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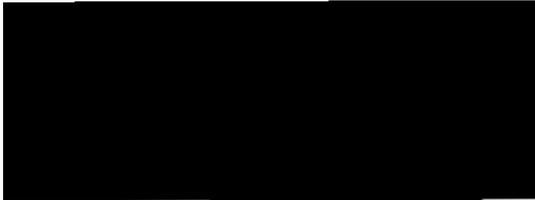
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 07 029 52542

Office: TEXAS SERVICE CENTER Date:

JAN 27 2009

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)

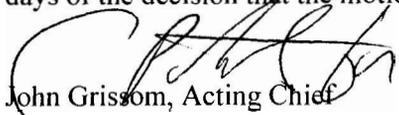
ON BEHALF OF PETITIONER:



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.

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


John Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition¹ was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner's business is software development and IT consulting. It seeks to employ the beneficiary² permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated December 28, 2006, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

¹ The petitioner filed another employment based petition (SRC 07 137 52720) for the beneficiary which was approved on April 4, 2007.

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services ("USCIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

Beyond the decision of the director, an issue in this case is whether or not the petitioner, who has filed multiple I-140 petitions, has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. Also, an additional issue in this case is whether or not the petitioner demonstrated that the beneficiary satisfied the minimum level of education and experience as stated on the labor certification. Specifically, whether or not the petitioner submitted documentation to show that the beneficiary had the requisite education and experience to meet the terms of the certified labor certification.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(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.

Ability to Pay the Proffered Wage

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by the DOL national processing center. *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 9089 Application for Permanent Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on June 6, 2006. The proffered wage as stated on the Form ETA 9089 is \$66,000.00 per year.³

³ This amount is the offered wage found on Page 2, Section G-1 of the labor certification.

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.⁴

Evidence in the record includes the original Form ETA 9089 Application for Permanent Employment Certification approved by DOL; a letter from counsel dated January 24, 2007; the petitioner's U.S. Internal Revenue Service Form 1120S⁵ tax return for 2005;⁶ two letters from WSFS Bank, Wilmington, Delaware concerning a commercial loan amount of credit available to the petitioner; a letter from PNC bank dated November 21, 2006, concerning the petitioner's established line of credit; an accountant's compilation report as of December 31, 2006; approximately thirty-one Bank checking account statements for the time period February 1, 2006 to December 29, 2006; and the petitioner's Employers Quarterly Federal Tax Form (Form-941) statement for the second quarter of 2006 and employee state wage reports for periods in 2006 as well as other documents.

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 1999 and to currently employ 60 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were "enough to pay the alien's salary" and "\$5,000,000.00+" respectively. On the Form ETA 9089, signed by the

⁴ The submission of additional evidence on appeal is allowed by the instructions to the USCIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's 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 1120 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 lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

⁶ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. In the present case, the petitioner's 2006 tax return would not have been available at the time of filing.

beneficiary on October 25, 2006, the beneficiary listed that he has worked for the petitioner since September 16, 2005.

On appeal counsel asserts that the petitioner has the ability to pay the proffered wage. Accompanying the appeal, counsel submits a legal brief and makes the following additional contentions.

First, counsel contends that the petitioner's accountant's compiled financial report shows that the petitioner's net income in the year of filing is greater than the proffered wage.

Counsel's contention is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel further contends that the petitioner's net current assets in 2006, as demonstrated by the petitioner's bank checking statements and bank credit lines, are equal to or greater than the proffered wage.

Counsel's reliance on the balances in the petitioner's bank statement is misplaced. First, bank statements 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Counsel asserts that the petitioner's credit lines are evidence of the ability to pay the proffered wage. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the

petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm.).

Counsel then argues according to the regulation at 8 C.F.R. § 204.5(g)(2) the petitioner is "only required" to demonstrate the ability to pay the proffered wage in 2006. However the petitioner references its federal tax return for 2005 and states that it is evidence of its ability to pay. Counsel's assertion is contradictory. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. *Cf. See Marston & Martston, Inc.* 90-INA-373 (Jan. 7, 1992).

