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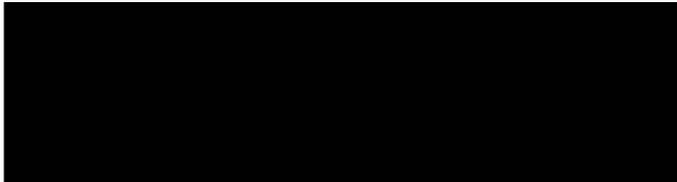
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
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**U.S. Citizenship
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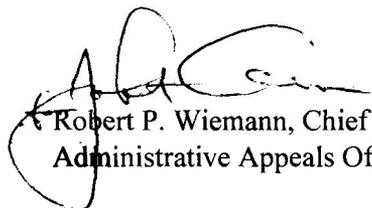
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 employment based 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 an engine rebuilding machine shop. It seeks to employ the beneficiary permanently in the United States as an assembly engine mechanic supervisor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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.¹

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 employer, alien, or the attorney. As such, the preference petition should have been rejected. Because the director's denial rested on his determination that the petitioner had not established its continuing financial ability to pay the proffered wage, this office will also review the merits of that decision.

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.

¹ Similar instructions are found on page 8 of the ETA Form 9089.

The regulation at 8 C.F.R. § 204.5(g)(2) 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 [Citizenship and Immigration Services (CIS)].

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 November 21, 2005. The proffered wage as stated on Part G of the ETA Form 9089 is \$12.95 per hour, which amounts to \$26,936 per year.² The ETA Form 9089 does not indicate that the beneficiary worked for the petitioner.

On Part 5 of the I-140, filed on April 17, 2006, the petitioner states that it was established on February 22, 1996, currently employs ten workers, reports an annual gross income of \$474,479, and a net annual income of \$14,980.

With the petition and in response to the director's August 25, 2006, request for evidence, the petitioner provided a copy of its Form 1120S U.S. Income Tax Return for an S Corporation for 2005. Relevant statements and attachments were not included. For the reasons discussed below, we concur with the director's decision to deny the petition, however, it is noted that the statements and attachments to the Form 1120S should have been included with the petitioner's submission. The return did contain the following information:

	2005
Net Income ³	\$14,755

² The director misstated the proffered wage as \$24,864 per year.

³ 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade

Current Assets	\$ 16,658
Current Liabilities	\$ none stated
Net Current Assets	\$ 16,658

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. 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.

The petitioner also supplied a copy of a profit and loss statement covering the first ten months of 2006. An accompanying letter from the petitioner's accountant indicates that the statement represents a compilation of these figures. A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with *generally accepted accounting principles* (GAAP). As noted by the accountant's letter, it is restricted to information based upon the representations of management. See *Barron's Accounting Handbook*, 37071 (3rd ed. 2000).

Following a review of the evidence submitted, the director denied the petition on April 18, 2007, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage and noting that the neither the petitioner's net income nor its net current assets demonstrated its ability to pay the proffered wage in 2005.

On appeal, the petitioner, through counsel, submits additional evidence consisting of unaudited financial statements covering the first four months of 2007, a copy of the petitioner's 2006 corporate tax return, and a copy of a 2005 tax return which counsel describes as an amended return and which presents new figures for total and current assets of the petitioner. Counsel asserts that the petitioner's 2005 and 2006 tax returns show that it had \$112,410 in net current assets in 2005 and \$108,261 in 2006.

Counsel's assertions are not convincing. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. If the petition is

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 17e (2004-2005) and line 18 (2006) 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.). Because the petitioner had additional deductions shown on its Schedule K for 2005, the petitioner's net income is found on Schedule K of its tax return for 2005.

⁴ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear. In this case, the priority date is November 21, 2005.

With reference to the 2007 financial statements submitted on appeal representing compilations of the figures presented on the balance sheet and profit and loss statement, as noted above, these are not considered to be probative of a petitioner's ability to pay a proffered wage during a designated period because they are based on the representations of management and are not audited as required by the regulation at 8 C.F.R. 204.5(g)(2).

