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: MAY 07 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker 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 is a firm engaged in woodworks. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, new counsel submitted additional evidence and maintained that the petition merits approval.

At the outset, it is noted that the counsel who submitted the Form I-140 and the accompanying ETA Form 9089 has admitted to committing immigration fraud.[1]

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] 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.

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*, 299 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)(AAO conducts appellate review on *de novo* basis).

It is additionally noted that on December 18, 2012, the AAO issued a Request for Evidence (RFE), instructing the petitioner to submit additional documentation establishing that the petitioner has the continuing ability to pay the proffered wage and that the beneficiary possesses the required 24 months (two years) of experience in the job offered by the priority date. For the reasons set forth below, the AAO finds that the petitioner has failed to establish that the beneficiary possessed the required two years of experience in the job offered and also failed to establish its continuing ability to pay the proffered wage.

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[1]On January 3, 2013, the petitioner's former counsel pleaded guilty to immigration fraud.

(Accessed April 1, 2013).

[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).

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(l)(3) provides:

> (ii) *Other documentation*—
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> > (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.
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> > (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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on February 23, 2006, which establishes the priority date.[3] The proffered wage as stated on the labor certification is $18.93 per hour ($39,374.40 per year). Part H of the ETA Form 9089 states that the position requires that the beneficiary possess

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[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, including a prospective U.S. employer's ability to pay the proffered wage is clear. In some cases, in determining the petitioner's ability to pay the proffered wage, USCIS may consider the overall circumstances of the petitioner's business activities where expectations of increasing business and profits overcome evidence of small profits. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967).

24 months (2 years) of employment experience in the job offered as a carpenter. On Part H.10 of the ETA Form 9089, the employer indicates that it will not accept employment experience in an alternate occupation.

Experience

The petitioner initially submitted a letter, dated August 30, 2005, from the general manager of ' a firm in Ecuador, who stated that the beneficiary had worked as a carpenter from December 1, 1993 to October 31, 1996. The beneficiary's duties were described and were virtually identical to those described in Part H.11 of the ETA Form 9089, where the job duties of the petitioner's offered job is listed. Whether the job was part-time or full-time was not stated. In the AAO's RFE, in view of the immigration fraud connected with prior counsel, as well as a prior labor certification filed on the beneficiary's behalf for the position of a jeweler, the AAO requested corroboration of this experience and confirming whether it was full-time or part-time employment. The AAO specifically requested independent, objective, corroboration to verify employment, hours, and/or pay that would confirm the beneficiary's claimed full-time employment with Mr. s business in Ecuador.

Instead of receiving corroborative, independent, objective evidence establishing that the beneficiary had obtained at least two years of full-time work experience in the job offered, the petitioner submitted another copy of the August 30, 2005, letter from Mr. This submission is not responsive to the AAO's RFE requesting independent, objective evidence that corroborates the beneficiary's claimed employment with Mr. and in view of the fraud-related concerns expressed previously, cannot be considered probative of the beneficiary's claimed full-time qualifying work experience. 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. *See* 8 C.F.R. § 103.2(b)(14).

The AAO concludes that the petitioner has failed to establish that the beneficiary possessed the required two years of full-time experience as of the priority date.

Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) further 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.[4]

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[4] USCIS reviews a petitioner's ability to pay a proffered wage through the examination of wages paid to a beneficiary by the petitioner, the petitioner's net income or the petitioner's net current assets for a given period. 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, or as appropriate, its net current assets, 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 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.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on November 7, 2006, it is claimed that the petitioner was established on January 1, 1992, has 10 workers, and reports a gross annual income of $2,752,000 and a net annual income of $525,000.

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 beneficiary's qualifications for the job offered

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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).

In some cases, 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. 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 such 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, and the occurrence of any uncharacteristic business expenditures or losses.

For the reasons set forth in this decision, based on the petitioner's failure to supply copies of IRS- certified tax returns as requested by both the director and the AAO, the AAO does not find, as the record currently stands, that the petition merits approval on the issue of the petitioner's ability to pay the proffered wage based on the principles of *Matter of Sonegawa.*

and 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). Relevant to the ability to pay, 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 overall 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 the AAO's RFE, issued on December 18, 2012, the AAO specifically requested copies of the petitioner's federal income tax returns for 2005, 2006, 2007, 2008, 2009, 2010 and 2011, *certified* by the Internal Revenue Service (IRS) and noted that the director had previously requested these materials prior to his decision in 2010. Although providing some materials related to its ability to pay the proffered wage, the petitioner has never provided the requested IRS certified tax returns to the director or to the AAO. It is noted that the record contains a copy of a request to the IRS that was not made until more than a month past the AAO's RFE. In view of the immigration fraud concerns as noted previously, and the petitioner's failure to submit these documents either to the director, on appeal, or in response to the AAO's RFE, as the current record stands, the AAO cannot conclude that the petitioner has established its ability to pay the proffered wage from the priority date onward. 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).

The petitioner has not established that the beneficiary possessed the requisite full-time work experience as of the priority date as required by the terms of the ETA Form 9089 and has not established that the petitioner has had the continuing ability to pay the proffered wage from the priority date onwards. 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.