(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: JUN 2 6 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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 with the field office or service center that originally decided your case by filing a 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, Texas Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a woodworking business. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).[1] As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.[2]

The director determined that the petitioner failed to establish that the beneficiary satisfied the minimum requirements for work experience stated on the labor certification, and that the petitioner failed to establish its ability to pay the proffered wage. The director denied the petition on August 27, 2009.

On appeal, the petitioner, through current counsel, submits additional evidence and maintains that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

---

[1]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.

[2]DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). USCIS evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable includes a review of whether the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i). USCIS has authority to evaluate whether the alien is eligible for the classification sought and has authority to evaluate whether the alien is qualified for the job offered.

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).

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.

As noted herein, the petitioner must establish that its ETA Form 9089 job offer to the beneficiary is realistic and *bona fide*. The petitioner must show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate that that it has the continuing ability to pay the proffered wage. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case the priority date is May 3, 2007, as stated on the ETA Form 9089 filed on behalf of the beneficiary. The ETA Form 9089 requires no formal education or training, but requires the beneficiary to have 24 months of experience in the job offered as a cabinetmaker. The proffered wage is stated as $14.40 per hour, which amounts to $29,952 per year. There is no claim in the record that the petitioner has employed the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on October 9, 2007, it is indicated that the petitioner was originally established in 1996 and employs ten workers.

The Beneficiary's experience

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* 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.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The ETA Form 9089 was signed under penalty of perjury by the beneficiary on September 21, 2007 and by the petitioner's representative on September 17, 2007. On Part K.1, the following instructions appear:

> List all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity for which the employer is seeking certification.

In support of the claimed two years of experience as a cabinetmaker, the beneficiary lists one prior job on the ETA Form 9089. He claims to have been self-employed as a cabinetmaker for 40 hours per week from January 2, 2003 to December 31, 2004. There are no further jobs listed either before this date or after this date (to the date of signing). As noted in the AAO's Notice of Derogatory Information (NDI) and Notice of Intent to Dismiss (NOID), copies of the beneficiary's individual Form 1040, U.S. Individual Income Tax Return for 2003, 2004, and 2005 declare adjusted gross earnings of $1,952 in 2003, $2,788 in 2004 and $3,717 in 2005. No other documentation of this employment has been submitted. Additionally, either individually or cumulatively, none of these figures on the beneficiary's individual Form 1040s reflect full-time employment and do not establish that the beneficiary obtained two full-time years of work experience as a cabinetmaker. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner also submitted an employment certification document signed by proprietor of a firm in Ecuador. The document states that the beneficiary worked in this shop from "July of 1997 until August of 1999" as a cabinetmaker. The document describes the beneficiary's duties but fails to state whether the work was part-time or full-time. Additionally, the credibility of this claimed work is significantly reduced by the fact that the beneficiary's work is stated to have commenced when the beneficiary was fourteen years of age. Further, as noted by the director, this work experience was not listed on Part K of the ETA Form 9089. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) Finally, as stated in the AAO's NDI/NOID, an overseas investigation was initiated relevant to this claimed employment. The NDI/NOID stated:

> On or about March 22, 2013, the investigator was contacted by and his wife. Neither could confirm any acquaintance with the beneficiary. Mr. also stressed that if the beneficiary worked for him for almost two years, he would remember because Mr. said that he usually had no more than two helpers in his shop at a time.

In response to the NDI/NOID, the petitioner submitted another declaration by Mr. stating that he issued a work experience certificate, but did not remember such issuance when he received an inquiry from the American Consulate. The beneficiary also submitted a statement in which he suggested that possibly age was responsible for Mr. lack of memory. Reviewing the overall evidence on this issue, the AAO does not find that the petitioner's response to the NDI/NOID is sufficiently credible to overcome the above-noted conflicts and inconsistencies in the beneficiary's evidence relevant to his claimed experience. Doubt cast on any aspect of the

petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In this case, the petitioner failed to resolve the inconsistencies of the beneficiary's claimed experience against the findings of the overseas investigation. Additionally, the beneficiary's individual tax returns fail to reflect full-time self-employment, and nothing documents that any of the beneficiary's claimed employment was full-time work experience as a cabinetmaker to establish that he has the required experience. The AAO concurs with the director's finding that the petitioner failed to credibly establish that the beneficiary acquired two years of work experience as a cabinetmaker pursuant to the ETA Form 9089 and 8 C.F.R. § 204.5(l)(3)(ii).

The Petitioner's ability to pay the proffered wage

As discussed above, the AAO requested additional evidence in the NDI/NOID relevant to the petitioner's ability to pay.[3] Pertinent to the ability to pay the proffered wage, the AAO requested *certified* of the stated quarterly wage reports for all quarters of 2007 through 2012, inclusive as well as *certified* copies of the petitioner's tax return transcripts for 2007 through 2012 by the Internal Revenue Service (IRS), and *certified* copies of W-2s and Form 1099s issued to the beneficiary and two other beneficiaries. The petitioner was permitted 65 days to submit a response. The petitioner did not submit certified copies of any documents and did not submit 2007, 2008 and 2009 state quarterly wage reports at all.[4] For these reasons, the AAO cannot properly evaluate the petitioner's ability to pay the proffered wage. As the matter now stands, the petitioner has not established the ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).[5]

---

[3]The director had also denied the petition based on the petitioner's failure to establish the continuing ability to pay the proffered wage.

[4] Additionally, both ETA Form 9089 and Form I-140 state that the employer has 10 employees. The quarterly wage statements in later years show that the petitioner only employs between two to four individuals depending on the quarter. 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).

[5] 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.

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 indication that the beneficiary has worked for the petitioner.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward.

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.

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).

In *K.C.P. Food*, 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). 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. 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.

In some cases USCIS additionally reviews the overall magnitude of the petitioner's business circumstances to evaluate the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). However, as stated above, the petitioner failed to submit the requested documents in response to the AAO's NDI/NOID. The requested information would have given the AAO more information from which to consider the petitioner's totality. As the petitioner failed to submit the requested information, such a review is cannot be accomplished.