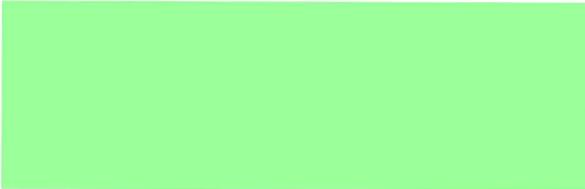


(b)(6)

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



DATE: **MAY 29 2014** OFFICE: NEBRASKA SERVICE CENTER FILE:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

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 December 6, 2013 denial, the primary issue is that the petitioner did not establish the beneficiary's five years of progressive work experience.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).² The priority date of the petition is June 3, 2012.³

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in Computer Science, Engineering (any), Math or related.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- 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: Yes, Computer / Engineering Professional.

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

² See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

³ The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

H.14. Specific skills or other requirements: Any suitable combination of education, training, and experience is acceptable. Job locations in Libertyville, IL and travel to various unanticipated locations throughout the U.S. for different short and long term assignments.

Part J of the labor certification states that the beneficiary possesses a Bachelor's Degree in Technology from [REDACTED] India, completed in July, 2005.⁴ The record contains a copy of the beneficiary's Bachelor's Degree in Technology diploma and transcripts from [REDACTED] India, issued in 2006.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed May 15, 2014). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." Id. According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed May 15, 2014). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. Id. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies. EDGE indicates that the beneficiary's Bachelor of Engineering/Technology represents attainment of a level of education comparable to a bachelor's degree in the United States.

Next, Part K of the labor certification states that the beneficiary possesses the following employment experience:

- Software Development and Consulting with [REDACTED] in Libertyville, IL from March 15, 2012 until Present.
- Computer Professional with [REDACTED] in Clearwater, FL from April 15, 2008 until March 14, 2012.
- Computer Professional with [REDACTED] in India, from July 11, 2005 until April 1, 2008

The record contains an experience letter from [REDACTED] Supervisor on [REDACTED] Inc. letterhead stating that the company employed the beneficiary as a Computer Professional from April 15, 2008 until March 14, 2012. The record also contains an experience letter from [REDACTED] HR Chief Executive on [REDACTED] letterhead dated April 1, 2008 stating that the company employed the beneficiary first as a Software Trainee then promoted to a Software Engineer. The letter from [REDACTED] does not establish how much of the time was spent in his role as trainee and how much as software engineer. Thus, the letter does not establish the

⁴ We note that the director incorrectly stated the beneficiary's graduation date was 2006.

beneficiary's work experience as a software engineer, or a computer/engineering professional, as required by the labor certification.⁵ Further the author of the letter states that the beneficiary "was associated with our organization" from July 11, 2005 to April 1, 2008. The author did not state that he worked for the period of time.⁶ Thus, the letter does not establish how much time the beneficiary gained work experience with the petitioner.

The director denied the petition because the record did not establish that the beneficiary was qualified. The director found that [REDACTED] was found by the DOL to have engaged in prohibited employment practices during the period of the beneficiary's employment, which cast doubt upon the experience letter. Thus, the petitioner failed to establish the beneficiary's 60 months of work experience.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁷ A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.⁸

In the instant case, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor's followed by at least five years of progressive experience in the specialty.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

As discussed above, the record contains an experience letter from [REDACTED] Supervisor on [REDACTED] Inc. letterhead stating that the company employed the beneficiary as a Computer Professional from April 15, 2008 until March 14, 2012. The record reflects that [REDACTED] was sanctioned by the United States Department of Labor Wage and Hour Division for engaging in willful violations and unlawful employment practices during the period when the

⁵ The record does not establish that beneficiary's work as a software trainee may be considered as work in a professional capacity.

⁶ A trainee position such as an unpaid internship would not be considered professional post baccalaureate work experience. The record does not contain sufficient information to establish work experience as a computer professional.

