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)

DATE: JUN 18 2013 OFFICE: TEXAS SERVICE CENTER

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,

Ron Rosenberg
Acting 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 claims to be a business development organization. It seeks to employ the beneficiary permanently in the United States as a facility. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 20, 2009 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on April 5, 2007. The proffered wage as stated on the ETA Form 9089 is $28,454 per year. The ETA Form 9089 states that the position requires a minimum of a high school degree with 24 months (two years) experience in the job offered, or alternately, an

Associate's degree in Facility Maintenance, or foreign equivalent, with one year of experience in the offered job.

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 a tax exempt corporation. The petitioner indicated on Form I-140, Immigrant Petition for Alien Worker, at part 5, section 2 that the organization was established in August 1989 and employs 35 workers. According to the tax returns in the record, the petitioner's fiscal year runs from July 1 to June 30 of the following year. On the ETA Form 9089 that was signed by the beneficiary on August 17, 2007, the beneficiary states that he has been self-employed as an independent contractor from October 1, 1993 to March 1, 2007, working for different clients, including the petitioner. The beneficiary did not indicate the duration of the employment or whether the employment was in a full-time or part-time capacity.

On appeal, counsel asserts that the director erred in concluding that the petitioner had not demonstrated its ability to pay the beneficiary the proffered wage.

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

The record contains the beneficiary's Internal Revenue Service (IRS) Form 1099-Misc issued by the petitioner for the years 2008 to 2011. Additionally, the petitioner has submitted its tax returns for 2003 through 2010, showing significant net income in fiscal years 2006 (which includes the priority date), 2007, and 2009, sufficient to cover the full proffered wage. Furthermore, the petitioner has also submitted its audited financial statements for fiscal years 2007 through 2010, showing significant net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities, despite any shortfall in the petitioner's wages paid to the beneficiary, net income, and net current assets, in

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

determining the petitioner's ability to pay the proffered wage during a given period. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* Upon review of the entire record here, and in assessing the totality of the circumstances here, it is concluded that, based on the petitioner's length of time in business, its tax returns from 2003 to 2010 and audited financial statements from 2007 to 2010, which reflect significant contributions and grants, revenue, and net assets, the petitioner has established that it had the continuing ability to pay the proffered wage.

However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Accordingly, beyond the decision of the director, as raised in the AAO's Request for Evidence (RFE), the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (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 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 Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a minimum of a high school education with 24 months experience in the job offered, or alternately, an Associate's degree or foreign equivalent in Facility Maintenance, with one year of experience in the offered job. The job duties of the offered position of facility technician as described in Part H.11 of the ETA Form 9089 are as follows:

> [C]oordinates 100-line Verizon digital phone system, including hardware wiring, line assignments and testing; Programs and executes computer-based Trane Heating-Ventilation-Air Conditioning (HVAC) system; Programs and executes computer-based Wayman SetRight security system, including scheduling cameras, monitors and mechanized gates and coordinating alarm protocols with local authorities; Receives and processes all tenant maintenance needs through computer-based help desk request system; Handles all building-related repairs and maintenance, both reactive and p[re]ventative, including but not limited to pai[n]ting, basic wiring and plumbing, etc.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a full-time maintenance technician from October 1, 1993 to March 1, 2007, working as a self-

employed independent contractor for different employers, including the petitioner.[2] In addition, the

[2] Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's "self-employed" experience with the petitioner, or experience in an alternate occupation, cannot be used to qualify the beneficiary for the certified position. 20 C.F.R. § 656.17. Specifically, the petitioner indicates "no" to question J.19, and that J.20, which asks about experience in an alternate occupation, is not applicable. In response to question J.21 on the ETA Form 9089, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required. In general, if the answer to question J.21 is no, then the experience with the employer may only be used by the beneficiary to qualify for the proffered position if the position was not "substantially comparable," and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. The regulation at 20 C.F.R. § 656.17 states:

> (i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
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> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
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> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
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> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
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> (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
>
> (4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.
>
> (5) For purposes of this paragraph (i):

beneficiary states that he was employed as a ventilation and air conditioning technician by [redacted] in a full-time capacity from April 1, 1987 to February 1, 1992.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The only employer letters in the record are from the Human Resources Manager at [redacted] and the beneficiary's former supervisor there. The letters corroborate the beneficiary's experience as a ventilation and air conditioning technician with their company. The beneficiary claimed on the labor certification that his job duties as a ventilation and air conditioning technician included:

> Conducting Ventilation and air conditioning maintenance, repair, and installation; responsible for upkeep and repair of all of the air conditioning units; supervise staff employees.

Similarly, the beneficiary's former supervisor at [redacted] indicates in his letter that the beneficiary's job duties as a ventilation and air conditioning technician included the "upkeep and repair of all of the air conditioning units in the [employer's 3,000 square feet production] facility" and that he received "training to increase his capacity as a technician and a manager of the employees he supervised."

As noted by the AAO in its June 11, 2012 RFE, which put the petitioner on notice of the deficiency in the evidence, the beneficiary's duties as a ventilation and air conditioning technician with [redacted]

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

Here, the beneficiary indicates in response to question K.1. that he was self-employed as a maintenance technician with the petitioner, and the job duties are the same duties as the position offered. The labor certification does not indicate the exact duration of the beneficiary's employment or whether it was in a full-time or part-time capacity. The experience with the petitioner appears to have all been gained in the position offered and appears to be substantially comparable as the duties claimed indicate that he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation.

as described in the labor certification and in his former supervisor's letter, encompass only a part of the job duties of facility technician position described in Part H.11 of the ETA Form 9089. The AAO specifically noted that the position with did not appear to the same as the offered position and instructed the petitioner to submit additional evidence that the beneficiary possessed the required experience for the offered position.

In the RFE, the AAO specifically alerted the petitioner that failure to respond to the RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. 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). However, the petitioner did not address or submit the requested evidence related to the beneficiary's work experience in its submission of July 23, 2012.

As the petitioner did not submit all the requested documentation, the petitioner has failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has failed to demonstrate that the beneficiary is qualified for the offered position.

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 appeal is dismissed.