The copy of a different 2005 tax return submitted on appeal includes, without explanation, increases to line 1 of Schedule L describing the petitioner's cash position at the beginning of the year, listing of inventories on line 3 of Schedule L and different figures throughout for other total assets and liabilities. This change reflects an increase to approximately \$36,509 as the petitioner's net current assets and raises questions as to the truth of the facts asserted as it now indicates an ability to pay the proffered wage out of net current assets. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).⁵ Without more, such as an explanation for such changes, as well as evidence that the amendments were filed with the Internal Revenue Service (IRS), the AAO does not find this amended return to be probative.

It is noted that the copy of the 2006 corporate tax return reflects -\$4,148 in net income (line 18). Schedule L indicates that the petitioner had \$32,361 in current assets, no current liabilities and net current assets of \$32,361.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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.

⁵A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985)).

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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

It is noted that counsel erroneously refers to figures on Schedule L of the petitioner's 2005 and 2006 tax returns as net current assets. They are shown as total assets and will not be considered in the determination of the ability to pay the proffered wage. A petitioner's total assets include depreciable assets that a 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.

In this case, as noted above, the copy of the petitioner's altered tax return for 2005 submitted on appeal is not considered to be sufficiently reliable for the reasons stated above. The original tax return failed to indicate that either the petitioner's net income of \$14,755 or its net current assets of \$16,658 were sufficient to cover the proffered wage of \$26,936. We also decline to find that the tax return submitted for 2006 on appeal is probative of the petitioner's net current assets for that year as its beginning year numbers are derived from the amended tax return figures for 2005. The petitioner's net income loss of -\$4,148 in 2006 does not reflect sufficient funds to pay the proffered wage.

Even if the copy of the petitioner's 2006 tax return was considered as a reliable indicator of its financial position in that year, 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 November 21, 2005. Demonstrating that the petitioner had the ability to pay the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g) (2) and does

not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date.

Beyond the decision of the director, it is noted that the terms of Items 1 through 6 of Part H of the ETA Form 9089 include the requirement that the beneficiary possesses an associate's degree in engine rebuilding, have obtained 24 months of training in engine rebuilding and have 24 months of experience in the offered job of assembly engine mechanic supervisor. Although Item 9 of Part H of the ETA Form 9089 refers to the petitioner's acceptance of foreign equivalent education, the credentials evaluation provided to the record determines that the beneficiary possesses a foreign degree equivalent to a U.S. associate's degree by not merely reviewing the beneficiary's foreign education but by combining the beneficiary's employment experience as well as his foreign education to reach the conclusion that he possesses the academic degree required by the terms of the labor certification. Moreover, it is noted that Item 8 of the ETA Form 9089 specifically disclaims that an alternate combination of education and experience is acceptable to the petitioner.

It is noted that CIS has authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree, even where a classification may not require a degree. In this case, the ETA Form 9089 states that the proffered position requires an associate's degree, not a combination of experience or certificates, which could be considered the equivalent of an associate's degree. Relevant to a petition for a skilled worker, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the evidence must show that the alien has the education, training or experience, and any other requirements of the individual labor certification. This labor certification does not specifically define an equivalency less than an associate's degree whether it is a U.S. awarded or foreign equivalent degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

It is further noted that in reviewing only the documents related to the beneficiary's formal education, the academic evaluation report issued by the Educational Assessment, Inc., dated November 27, 2006, stated that these documents, including one evidencing the beneficiary's completion of a two-year course in automotive mechanics in 1967 when he was approximately 20 years old, do not demonstrate the attainment of an associate's degree but rather that the beneficiary earned the U.S. equivalent of a high school or GED diploma from an accredited technical or vocational institution in the United States. In reaching a final degree recommendation, the evaluation combined the beneficiary's formal academic education with his work experience using a formula equating three years experience to one year of education. This method is derived from non-immigrant regulations that include such guidelines in equating three years of experience for one year of education. *See* 8 CFR §

214.2(h)(4)(iii)(D)(5). Although the regulations governing immigrant petitions contemplate a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of lesser degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. academic degree. *See* 8 C.F.R. § 204.5(k)(2). It remains that the ETA Form 9089 required the beneficiary to hold an associate's degree. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the Department of Labor. As it is, it may be concluded that the petition is not approvable because the beneficiary's educational credentials do not meet the requirements of the labor certification.

As initially discussed, the petition was also not approvable in any case due to the lack of signatures on the ETA Form 9089. 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 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.