⁷ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

⁸ *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).

beneficiary was employed by [REDACTED] Inc.⁹ The findings included failure to maintain employer-employee relationships, provide qualifying employment, benching of employees between contracts, and falsifying client relationships and end client contracts.¹⁰ The director requested additional proof that the beneficiary was employed in a fulltime capacity from April 15, 2008 until March 14, 2012. The record does not contain independent objective evidence establishing the beneficiary's fulltime employment with [REDACTED], Inc. Such evidence could include Forms W-2 issued by [REDACTED] Inc. to the beneficiary and company payroll records establishing that the beneficiary did in fact gain three years and 11 months of fulltime work experience with [REDACTED] Inc. as a computer professional. Without independent objective evidence of the beneficiary's fulltime employment the AAO will not accept the experience letter from [REDACTED] Inc.

The petitioner argues that because the debarment of the company did not occur until after the beneficiary no longer worked for [REDACTED] the director unreasonably failed to consider the beneficiary's work experience with [REDACTED]. We disagree. The claimed employer had documented inconsistencies in employment practices during the time that the beneficiary was said to have been employed with [REDACTED]. The record reflects that the director requested objective independent evidence of such employment in the NOID. The petitioner failed to submit Forms W-2 or payroll records corroborating the beneficiary's fulltime employment.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

Therefore, the submitted experience letters do not establish that the beneficiary possessed five years of post-baccalaureate experience in the specialty.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

⁹ [REDACTED] was debarred from filing H-1B visa petitions from March 1, 2013 to January 31, 2015.

¹⁰ Benching refers to the unlawful practice of not employing workers in the United States on H-1B visas between contracts, e.g. when the employer has no work.

Beyond the decision of the director, the petitioner has failed to establish its ability to pay the proffered wage to the beneficiary of the instant petition and other sponsored workers.

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, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on June 3, 2012. The proffered wage as stated on the ETA Form 9089 is \$95,500 per year. The ETA Form 9089 states that the position requires a bachelor's degree and five years of progressive experience in the job offered.

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 in June 13, 2006 and to currently employ 14 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on April 5, 2013, the beneficiary claimed to have worked for the petitioner.

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, 144 (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, 614-15 (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. In the instant case, the petitioner demonstrated that it paid the beneficiary \$52,438.78 in 2012, which is less than the proffered wage (a deficiency of \$43,061.22). Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2012.

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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.*, 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 also Taco Especial*, 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.

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 St. Donuts, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

The petitioner was placed on notice by the director on September 23, 2013, that it has sponsored multiple beneficiaries. Specifically, the petitioner has filed immigrant visa petitions for sponsoring nine beneficiaries including the instant beneficiary. The evidence in the record documents the priority date, the proffered wage or wages paid to five beneficiaries in 2012. However, the petitioner has not offered evidence concerning four additional beneficiaries. The petitioner filed Forms I-140 on behalf of beneficiaries with receipt numbers [REDACTED] and [REDACTED].¹¹

The record before the director closed on October 22, 2013 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2013 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2012 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2012, as shown in the table below.

- In 2012, the Form 1120S stated net income of \$70,627.

Therefore, for the year 2012, the petitioner did not have sufficient net income to pay the proffered wage to all of its beneficiaries.

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.¹² 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. 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

¹¹ We have reviewed the evidence submitted for the additional four beneficiaries. The record reflects that the petitioner had a wage deficiency of \$535,500 in proffered wages in 2012, and that it paid wages of \$238,577. The petitioner must establish an ability to pay the difference between the proffered wages and the wages paid, which is \$296,923.

¹² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron’s Educ. Series 2000).

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2012, as shown in the table below.

- In 2012, the Form 1120S stated net current assets of \$203,937.

Thus, for the years 2012, the petitioner did not have sufficient net current assets to pay the proffered wage to all of its beneficiaries.

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 all of its beneficiaries 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.

We note that the record contains bank statements and quarterly wage reports for 2012. Bank statements and quarterly wage reports are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L.

The petitioner also requests that we accept pro-rated wages as evidence of its ability to pay the proffered wage. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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 *Sonegawa*, 12 I&N Dec. at 614-15. 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 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 has been in business since 2006 and claims to employ 14 workers. However the record is silent concerning the established historical growth of the petitioner's business, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, and whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual 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.

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.