2]

The evidence in the record of proceeding shows that the petitioner is an individual. On the ETA Form 9089, signed by the beneficiary on June 27, 2008, the beneficiary claimed to have worked for the petitioner since June 28, 2004.

The petitioner must establish that his 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 he employed the beneficiary at a salary equal to

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[1] The AAO's February 28, 2011 decision noted that the petitioner submitted a job order, which stated the rate of pay as $5.15 to $6.00 per hour, which is less than the rate on the labor certification. The AAO noted that if this job order was used for the labor certification in question, the advertised wage on the job order is in conflict with the certified wage. *See* 20 C.F.R. § 656.17(f)(5). Additionally, we noted that the job order refers to the employer as "D & D Dairy," which is identified on another page of the job order as the petitioner's "site trade name." The decision stated that in any further filings, the sole proprietor should submit evidence that the petitioner and D & D Dairy are the same company operating under the same tax identification number or other evidence that D & D Dairy is the trade name, alias, or d/b/a. The petitioner submitted no such evidence on motion.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 has not established that he employed and paid the beneficiary the full proffered wage from the priority date in 2008 onwards.

As previously noted in the AAO's February 27, 2012 decision, the petitioner has not established his ability to pay the proffered wage in 2007, 2008, and 2009. In the February 27, 2012 decision, the AAO noted that the petitioner has also sponsored three other workers besides the instant beneficiary. In the instant case, the petitioner submitted no new evidence concerning his ability to pay the proffered wage to the instant beneficiary or to the other sponsored workers in 2008 and 2009. Previously, the petitioner submitted a 2010 Form W-2 for the beneficiary establishing the petitioner's ability to pay the proffered wage in 2010. On motion, the petitioner has submitted a 2011 Form W-2 establishing his ability to pay the proffered wage in 2011. However, the petitioner must demonstrate his ability to pay the proffered wage in every year from the priority date onward.

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).[3] USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker 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, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that 2008 and 2009 were uncharacteristically unprofitable years for the petitioner. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

In addition to the ability to pay, we noted in the February 28, 2011 and February 27, 2012 decisions that the petitioner did not submit evidence that the beneficiary had the specific skills required by the terms of the labor certification. On motion, the petitioner submits a copy of the beneficiary's high

[3] 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.

school diploma and a letter from D & D Farm signed by the petitioner stating that from 2004 to 2008, "we have been working with [the beneficiary] to update his knowledge-examining animals, detecting illnesses, injuries, and /or diseases."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The ETA Form 9089 states that the position requires a high school education and the specific skills of "assist[ing] in [the] birthing process for bovines, [the] ability to identify sick cows, and [the] ability to recognize injured cows. The petitioner has not established that the beneficiary possesses the specific skills as required by the labor certification application. The letter on the record from the petitioner does not meet the regulatory requirements set forth in 8 C.F.R. § 204.5(l)(3)(iii)(A). The letter states that the petitioner has worked with the beneficiary to update the beneficiary's knowledge with regards to examining animals and "detecting illnesses, injuries and other diseases," but fails to describe the specific skills gained by the beneficiary during his work from 2004 to 2008. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner states that the beneficiary gained the specific skills required in the job offered with the petitioner prior to the priority date in 2008. The AAO, however, will not consider experience gained by the beneficiary while working for the petitioner prior to the priority date because, as discussed above, the petitioner failed to provide regulatory prescribed evidence verifying the extent of the experience gained.

Moreover, representations made on the certified Form ETA 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 or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[4] In response to question J.21, which asks, "Did the alien gain any of the qualifying

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[4] 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

(i) 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.

(ii) *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 cannot 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.

experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "NA." The petitioner specifically indicates in response to question H.10 that experience in an alternate occupation is not acceptable. 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[5] and the terms of the ETA Form 9089 at H.10 provide that applicants cannot qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a milker, and the job duties are essentially the same duties as the position offered. Therefore, the experience gained with the petitioner was 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. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

Thus, based on the terms of the labor certification application, the beneficiary does not possess the requisite specific skills in the job offered. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. The United States Citizenship and Immigration Service (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).

The petitioner's assertions and evidence submitted on motion do not overcome the grounds of denial in the director's February 4, 2009, March 30, 2009, and June 18, 2009 decision and the AAO's February 28, 2011 and February 27, 2012 decisions. The petitioner failed to establish that it had the continuing ability to pay the proffered wage from the priority date through the present or that the beneficiary possesses the specific skills required by the terms of the labor certification. Therefore, the petition cannot be approved.

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[5] 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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> . . .
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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.

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 motion to reopen is granted and the decision of the AAO dated February 27, 2012 is affirmed. The petition remains denied.