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

(b)(6)

[redacted]

Date: JUN 2 8 2012 Office: TEXAS 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a labor contractor provider. It seeks to employ the beneficiary in the United States as a welder. 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 petition was denied 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.

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 regulation at 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 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 September 9, 2005. The proffered wage as stated on the ETA Form 9089 is $18.81 per hour ($39,124.80 per year). The ETA Form 9089 states that the position requires 24 months (two years) of experience in the job offered.

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 an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ 199 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

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. Comm. 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. 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, there is no evidence that the petitioner employed and paid the beneficiary the full proffered wage during any relevant time frame, including the priority date in 2005 or subsequently.

If, as here, 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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.

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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 record 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).

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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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).

When the petition was filed on July 30, 2007, only the petitioner's 2005 federal income tax returns (Form 1120S) were provided. On August 11, 2009, the director issued a Request for Evidence (RFE), directing the petitioner to provide its 2006, 2007, and 2008 tax returns. In response, the petitioner provided only its 2006 tax returns, and maintained that it had the ability to pay the proffered wage based on its 2005 and 2006 tax returns. We note that the petitioner filed nearly 200 Form I-140 petitions for welders and fitters in 2005. Many of these petitions were subsequently withdrawn by the petitioner. However, USCIS issued RFEs for the majority of the active petitions. In response to the RFEs, the petitioner provided its 2007 federal income tax returns. The information on that return, which was provided in multiple related cases filed by the petitioner, is

incorporated in the record. We note that the petitioner has never provided USCIS with copies of its 2008 federal income tax return.

The petitioner's tax returns demonstrate its net income for 2005 through 2007, as shown in the table below.

- In 2005, the Form 1120S stated net income[2] of $1,010,689.00.
- In 2006, the Form 1120S stated net income of $182,023.00.
- In 2007, the Form 1120S stated net income of -$148,313.00.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage in 2007.

Although it appears that the petitioner's net income was sufficient to pay the proffered wage in 2005 and 2006, the petitioner has filed numerous other Form I-140 petitions. There are more than 50 Form I-140 petitions filed by the petitioner which have been approved, are currently pending, or are on appeal.[3] If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

Because the petitioner has failed to provide any evidence regarding the proffered wages and/or wages actually paid to the beneficiaries of the other Form I-140 petitions, the AAO finds that the petitioner has failed to establish that its net income was sufficient to pay the proffered wages in 2005 or 2006. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (for the tax return from 2005) or line 18 (for the tax returns from 2006 and 2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed April 10, 2012) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

[3] In its response to the director's RFE in another petition, the petitioner provided a list of beneficiaries for which it had filed immigrant petitions. The list includes 190 names (99 beneficiaries are listed as welders with a rate of pay of $18.81 per hour ($39,125 per year), and 91 are listed as fitters with a rate of pay of $17.12 per hour ($35,609 per year).

burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Applying even the lowest proffered wage disclosed by counsel for the other pending petitions, $35,609.60, and multiplying this number by 66 (the number of petitions counsel asserts remain on appeal in a related case), the petitioner would be required to show an ability to pay a minimum of $2,350,233.60 per year in wages to beneficiaries. It is clear that the petitioner did not have sufficient net income to pay all of these wages in 2005 or 2006. Crucially, and as noted above, the petitioner had negative net income in 2007, and consequently could not even establish an ability to pay the instant beneficiary. Therefore, the record of proceeding fails to establish that, in 2007, the petitioner had sufficient net income to pay the proffered wage to the instant beneficiary alone, without considering the numerous other beneficiaries with simultaneously pending petitions. The petitioner failed to show the ability to pay any wages in 2008.

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.[4] 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2005, 2006 and 2007, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of $28,624.00.
- In 2006, the Form 1120S stated net current assets of -$86,797.00.
- In 2007, the Form 1120S stated net current assets of $10,809.00.

The petitioner did not have sufficient net current assets to pay the proffered wage in 2005, 2006 or 2007. In addition, as discussed above, the petitioner has more than 50 other Form I-140 petitions which have been approved, are currently pending, or are on appeal. The petitioner had insufficient net current assets in 2005, 2006 and 2007 to pay the proffered wages of all the beneficiaries.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, net income or net current assets.

