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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **JUL 30 2008**
LIN-06-188-53021

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software consulting company. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification application),¹ approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as required on the ETA Form 9089. Accordingly, the director denied the petition on January 22, 2007.

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.

On appeal, counsel asserted that the ETA Form 9089 specifies that the minimum academic requirements of a bachelor's degree might be met through a lesser degree and/or quantifiable amount of work experience. In Part H of the ETA Form 9089, the petitioner requires a bachelor's degree in computer science, CIS, MIS, Math, Engineering, Business, Science or related field or a foreign equivalent degree and 60 months (five years) of experience in the job offered or in an alternate occupation of software engineer/developer/IT consultant, programmer analyst or programmer. The petitioner will accept a combination of a master's degree and two years of experience as an alternative method to meet the requirements for the proffered position. Counsel asserts that in Part H, Item 14 the petitioner defined or interpreted the bachelor degree equivalency requirement as follows:

Any reasonable combination of education, training and experience is acceptable for the position offered; In the alternative to the primary educational requirements, the employer will also accept 3 years of college in the listed fields of study + 3 years of experience in the job offered or a related occupation as the equivalent of a Bachelor's degree; Employer is willing to accept a foreign education degree equivalent in one of the listed fields of study including a combination of one or more degrees or diplomas.

However, the record did not contain any evidence showing that the petitioner actually used these defined equivalent requirements in its labor market test.² Therefore, the AAO issued a request for evidence (RFE) on

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Since the instant labor certification application was filed after March 28, 2005, it is governed by the PERM regulations.

² The DOL has provided the following field guidance: "When an equivalent degree or alternative work

January 7, 2008 granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. The AAO received the response on March 28, 2008.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal and in response to the AAO's RFE.

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

DOL assigned the occupational code of 15-1031.00, systems analyst to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed June 9, 2008) and its extensive description of the position and requirements for the position most analogous to systems analyst position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to QA software specialist position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [Citizenship and Immigration Services (CIS)] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

Therefore, a systems analyst position depending on the requirements could be analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.³ In this case, the employer indicated on the ETA Form 9089 that the position does not always require a bachelor's degree. By setting an alternative requirement, the employer would accept three years of college study and eight years of experience as the minimum requirements for the proffered position.⁴ In response to the AAO's RFE, counsel submits recruitment efforts conducted related to the relevant labor certification, including the internal posting notice, internet postings, newspaper advertisements and its recruitment efforts report. They clearly indicate that the employer would accept a combination of lesser degree(s) and quantifiable amount of work experience, i.e. three years of college study plus three years of experience, as an "equivalent" to meet the minimum educational requirement of a bachelor's degree. The AAO finds that U.S. workers were on notice that a combination of lesser degree(s) and work experience as an equivalent would meet the minimum educational requirement of a bachelor's degree in engineering, math, computer science or MIS. The petitioner demonstrated its intent to accept a combination of lesser degree(s) and work experience as an equivalent of a bachelor's degree on the EAT Form 9089 and the relevant recruitment materials. Therefore, the AAO will examine the petition under the skilled worker category only, which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the labor certification application. 8 C.F.R. § 204.5(1)(3)(ii)(B).

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

The record shows that the beneficiary possesses a three-year Bachelor of Science degree in chemistry, botany and zoology from the University of Rajasthan in India. The petitioner asserts that the beneficiary possessed the equivalent to a U.S. bachelor's degree according to private credential evaluations from Peter Szabo of

³ A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that systems analyst positions are not included in this section.

⁴ By defining the equivalent of a U.S. bachelor's degree as three years of college study and three years of experience, the employer expresses three sets of acceptable requirements for the proffered position: (1) a bachelor's degree plus five years of experience; (2) a master's degree plus two years of experience; or (3) three years of college study plus eight years of experience as required.

