(b)(6)

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

DATE: FEB 28 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

ON BEHALF OF PETITIONER:

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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foreign language immersion school. It seeks to employ the beneficiary permanently in the United States as a French teacher. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.[1] Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The director also determined that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date onward.

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]

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on February 26, 2009.[3] The Immigrant Petition for Alien Worker (Form I-140) was filed on August 18, 2010.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and

---

[1] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

[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).

[3] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a French teacher provides:

> Teach French to elementary students in accordance with established curriculum. Develop lesson plans, testing, grading, maintain discipline, undertake classroom instruction, monitor progress, other normal faculty duties.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's degree.

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

4-B. Major Field Study: Education.

6. No experience is required for the position.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

7-A. If Yes, specify the major field of study:

[left blank]

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

8-A. If yes, specify the alternate level of education required:

[left blank]

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

14. Specific skills or other requirements: "Must be fluent in French. This is a foreign language immersion school. Because French is the language of instruction, a knowledge of this language is obviously necessary."

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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 Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires a Bachelor's degree in Education.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation that she had was a Bachelor's degree in Elementary Education. She listed the institution of study where that education was obtained as the and the year completed as 1997.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma from the It indicates that the beneficiary was awarded "the Degree of Preschool/Elementary School Teacher" on September 15, 1997. The petitioner additionally submitted a credentials evaluation, dated February 1, 2005, from Academic Credentials Evaluator, Baton Rouge, Louisiana. The evaluation describes the beneficiary's Belgian diploma from as being equivalent to three years of full-time undergraduate work at a regionally accredited university in the United States. The evaluation further considers the beneficiary's six years of experience as an elementary school teacher in French and concludes that her education and experience combined are equivalent to Bachelor of Arts degree in the United States with a major in Preschool Elementary Education. The evaluation does not conclude that her education alone is the foreign equivalent to a U.S. bachelor's degree as required by the terms of the certified labor certification.

The director denied the petition on August 19, 2011. He determined that the beneficiary's foreign education was not the foreign equivalent to a bachelor's degree in the United States because the degree, according to the petitioner's own credentials evaluation, was deemed equivalent only to three years of university study in the United States. The director further noted that the petitioner did not submit certified copies of the beneficiary's transcripts to permit comparison of her academic

studies to those in the United States.[4]

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel states that the beneficiary's credentials have been reviewed by the State of Louisiana and deemed to be equivalent to a bachelor's degree which is required for teacher certification in that state as the beneficiary was awarded a teaching certificate based upon "B.S. FOREIGN COLLEGE OR UNIVERSITY, 1997." Counsel further states that the financial documentation submitted in support of the petitioner's ability to pay the proffered wage is sufficient and warrants a reversal of the director's decision.

The position requires a Bachelor's Degree in Education, which is the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C).[5] Thus, combined with the petitioner's selection of box E on Form I-140, "professional," DOL's classification and assignment of educational requirements for the occupation, the certified position must be considered as a professional occupation only.

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

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

---

[4] The director requested in his RFE "an official record (transcript) showing the dates of attendance, coursework, area of concentration of study." The petitioner failed to submit such documentation. 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).

[5] DOL assigned the code of 25-2021.00 to the proffered position. According to DOL's public online database at http://online.onetcenter.org/crosswalk/ (accessed January 23, 2013) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Five requiring "extensive preparation" for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means that "[A] bachelor's degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)."

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

On March 24, 2011, director issued a Request for Evidence asking that the petitioner submit evidence of its ability to pay the proffered wage in the form of proof of wages paid, tax returns, an annual report or independently audited financial statements. The director also asked the petitioner to submit evidence that the beneficiary holds a foreign equivalent degree to a U.S. baccalaureate degree. The petitioner was told that evidence of education must be in the form of an official record (transcript) showing the dates of attendance, coursework, area of concentration of study and date of degree award, if any. Copies of foreign documents were to be accompanied by certified English translations.

In response to the request for evidence, the petitioner submitted a statement from counsel, unaudited financial statements with two letters from the petitioner's accountant. The petitioner also submitted a copy of the beneficiary's Louisiana teaching certificate, a credentials evaluation which has been previously referred to and a copy of Louisiana code sections pertaining to the certification of school personnel.

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority

> to make the two determinations listed in section 212(a)(14).[6] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
>
> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[7]

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have

---

[6] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

[7] The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree.[8] Where the analysis of the beneficiary's credentials relies on work experience alone, experience and education combined, or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have the education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA Form 9089 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the ETA Form 9089 does not specify an equivalency to the requirement of a Bachelor's degree in Education, nor could any equivalency, even if stated, be accepted here as the petitioner filed the petition under the professional category. As stated above, the professional category requires a bachelor's degree, and does not allow for a lesser combination of degrees and/or experience.[9]

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

---

[8] A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977).

[9] The skilled worker category on Form I-140 is listed as Box F.

