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

U.S. Citizenship
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Services

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FILE:

SRC 07 265 53760

Office: TEXAS SERVICE CENTER

Date:

OCT 06 2009

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 windows installation firm. It seeks to employ the beneficiary permanently in the United States as a financial manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor.

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree and therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree pursuant to 8 C.F.R. § 204.5(k)(4). The director also found that the petitioner failed to submit any evidence demonstrating that the beneficiary possesses the requisite educational credentials or that the petitioner has the ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through former counsel¹ submits additional evidence relating to its ability to pay the proffered wage, the beneficiary's qualifying employment experience and the beneficiary's educational credentials. The petitioner also asserts that the director should have issued a request for evidence and given the petitioner the opportunity to submit the necessary documentation and explain that the ETA Form 9089 contained a simple error regarding the quantity of work experience required for the certified position.

The record shows that the appeal is properly filed and timely. 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.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

¹The petitioner will be treated as representing itself as former counsel was suspended from the practice of law in New York on October 17, 2008.

The regulation at 8 C.F.R. § 204.5(k)(3) provides in pertinent part:

- (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
 - (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
 - (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The regulation at 8 C.F.R. § 204.5(g)(2) further states:

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 in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date. The petitioner must also establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on August 30, 2006. The proffered wage as stated on Part G of the ETA Form 9089 is \$45.85 per hour, which amounts to \$95,368 per year. The ETA Form 9089 does not indicate that the beneficiary worked for the petitioner.

Part 5 of the I-140, Immigrant Petition for Alien Worker, filed on July 3, 2007, indicates that the petitioner was established in 2002 and currently employs twenty workers.

At the outset, it is noted that this petition was not eligible for approval at filing because it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

(a) Filing applications.

- (1) . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.²

Although an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition, it was not signed by the alien or the petitioner. As such, the preference petition should have been rejected. 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 Dor v. INS*, 891 F.2d 997 at 1002 n. 9.

Because the director's denial rested on his determination that the petitioner had not established its continuing financial ability to pay the proffered wage, the beneficiary's qualifying credentials and the petitioner's failure to demonstrate that the job requires a professional holding an advanced degree pursuant to 8 C.F.R. § 204.5(k)(4), these issues will be herein reviewed.

In this case, Part H, no. 4 and 4-B of the ETA Form 9089 indicates that the minimum level of education required for the position is a Bachelor's degree in business, accounting, economics, marketing or finance. Part H 6 reflects that experience in the job offered of financial manager is also required. Part H, 6-A indicates "5" for the "number of months of experience required." An alternate field of study in business, accounting, economics, marketing or finance is also indicated in H 7-A. An alternate combination of education and experience consisting of a master's degree and no experience is also indicated on Part H, 8-A. The job duties described for a financial manager are summarized on an addendum to Part H, 11:

Develop and analyze information to assess the current and future financial status of company; Establish and maintain relationships with business customers, and provide assistance with problems customers may encounter; Network within communities to find and attract new business customers; Evaluate financial reporting systems, accounting and collection procedures, and investment activities;

² Similar instructions are found on page 8 of the ETA Form 9089.

oversee the flow of cash and financial instruments; Evaluate data pertaining to costs in order to plan budgets.

In his denial, the director noted that the ETA Form 9089 as stated, required either a bachelor's degree and five months experience or a master's degree in business, accounting, economics, marketing, or finance. The director found that even if the beneficiary had provided a copy of his bachelor's degree with the petition, coupled with five months experience, it would not qualify for an advanced degree professional visa because five progressive years of experience is required to be combined with a bachelor's degree or foreign equivalent degree.

On appeal, the petitioner's principal shareholder, [REDACTED] asserts that the designation of "5" in Part H -6A of the ETA Form 9089 was an unintended error in that he was thinking that it meant 5 years not 5 months and that the 9089 should have had 60 months as the selection. [REDACTED] contended that the recruitment for the position advertised for someone with five years of experience. He provided copies of recruitment notices that were posted in the *Philadelphia News* on April 16, 2006 and April 23, 2006, as well as the internet as attested by [REDACTED] of the [REDACTED]. [REDACTED] The notices state that "qualified applicants must have 4 yr college degree & 5 yrs exp."³

The petitioner asserts that the director erred in not issuing a request for additional evidence, which could have permitted the petitioner to provide this documentation to the record. It is noted that 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). The instructions for the ETA Form 9089, Part H, also 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.