A.E.S.F. Inc. (AESF), Pai-chu Ma of Baruch College – The city University of New York (Prof. Ma). All of the evaluations evaluate the beneficiary's three-year bachelor's degree in chemistry, botany and zoology as the equivalent of three years of academic studies toward a Bachelor of Science degree at an accredited college or university in the United States. The AESF's evaluation concludes that the beneficiary attained the equivalent of a bachelor of science degree in management information systems from an accredited college or university in the United States based on the beneficiary's three-year bachelor's degree in chemistry, botany and zoology from the University of Rajasthan, his diploma in computer programming from Dahanukar Institute of Management, and the diploma in management from IGNOU. However, as previously discussed, a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate since a bachelor degree is generally found to require four years of education, *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977) and the petitioner has not established that either the diploma in computer programming from Dahanukar Institute of Management or the diploma in management from IGNOU is a post graduate diploma. In addition, the petitioner did not submit the diploma in computer programming from Dahanukar Institute of Management as a part of the beneficiary's education qualifications but as evidence of his training in software. Prof. Ma's evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The evaluations are consistent with the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, <http://www.aacrao.org>, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE provides a great deal of information about the educational system in India. While it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States. Therefore, the beneficiary's three-year bachelor of science degree in chemistry, botany and zoology from the University of Rajasthan in India alone represents attainment of a level of education comparable to three years of university study in the field of science in the United States, and thus meets the educational requirement of three years of college study in the field of computer science, CIS, MIS, math, engineering, business, science or related field. Thus, the ground of the director's January 22, 2007 denial was that the petitioner failed to demonstrate that the beneficiary met the minimum education requirements is herewith withdrawn.

However, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*,

16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The petitioner must demonstrate that, on the priority date, that is May 4, 2006 in the instant case, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The certified ETA Form 9089 can be read as requiring eight years of experience in the job offered, i.e. systems analyst, or in the related occupation of software engineer/developer/IT consultant, programmer analyst or programmer since the employer defines the equivalent to a bachelor's degree as three years of college study and three years of experience in the job offered or in a related occupation listed. The beneficiary is qualified to meet the educational requirements with his three-year bachelor's degree. The beneficiary set forth his work experience on the ETA Form 9089. He listed his experience as a full-time "System Analyst" with the petitioner since October 10, 2003; as a full-time "Programmer" at Future Technology Foundation Inc. from February 22, 2003 to September 30, 2003; as a full-time "IT Consultant" at Ohm Technologies from September 7, 2000 to February 20, 2003; as a full-time "Information Technology Analyst" at Abdul Monem Ltd. from November 1, 1999 to September 6, 2000; as a full-time "Regional Manager" at Vadilal Enterprises Limited from November 1, 1996 to October 30, 1999; as a full-time "Manager" at Kwaliti Ice Creams I Ltd. from June 6, 1986 to October 10, 1996; and as a full-time "Programmer" at Colgate Palmolive India Pvt. Ltd. from September 21, 1977 to June 6, 1986. The record contains another immigrant petition (LIN-06-263-52737) that the petitioner filed on behalf of the beneficiary based on a certified Form ETA 750. On the Form ETA 750B signed on December 3, 2003, the beneficiary did not list his employment with the petitioner which started October 10, 2003 according to the instant ETA Form 9089. While the beneficiary listed his title at Future Technology Foundation Inc. as a "Computer Consultant" on the ETA 750B, he lists the same position as a "Programmer" on the ETA Form 9089. Counsel, the petitioner or the beneficiary did not explain and/or resolve these inconsistencies.