Counsel then cites a USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. Counsel asserts that net income, depreciation, cash on hand and retained earnings from the petitioner's 2005 federal tax return can be added to demonstrate the petitioner's ability to pay the proffered wage. As already stated, the 2005 return is not independent and objective evidence of the petitioner's ability to pay the proffered wage from the priority date in 2006. Further, the above referenced memo does not state that net income, depreciation, cash on hand and retained earnings as totaled in combination can be evidence of the petitioner's ability to pay the proffered wage.

Counsel states that the cases of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm.)⁷ support the petitioner's ability to pay. Counsel compares and contrasts these two cases but makes no statement referencing the facts of the subject matter to these two cases. *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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

⁷ *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977) has been commonly cited for the proposition that the job offer must be realistic and can be satisfied by the petitioner.

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.

Counsel has not asserted any unusual one-time circumstances to account for any financial difficulties to parallel those in *Sonegawa*, nor has it been established that 2006 was an uncharacteristically unprofitable year for the petitioner.

On appeal, counsel refers to two decisions issued by the AAO, but does not provide their published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The cases that counsel cites are not binding precedent.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition later based on the Form ETA 9089 Application for Permanent Employment Certification, 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 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, UCIS 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 (Reg. Comm. 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp.

647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that the petitioner's depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court 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 that 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. [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.

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

The petitioner provides no tax returns from the priority date to demonstrate the financial information concerning the petitioner's ability to pay. The 2005 tax return submitted⁸ is insufficient to prove the petitioner's ability to pay the proffered wage in 2006.

If the net income the petitioner demonstrates it had available during the 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, USCIS 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, USCIS 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.⁹ A

⁸ The 2005 federal income tax return stated net income (Schedule K, line 17.e) of \$42,697.00, which even if we considered the 2005 return, shows an amount less than the \$66,000 proffered wage.

⁹ 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,

corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

The petitioner did not provide sufficient evidence¹⁰ that it had sufficient net current assets to pay the proffered wage. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date.

Therefore, from the date the Form ETA 9089 was accepted for processing by the U.S. Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary 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. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Ability to Pay the Proffered Wage – Multiple Beneficiaries

USCIS electronic records indicate that the petitioner has filed over 500 petitions since the petitioner's establishment in 1999, including both I-129 petitions¹¹ and I-140 petitions. 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, 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 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 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750, now Form ETA 9089). See also 8 C.F.R. § 204.5(g)(2).

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.

¹⁰ The 2005 federal income tax return stated net current assets of <\$220,150.00>. The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss. As this return is before the priority date, it will be given only general consideration.

¹¹ The petitioner is obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.

The record in the instant case contains no information about the proffered wages for the beneficiaries of the other I-140 petitions submitted by the petitioner, nor about the current immigration status of those beneficiaries for which the petitions that are pending, were approved or were denied.

The record in the instant petition fails to establish the petitioner's ability to pay the proffered wage for the single beneficiary of the instant petition. Further, the record would not evidence the petitioner's ability to pay for multiple beneficiaries.

Qualifications of the Beneficiary and the Regulation at 8 C.F.R. § 204.5(l)(3)

As already stated, an additional issue in this case is whether or not the petitioner demonstrated that the beneficiary satisfied the minimum level of education and work experience as stated on the labor certification. Specifically, whether or not the petitioner submitted documentation that the beneficiary had the requisite education and experience to meet the terms of the certified labor certification.

The petitioner must establish that its ETA 9089 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form Application for Permanent Employment Certification, ETA Form 9089 was accepted for processing. *See* 8 CFR § 204.5(d). Therefore, 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.

On the Form ETA 9089, Part H, the petitioner required that the individual have an associate's degree in computer science, computer information systems or business administration. The petitioner also required three years of experience in the position offered or three years of experience in the alternate occupation of a computer professional or programmer analyst.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, *and any other requirements of the individual labor certification*, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Further, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(ii) Other documentation—

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner submitted no documentation with the petition concerning the beneficiary's qualifications to perform the occupation of programmer analyst.¹² Accordingly, the petitioner failed to demonstrate that the beneficiary met the requirements of the certified labor certification.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Further, the evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.

¹² The petitioner's cover letter references that it submitted the beneficiary's educational credentials and a letter of experience. The record of proceeding before us, however, does not contain any such documentation.