In this case, the petitioner additionally failed to submit with the petition, evidence of the beneficiary's bachelor's degree and evidence of the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 103.2(b)(8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of ineligibility in the record." In this context, the director's determination that the ETA Form 9089 failed to support the

³ An Internet Job Bank posting listed a Bachelor's degree and "mid-career" experience of two to fifteen years. The ads did not reference that the candidates could meet the position requirements through alternate education of a Master's degree.

selected visa category of an advance degree professional was understandable as USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Matter of Silver Dragon*, 19 I&N Dec. at 406. Additionally, as noted by the director, the petitioner's designation of a bachelor's degree and five months of experience on Part H, 6-A of the ETA Form 9089 would not qualify as a position for an advanced degree professional.

The beneficiary's diploma submitted on appeal indicates that he obtained a four-year bachelor's degree in economics from Yeungnam University, Korea on February 21, 1987. However, for the reasons explained below, we do not conclude that the petitioner demonstrated its ability to pay the proffered wage of \$95,368 per year or demonstrated that the beneficiary had acquired five years of experience as a financial manager following his baccalaureate.

In support of its ability to pay the proffered wage, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2006 and 2007. They indicate that the petitioner's tax year is a standard calendar year. The returns contain the following information:

Year	2006	2007
Net Income ⁴	- \$25,930	\$62,254
Current Assets	\$248,506	\$244,356
Current Liabilities	\$420,322	\$345,522
Net Current Assets	- \$171,816	-\$101,166

Schedule L reflects the petitioner's current assets and current liabilities. Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

⁴ 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. 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) and (2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, the record does not indicate that the petitioner has employed the beneficiary.

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. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. See *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.

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 116. “[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 suggested by the petitioner’s principal shareholder on appeal, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in Time and Look. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, based on the submission of two income tax returns, it may not be concluded that they represent the kind of framework of profitability such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual and unique business or reputational circumstances exist in this case, which are analogous to the facts set forth in that case. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2006 was an uncharacteristically unprofitable year for the petitioner.

In this case, in 2006, neither the petitioner’s -\$25,930 in net income nor its -\$171,816 in net current assets was sufficient to pay the proffered wage of \$95,368.

In 2007, the petitioner’s net income rose to \$62,254, but was still \$33,114 short of the proffered salary of \$95,368. The petitioner’s net current assets of -\$101,166 was insufficient to pay the proffered wage.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority

date, which in this case is August 30, 2006. The evidence provided in this matter does not establish the petitioner's continuing financial ability to pay the certified wage.

Additionally, even if accepted that the petitioner meant five years, the AAO also finds that the employment verification documents submitted to the record failed to adequately demonstrate that the beneficiary had acquired five years of employment experience as a financial manager as of the priority date. The ETA Form 9089 did not state that the experience requirement could be met through experience in any alternate, related occupation. With the petition, the petitioner provided a "Certificate of Experience" dated April 20, 2001. It contains no signature and does not identify the name of the author except to state that it is the "Daedong Bank Chief or the General Affairs Department." It itemizes various positions that the beneficiary has held in a chart that refers to the jobs as "manager," "vice chief," and "chief," from 1989 through 1998, but does not describe any duties performed similar to the certified position, does not state that he worked as a financial manager, and does not specify whether the employment was part-time or full-time. Another "Certificate of Experience," dated November 30, 2006, indicates that the beneficiary was a MIS Financial Manager from January 2, 2000 to November 30, 2003 at the Shinwon Accounting Corporation. It is signed by the president, identified as [REDACTED] but does not indicate whether this was part-time or full-time employment. A "Certificate of Employment," dated April 21, 2001 from an individual identified only as the supervisor of personnel [REDACTED] indicates that the beneficiary was a manager from January 15, 1977 until April 6, 1989. The author is not identified by name, the beneficiary's duties are not described and the employment is not specified as full-time or part-time. Moreover, the bulk of this work would have occurred prior to the beneficiary's baccalaureate degree.

As noted above, these documents do not specifically corroborate that the beneficiary's past work experience was sufficient to establish that he had obtained five years of progressive employment experience as a financial manager as of the priority date. 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)).

Based on the above, the petitioner failed to establish its continuing financial ability to pay the proffered wage and failed to demonstrate that the beneficiary had acquired the requisite employment experience as of the priority date and failed to establish that the position described on the ETA Form 9089 was for an advanced degree professional based on the designation of a bachelor's degree and five months of experience. As initially discussed, the petition was also not approvable in any case due to the lack of signatures on the ETA Form 9089.

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.