The record contains letters or other documents submitted as evidence to demonstrate the beneficiary's qualifications in experience, including a letter dated April 2, 1980 from [REDACTED] E.D.P. Manager of Colgate Palmolive (India) Ltd. (Colgate April 2, 1980 letter); a letter dated March 24, 1987 from A [REDACTED] [REDACTED] E.D.P. Manager of Colgate Palmolive (India) Ltd. (Colgate March 24, 1987 letter); a letter dated April 1, 1996 from [REDACTED] the director of Kwaliti Ice Creams (India) Ltd. (Kwaliti April 1, 1996 letter); an employment agreement entered November 1, 1996 between Vadilal Enterprises Ltd. and the beneficiary (Vadilal employment agreement); an employment agreement entered October 30, 1999 between Abdul Monem Ltd. and the beneficiary that supersedes an October 4, 1999 agreement (Abdul employment agreement); a letter dated July 3, 2002 from [REDACTED] the director of Ohm Technologies Pvt. Ltd. (Ohm July 3, 2002 letter); a letter dated September 5, 2002 from [REDACTED] Vice President of Future

Technology Foundation, Inc. (Future September 5, 2002 letter); and a letter dated October 1, 2003 from the petitioner (the petitioner's October 1, 2003 letter).

The Colgate April 2, 1980 letter was to inform the beneficiary of his promotion to "Programmer effective of April 2, 1980. It does not contain any contents required by the regulation at 8 C.F.R. § 204.5(g)(1) for the evidence relating to qualifying experience or training. The Colgate March 24, 1987 letter verifies that the beneficiary worked for that company as a D.P. Operator from September 21, 1977 and then as a programmer from April 2, 1980 to June 6, 1986; however, it does not verify the beneficiary's full-time employment and does not contain a specific description of the duties performed by the beneficiary as a programmer during the six-year period. The [REDACTED] April 1, 1996 letter verifies that the beneficiary worked for that company as an assistant manager (systems) from June 6, 1986 to April 2, 1992 and then as a system manager (electronic date processing) from April 2, 1992 to October 1, 1995. However, this letter does not verify the beneficiary's full-time employment. In addition, with the description of the duties performed by the beneficiary at Kquality Ice Creams, it is not clear whether the beneficiary's experience as an assistant manager and system manager twenty years ago at an ice cream manufacturing and marketing company in India qualifies him to perform the duties described in item 11, Part H of the ETA Form 9089 as a systems analyst for a software consulting service company in the United States. The Ohm July 3, 2002 letter verifies the beneficiary's employment with them as an information technology consultant for one year and ten months from September 2000 to the date of the letter, i.e. July 3, 2002. It does not verify the beneficiary's full-time employment. In addition, with the description of the duties performed by the beneficiary at Ohm Technologies, it is not clear whether the beneficiary's experience as an information technology consultant there qualifies him to perform the duties described in item 11, Part H of the ETA Form 9089. The Vadilal employment agreement and the Abdul employment agreement are employment contracts, which were entered into before the beneficiary started the employments with these companies and thus, do not and could not verify the beneficiary's employment thereafter. The Future September 5, 2002 letter and the petitioner's October 1, 2003 letter are job offer letters. Similarly with the employment agreements above, job offer letters are not and cannot be primary evidence to establish the beneficiary's experience under the regulation at 8 C.F.R. § 204.5(g)(1).

In its RFE dated January 7, 2008, the AAO informed the petitioner of these defects and requested that the petitioner submit the regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite experience for the proffered position prior to the priority date in the instant case. In response to the AAO's RFE, counsel submits several items as new and additional evidence to establish the beneficiary's qualifications in experience. The new evidence submitted in response to the AAO's RFE includes two affidavits from R [REDACTED] affidavit) and [REDACTED] affidavit) respectively pertinent to the beneficiary's experience with Colgate Palmolive (India) Limited; a letter dated April 1, 1996 from [REDACTED] IT Manger of Kquality Ice Creams (India) Ltd. [REDACTED] second letter); and two letters dated January 30, 2008 from [REDACTED] January 30, 2008 letter) and dated February 20, 2008 from Eric Tilton (Tilton February 20, 2008 letter) respectively.

Neither the [REDACTED] affidavit nor the [REDACTED] affidavit is a regulatory-prescribed experience letter because they are from the beneficiary's former coworkers instead of his former employers or trainers. The regulation allows consideration of other documentation relating to the beneficiary's experience or training only when the regulatory-prescribed experience letter from the beneficiary's former employer(s) is unavailable.