With the I-140 petition, evidence is required of a sponsoring employer's ability to pay the proffered wage as of the priority date, not a guaranty to support the beneficiary in the future. 8 C.F.R.

[4]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.

§ 204.5(g)(2). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

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. 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 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, or that it has a sound business reputation. On the contrary, the record shows a dramatic decrease in the petitioner's gross receipts, wages paid and net income from the years 2005 to 2007. This trend supports the conclusion that the petitioner lacks the continuing ability to pay the proffered wage. 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 wage.

Finally, beyond the decision of the director, the petitioner has also failed to establish that the beneficiary is qualified for the proffered position.

The petitioner must 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 petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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. 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).

According to the plain terms of the ETA Form 9089, the applicant must have two years of experience in the job offered. The job is for a "welder," and the job duties are described as follows:

> Weld metal components together to fabricate or repair ship according to layouts, blueprints and work orders using brazing and various arc and gas welding equipment.

In order to establish that the beneficiary has the necessary experience in the job offered by the priority date, the petitioner must submit "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." 8 C.F.R. § 204.5(l)(3)(ii)(A). Furthermore, 8 C.F.R. § 204.5(g)(1) requires such letters to include a "specific description of the duties performed by the alien."

The beneficiary claims in the ETA Form 9089 to have been employed by: [redacted] as a welder from May 31, 2005, to August 1, 2005; [redacted] as a welder from March 31, 2005, to May 1, 2005; [redacted] from December 31, 2004, to March 1, 2005; [redacted] as a welder, from August 31, 2004, to November 1, 2004; [redacted] from March 31, 2004, to April 1, 2004; [redacted] as a welder from November 30, 2002, to February 1, 2004; [redacted] as a welder, from August 31, 2002, to September 1, 2002; [redacted] from June, 30, 2001, to September 1, 2002; and, [redacted] as a welder, from September 30, 1999, to June 1, 2001. At the outset, we note that some of the employment experience claimed by the beneficiary overlaps and it is geographically impossible for him to have worked in both locations. Additionally, the beneficiary claimed to have been employed for only one day in one position listed above. Finally, the above listed employment dates are inconsistent with Forms W-2, and data supplied by the beneficiary on Form G-325 in the record of proceeding.

The record contains a letter from [redacted] dated January 26, 2001, signed by [redacted], payroll clerk, and [redacted] general foreman. The payroll clerk states that the beneficiary was employed since December 8, 1999, no end date was given. There is also a handwritten addition on the letter from the general foreman, attesting to the beneficiary's English ability and good work performance. This letter does not comply with the regulations as it does not discuss the beneficiary's training or experience as a welder. Furthermore its dates are inconsistent with those claimed on the ETA Form 9089. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

A letter from dated July 22, 1993, is also in the record. It is signed by the "Head of Project Admin. & Personnel" and attests to the beneficiary's employment from October 4, 1992 to July 23, 1993. This letter fails to comply with the regulation as it does not address any training or experience the beneficiary would have gained as a welder. Additionally, the beneficiary did not list this employer on his long list of past employers on Form 9089. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

A second letter from dated April 15, 1995, is in the record. Although it asserts the beneficiary was employed from February 15, 1994, to April 15, 1995, it likewise fails to give any specific information about the beneficiary's training or experience as a welder. Again, the beneficiary failed to list this employer on this previous work experience. *See Matter of Leung, supra.*

Another letter included in the record is from Fluor Corporation, Greenville, South Carolina. This employer was not listed on the beneficiary's past employment on the ETA Form 9089. *See Matter of Leung, supra.* The letter fails to comply with the regulation as it does not give specifics of the beneficiary's training or experience as a welder. The letter was dated May 17, 2006, and asserts that the beneficiary had been employed since June 2001. This contradicts the beneficiary's claimed experience as laid out on the ETA Form 9089. *See Matter of Ho, supra.*

An additional letter from was in the record. However, this letter substantiates employment which occurred after the priority date.

As none of the letters comply with the regulations, the record does not establish that the beneficiary gained the necessary experience in the job offered before the priority date.

Accordingly, as the petitioner failed to establish that the beneficiary is qualified for the proffered position based on the requirements of the labor certification, the petition is denied for this additional reason.

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 appeal is dismissed.