(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: JUN 07 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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,

Rachel DiFiore
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter came before the Administrative Appeals Office (AAO) on appeal, and the AAO dismissed the appeal on September 26, 2012. The matter is now before the AAO on a motion to reopen and a motion to reconsider.[1] The motions will be granted, and the prior decision dismissing the appeal shall be affirmed.

The petitioner is a manufacturing company. It seeks to employ the beneficiary permanently in the United States as a casting machine setter. 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 Form I-140, Immigrant Petition for Alien Worker, was submitted without all of the required initial evidence, specifically the original ETA Form 9089 with signatures, evidence that the beneficiary is qualified to perform the duties of the proffered position and evidence of the petitioner's ability to pay the proffered wage. The director denied the petition accordingly. The petitioner submitted a timely appeal to the denial of the petition that was subsequently dismissed by the AAO on September 26, 2012.

The record shows that the motions are timely and make 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.

On motion, counsel includes a statement from the beneficiary, a letter of employment and corresponding certified English language translation, Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, issued to the beneficiary from 1996 to 2005, copies of the first page of the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2008, 2009, 2010, and 2011, as well as copies of previously submitted documents.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

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[1]The AAO upheld the director's determination that the I-140 petition was submitted without all of the required initial evidence, specifically the original ETA Form 9089 with signatures, evidence that the beneficiary is qualified to perform the duties of the proffered position and evidence of the petitioner's ability to pay the proffered wage and dismissed the appeal on September 26, 2012. The petitioner's most current subsequently filed another appeal on October 26, 2012. The AAO, however, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Although this appeal was improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1), the AAO will treat the Form I-290, Notice of Appeal or Motion, filed by the petitioner on October 26, 2012 as a motion to reopen and a motion to reconsider.

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.

As set forth in the AAO's prior dismissal of the petitioner's appeal on September 26, 2012, the first issue to be examined in this proceeding is whether the original certified ETA Form 9089 in the record contains the requisite signatures.

The regulation at 8 C.F.R. § 103.2(b)(4) requires that the original labor certification be submitted unless the original was previously filed with the United States Citizenship and Immigration Services (USCIS). The petitioner did not submit the original labor certification with the petition. On appeal, the petitioner submitted the original labor certification with original signatures by the petitioner and the beneficiary. However, paralegal, the individual who prepared the ETA Form 9089 on behalf of the petitioner's former counsel did not sign the certified ETA Form 9089. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. *See* 20 C.F.R. § 656.17(a)(1).

On motion, counsel fails to address this deficiency in the original certified ETA Form 9089 and does not provide any documentation relating the issue. Accordingly, the petition cannot be approved for this reason. The AAO finds that the appeal to the denial of the Form I-140 petition was properly dismissed on this basis.

The next issue to be examined in this proceeding is whether the petitioner had failed to submit evidence to establish that the beneficiary is qualified to perform the duties of the proffered position.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

H.4. Education: High School.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months of experience in the job offered.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The ETA Form 9089 at Part K., states that the beneficiary qualifies for the offered position based

on experience as a tool and die maker manager with Gardena, California, from April 1, 1998 to July 1, 2006. The labor certification also states that the beneficiary was employed as a machinist with Gardena, California from September 11, 1996 to March 1, 2000. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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

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

(Emphasis added). Therefore, the AAO may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. The AAO may also consider copies of Form W-2 statements issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

On motion, counsel submits a letter written in Spanish, dated February 19, 2001 and containing the letterhead of in Mexico City, Mexico, D.F., Mexico, that is signed by The letterhead reflects that is involved in the production of machinery for carpentry, including ribbon saws, circular saws, dies, and lathes. Mr. states that the beneficiary worked as general operator of drilling machines, die machines, and lathe machines, a manufacturer of dies used to perforate metal, and a "Mig" welder, during his employment with this enterprise from July 7, 1992 to June 19, 1996. The letter is accompanied by a corresponding certified English language translation. However, the beneficiary's work experience for was not listed at Part J., of the ETA Form 9089. Neither the beneficiary nor the petitioner has offered any explanation as to why the beneficiary did not list this employment on the labor certification if this experience qualified him for the offered job of casting machine setter. For these reasons, the beneficiary's employment with may not be used to establish the beneficiary's work experience. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (where the Board noted in dicta that the beneficiary's experience, without such fact certified by DOL on the

beneficiary's Form ETA 750B (a part of the Form ETA 750, Application for Alien Employment Certification, the predecessor to the ETA Form 9089) lessens the credibility of the evidence and facts asserted.