Counsel does not explain why and submit any objective evidence to confirm such regulatory required experience letter unavailable. The authors of the affidavits do not indicate what records or documents they relied upon to provide such detailed job description for a coworker twenty years ago. Nor does the record contain any objective evidence, such as the beneficiary's pay statements from the company, income records, the company's payroll records or personnel records, to support the beneficiary's employment history with this company. Thus, the petitioner failed to establish the beneficiary's experience from the employment with Colgate Palmolive with regulatory-prescribed evidence.

██████████'s second letter supplements the ██████████ by April 1, 1996 letter with a paragraph regarding tools the beneficiary used when he performed the duties described in the ██████████ by April 1, 1996 letter. The paragraph states that: "[The beneficiary] developed these packages using HTML, JavaScript, VBScript, C, C++ as programming language and in backend extensively worked on Oracle 7 and 8i database created on UNIX servers." However, the submission of ██████████'s second letter does not resolve the defect in the ██████████ April 1, 1996 letter, namely, whether the beneficiary's experience as an assistant manager and system manager twenty years ago at an ice cream manufacturing and marketing company in India qualifies him to perform the duties described in item 11, Part H of the ETA Form 9089 as a systems analyst for a software consulting service company in the United States. In addition, ██████████'s second letter is dated April 1, 1996, the same day as the ██████████'s first letter. The two letters were issued on the same day. However, counsel did not explain why the ██████████ second letter was not submitted at the filing of the petition with ██████████'s first letter together. Furthermore, the record does not contain any objective evidence, such as the beneficiary's pay statements from the company, income records, the company's payroll records or personnel records, to support the beneficiary's employment history with this company. Therefore, the petitioner failed to establish the beneficiary's experience from the employment with ██████████. with the regulatory-prescribed evidence.

In response to the AAO's RFE, counsel also submits the ██████████ January 30, 2008 letter and the ██████████ February 20, 2008 letter. ██████████ issued the letter as the former team leader and ██████████ issued his letter as the current team leader for Software Development Life Cycle (SDLC) Tools support for IBM Global Services (IGS) respectively. Both letters were submitted to verify the beneficiary's employment experience as a contractor for SDLC Tools, supporting IGS since March 14, 2005. However, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date in the instant case is May 4, 2006. Therefore, only one year of the experience obtained from March 14, 2005 to May 4, 2006, the priority date, can be used to qualify the beneficiary for the proffered position in the instant case. Moreover, both the petitioner and the beneficiary claim that the beneficiary has been working for the petitioner in the position of systems analyst since October 10, 2003 and the beneficiary's W-2 forms issued by the petitioner confirm the beneficiary's employment with the petitioner for this period. Therefore, the employment verification for the beneficiary's experience for the period from October 10, 2003 to May 4, 2006 from the petitioner is already primary evidence to establish the beneficiary's experience during that period. The Towles January 30, 2008 letter and the Tilton February 20, 2008 letter cannot be accepted as an experience letter from the beneficiary's former or current employer, and thus, do not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(g)(1).

Therefore, the record does not contain experience letters from former employer(s) or trainer(s) to verify that the beneficiary possessed the requisite eight years of experience in the job offered or in an alternate occupation of software engineer/developer/IT consultant, programmer analyst or programmer prior to the priority date as required by the regulation. The petitioner failed to establish the beneficiary's qualifications in experience with regulatory-prescribed evidence. Therefore, the AAO concurs with the director's decision that the petitioner has not demonstrated that the beneficiary met the minimum requirements at the time the request for certification was filed and that the beneficiary cannot be found to be qualified for the proffered position under the skilled worker category. Thus, the director's January 22, 2007 decision is affirmed.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss this issue below. 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, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation 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 was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 CFR § 204.5(d). The priority date in this case is May 4, 2006. The proffered wage as stated on the ETA Form 9089 is \$87,500 per year.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 submitted the beneficiary's W-2 forms for 2006 and 2007. These W-2 forms show that the petitioner paid the beneficiary \$68,380 in 2006 and \$74,640 in 2007. Therefore, the petitioner did not establish its ability to pay the proffered wage in these relevant years through the examination of wages actually paid to the beneficiary. Rather, the petitioner is obligated to demonstrate that it could pay the difference of \$19,120 in 2006 and \$12,860 in 2007 between wages actually paid to the beneficiary and the proffered wage with its net income or net current assets.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 income and gross profit is misplaced. Showing that the petitioner's total income 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 CIS, 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

The petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 2006 and 2007 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. The tax returns for 2006 through 2007 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$87,500 per year from the year of the priority date:

- In 2006, the Form 1120S stated a net income⁵ of \$226,894.

⁵ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the

- In 2007, the Form 1120S stated a net income of \$265,752.

For the years 2006 and 2007, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage, and thus established its ability to pay the proffered wage with its net income in 2006 and 2007.

Therefore, from the date the ETA Form 9089 was accepted for processing by DOL, the petitioner established that it had ability to pay the beneficiary the proffered wage as of the priority date in 2006 and 2007 through an examination of wages paid to the beneficiary and its net income.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner filed 284 petitions (48 immigrant petitions and 236 nonimmigrant petitions). Among the immigrant petitions filed, the petitioner has 31 petitions approved and 6 currently pending.⁶ For these approved and pending immigrant petitions, the petitioner must establish its ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. Therefore, the petitioner must also show that it had sufficient income to pay thirty-one proffered wages in 2006 and twenty-seven in 2007.⁷

Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

⁶ For most of the approved petitions and pending petitions, counsel submits the approval notices and receipt notices in response to the AAO's RFE.

⁷ The figures are mostly based on the priority date and the approval date for the approved petitions and based on the filing date for the pending petitions. If the calculation is based on the priority date and the date the beneficiary obtains lawful permanent residence for the approved petitions and based on the priority date for the pending petitions, the number of proffered wages the petitioner is responsible to pay each year would be must more.

The petitioner had net income of \$226,894 and net current assets⁸ of \$248,458 in 2006. The balance of \$229,338 after paying the difference of \$19,120 between wages paid to the beneficiary and the proffered wage from the net current assets appears to be sufficient to cover two and a half proffered wages at the same level with the instant proffered wage. In response to the AAO's RFE, however, counsel submits the 2006 W-2 forms for the petitioner's employees. These W-2 forms show that the petitioner did not pay any wages to eight, and paid partial proffered wages (less than the proffered wage in the instant case) to most of the thirty-one beneficiaries for whom the petitioner was obligated to establish its ability to pay in 2006. Therefore, the AAO cannot conclude that the petitioner established its ability to pay all the thirty-one proffered wages through the examination of wages actually paid to the beneficiaries and with its net income or net current assets in 2006.

The petitioner had net income of \$265,752 and net current assets of \$214,755 in 2007. The balance of \$252,892 after paying the difference of \$12,860 between wages paid to the beneficiary and the proffered wage from the net income appears to be sufficient to cover less than three proffered wages at the same level with the instant proffered wage. In response to the AAO's RFE, however, counsel submits the 2007 W-2 forms for the petitioner's employees. These W-2 forms show that the petitioner had at least six beneficiaries need to establish its ability to pay the full proffered wage with its net income or net current assets because the petitioner did not pay any compensation to these six. The petitioner paid partial proffered wages (less than the proffered wage in the instant case) to many of the twenty-seven beneficiaries for whom the petitioner was obligated to establish its ability to pay in 2007. Therefore, the AAO cannot conclude that the petitioner established its ability to pay all the twenty-seven proffered wages through the examination of wages actually paid to the beneficiaries and with its net income or net current assets in 2007.

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.

⁸ If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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. 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 proffered wage using those net current assets.

According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "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). *Id.* at 118.

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ORDER: The appeal is dismissed.