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 Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. 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." *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 [labor certification application form]." *Id.* at 834 (emphasis added). 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.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

As previously noted, the petitioner's own credentials evaluation stated that the beneficiary's foreign education was only equivalent to three years of university study in the United States, not a U.S. bachelor's degree. The ETA Form 9089 does not provide that the minimum academic requirements of a Bachelor of Education might be met through three years of college or some other formula other than that explicitly stated on the ETA Form 9089, of Bachelor's degree only. The petitioner did not state any alternate combination of education plus experience would be accepted, and such a combination even if stated, could not be accepted here, as the petitioner filed Form I-140 for a professional worker.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

The petitioner notes that the beneficiary was issued a teaching certificate by the Louisiana State Department of Education which states therein:

> . . .
>
> **By the Louisiana Department of Education, based upon the following:**
>
> B.S., FOREIGN COLLEGE OR UNIVERSITY, 1997
>
> **ELIGIBILITY: The holder of this certificate is eligible for the following area(s) and/or terms:**
>
> ELEMENTARY: PK-5 (French), 02/21/2005
>
> ELEMENTARY: PK-5 IMMERSION (FRENCH), 02/21/2005
>
> EXTENTED FOR 3 YEARS, 12/10/2008

The petitioner submitted copies of 2011 code sections (Title 28 Louisiana Administrative Code, Part CXXI, Bulletin 746, Louisiana Standards of Certification of School Personnel) stating that there are two types of eacher preparation programs in Louisiana, both of which require bachelor's degrees. Specifically, §311 that counsel cites to states the requirement of a "bachelor's degree in education or equivalent preparation in education from a foreign country." Whether the beneficiary qualified based on a determination of "equivalent preparation" is unclear. Additionally, as the guidelines submitted are dated July 2011, the beneficiary could have qualified under earlier standards.[10] It is unclear in this instance, however, what evaluation was used by the Louisiana State Department of Education to determine the value of the beneficiary's foreign education, or if the certification when issued was based on different criteria. Counsel notes that the beneficiary has worked for the [redacted] under an H-1B visa which requires the equivalent of a four-year U.S. baccalaureate degree. The evaluation in the record [redacted] Academic Credentials Evaluator, Baton Rouge, Louisiana) used a rule applicable to H-1B visas to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). The beneficiary was required to have a four-year bachelor's degree on the ETA Form 9089 and there is no stated equivalent on the labor certification which would allow for a combination of education and experience in this instance.

Counsel states on appeal that ". . . USCIS ignored the fact that the petitioner filed another petition for another Belgian with the same degree which the USCIS denied but the AAO reversed upon

---

[10] Whether those standards would be the same as 2011 standards is unclear.

appeal because the USCIS's reason in that case, like in this case was erroneous." Counsel did not submit a copy of the referenced AAO decision and it is unclear whether the labor certification in that case allowed for any equivalency or if it was filed under a different category such as "Skilled Worker." If the previous immigrant petition referenced was approved based on the same evidence that is contained in the current record, the approval would constitute error. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). USCIS is not required to treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Based on the foregoing, the petitioner has failed to establish that the beneficiary qualified for the position offered as the petitioner has failed to establish that she has the required education to meet the terms of the certified labor certification.

As noted above, the director also denied the petition for failure to establish the petitioner's ability to pay the beneficiary's proffered wage.

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, Application for Alien 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 Alien Employment Certification, 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 February 26, 2009. The proffered wage as stated on the ETA Form 9089 is $41,000 per year.

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.

The petitioner asserts that it is a private school and therefore exempt from federal income tax under the provisions of section 101(6) of the Internal Revenue Code of 1939, which corresponds to section 501(c)(3) of the 1986 Code. On the ETA Form 9089, signed by the beneficiary on March 31, 2010, the beneficiary claimed to have worked for the petitioner from August 15, 2002 through February 26, 2009.

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 labor certification, 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2009 or subsequently. Although the beneficiary apparently worked for the petitioner beginning in 2002 in H-1B status, no proof of any wages paid was ever presented from the priority date onward despite being requested in the director's Request for Evidence.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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).

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.[11] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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

---

[11] 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.

paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As stated above, 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its ability to pay the proffered wage through evidence in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner states that it is tax exempt based on 501(c)(3) of the Internal Revenue Code and not required to file federal tax returns.[12] In support of the Form I-140 petition and in response to the director's Request for Evidence, the petitioner submitted its unaudited financial statement for year ended May 31, 2009. The petitioner also submitted two letters from the petitioner's accountant. One letter acknowledged that the financial statement was not audited and represented the assertions of management. In a separate letter, the accountant stated that he "feel[s] the attached financial statements accurately reflect the financial position of" the petitioner. Despite the director's request for acceptable financial documentation, the petitioner submitted the same 2009 unaudited financial statement with the referenced accountant letters. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Thus, the statements are not sufficient to demonstrate the petitioner's ability to pay the proffered wage from the priority date as they are not the evidence required by 8 C.F.R. § 204.5(g)(2). Although the director included the petitioner's failure to establish its ability to pay the beneficiary's wage in the decision, the petitioner failed to submit any additional evidence related to this issue on appeal.

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

[12] The record does not contain evidence of the Internal Revenue Service's approval of this status. The petitioner should submit such evidence in any further filings.

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.

The petitioner has not presented financial documentation required by 8 C.F.R. § 204.5(g)(2) for the petitioning entity in support of its petition in the form of a federal tax return, audited financial statement in accordance with GAAP principles, or annual report. While the financial documentation submitted by the petitioner may, in certain circumstances, be considered in addition to the documentation required by 8 C.F.R. § 204.5(g)(2), it may not be accepted in lieu of the documentation required by regulation to establish the petitioner's ability to pay the proffered wage. Without the proper required financial documentation, the AAO cannot make any finding in favor of the petitioner that based on the totality of the circumstances the petitioner could establish that it is more likely than not that it has maintained the continuing ability to pay the proffered wage of $41,000 per year from the 2009 priority date onward.

Accordingly, 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.