Counsel also submits IRS Form W-2 statements issued by to the beneficiary from 1996 to 2000, as well as IRS Form W-2 statements issued by Corp., from 1998 to 2005. The AAO acknowledges that these IRS Form W-2 statements corroborate the beneficiary's claim that he was employed by these enterprises as listed on the ETA Form 9089, but the IRS Form W-2 statements do not provide any information relating to the nature of the beneficiary's experience or the specific duties that he performed for these employers.

It is noted that a search of the publically accessible internet search engine at http://www.google.com (accessed on May 30, 2013) for both and revealed both businesses are currently listed on the websites of local business directories at the addresses provided above. In addition, a review of the publicly accessible official website of the California Secretary of State at http://www.kepler.sos.ca.gov/cbs.aspx (accessed on May 30, 2013) reveals that is currently active, while the status of , is suspended. The status "suspended" is defined at the website http://www.sos.ca.gov/business/be/cbs-field-status-definitions.htm as:

> The business entities, powers, rights and privileges were suspended of forfeited in California 1) by the Franchise Tax Board for failure to file a return and/or failure to pay taxes, penalties, or interest; and/or 2) by the Secretary of State for failure to file the required Statement of Information and, if applicable, the required Statement by Common Interest Development Association.

Although it is unclear whether is an active business, it is evident that is actively conducting business, and therefore, is a readily available source from which a letter of employment containing a sufficiently detailed description of the beneficiary's duties and experience could be obtained.

The record does not contain any experience letters to document the beneficiary's claimed experience with either 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The evidence in the record is not sufficient to establish that the beneficiary possessed the required 12 months of experience in the offered job of casting machine setter as listed at Part H.6., of ETA Form 9089. Accordingly, the petition cannot be approved for this reason. The AAO finds that the appeal to the denial of the Form I-140 petition was properly dismissed on this basis as well.

The next issue to be examined in this proceeding the whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation 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 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).

Here, the ETA Form 9089 was accepted on April 28, 2008. The proffered wage as stated on the ETA Form 9089 is $12.70 per hour or $26,416.00 annually based on 40 hours per week.

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 July 1, 1971 and to currently employ 28 workers. According to the tax returns in the record, the petitioner's tax year was based on a calendar year starting in 2006. On the ETA Form 9089, signed by the beneficiary on April 22, 2008, the beneficiary claimed to currently work for the petitioner at Part J.23.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of

the petitioner's ability to pay the proffered wage. While the beneficiary claimed that he was currently employed by the petitioner at Part J.23., of the ETA Form 9089, the record is absent any evidence that the petitioner paid any wages to the beneficiary. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage since the priority date of April 28, 2008 onward.

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), *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. 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.
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> 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).

On motion, counsel submits copies of the first page of the petitioner's Form 1120S tax returns for 2008, 2009, 2010, and 2011. While it appears that the petitioner possessed sufficient net income to pay the proffered wage in 2008, 2009, 2010, and 2011, based upon an examination of line 21 of each first page of the petitioner's Form 1120S tax returns, it is not possible to reach any meaningful conclusion regarding the petitioner's actual net income without a complete tax return for each year.

As previously discussed, the petitioner is an S corporation. 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 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed May 30, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The record contains copies of the petitioner's Form 1120S tax returns for 2006 and 2007. In both of these respective years, the petitioner's net income is actually listed at line 18 of the petitioner's Schedule K and is significantly different than the amount listed at line 21 of each first page of the petitioner's Form 1120S tax returns for 2006 and 2007. Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2006 and 2007, it is likely that it had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2008, 2009, 2010, and 2011. It cannot be determined whether the petitioner possessed the continuing ability to pay the proffered wage to the beneficiary since the priority date through an examination of its net income in 2008, 2009, 2010, and 2011, without the petitioner's complete federal tax returns for each year. Therefore, the petitioner has not established that it had sufficient net income in 2008, 2009, 2010, and 2011 to pay the proffered wage.

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.[2] A corporation's year-end current assets are

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[2]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.

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. As the petitioner failed to provide its complete federal tax returns including the Schedule L for 2008, 2009, 2010, and 2011, it cannot be determined whether the petitioner possessed the continuing ability to pay the proffered wage to the beneficiary since the priority date through an examination of its net current assets. The petitioner has not established that it had sufficient net current assets in 2008, 2009, 2010, and 2011, to pay the proffered wage.

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, or its net income or net current assets.

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner failed to establish the ability to pay the annual proffered wage of $26,416.00 through an examination of wages paid, the petitioner's net income, and the petitioner's net current assets in 2008, 2009, 2010 and 2011. The petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are present in this matter. In assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Accordingly, the petition cannot be approved for this reason. The AAO finds that the appeal to the denial of the Form I-140 petition was properly dismissed on this basis as well.

The AAO's decision of September 26, 2012 dismissing the appeal of the denied petition will not be disturbed.

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 prior decision of the AAO dated September 26, 2012 dismissing the appeal is affirmed.