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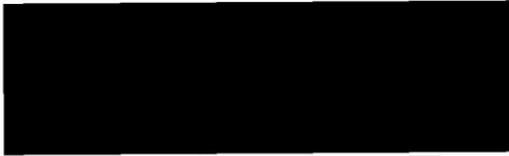


U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **NOV 18 2009**

SRC 07 098 53546

IN RE:

Petitioner:

Beneficiary:



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).

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner<sup>1</sup> is a translation and legal service business. It seeks to employ the beneficiary permanently in the United States as an interpreter. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The 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 shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, 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.

Beyond the decision of the director is the issue whether the petitioner was an active corporation when the ETA Form 9089, Application for Permanent Employment Certification, was accepted on September 26, 2006, and when it filed the I-140 petition on November 15, 2007, and if not, whether the petitioner has established a continuing ability to pay the proffered wage, or has established that it is a United States employer.

Also, beyond the decision of the director, an issue in this case is whether the petitioner adequately demonstrated that the beneficiary's training and experience conforms to the requirements of the labor certification, specifically, whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

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<sup>1</sup> The AAO notes that according to the records of the State of New York as accessed at the website <<http://appsex8.dos.state.ny.us>> on October 8, 2009, the petitioner was incorporated as E & I Empire Corp. on October 23, 2002. The company is known variously as ENI Empire Corp. as noted on the petition, and E and I Empire Corp. as noted on the Form ETA 9089, but by any name the corporation is the same entity and is identified by its Federal Employer Identification Number (FEIN) [REDACTED]. According to the website identified above, the petitioner is "Inactive-Dissolution (March 29, 2007)."

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 the DOL national processing center. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 9089 was accepted on September 26, 2006. The proffered wage as stated on the Form ETA 9089 is \$22.19 per hour (\$46,155.20 per year).

The AAO maintains plenary power to review each appeal on a *de novo* basis. *See, 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.<sup>2</sup>

Evidence in the record includes a signed ETA Form 9089 approved by the DOL; a letter from the petitioner dated January 10, 2007; the petitioner's U.S. Internal Revenue Service (IRS) Forms 1120, U.S. Corporation income tax return, for 2004 and 2005<sup>3</sup> (these tax returns indicate that the petitioner's fiscal year is October 1st to September 30<sup>th</sup>); six checks from the petitioner from 2006 purportedly representing wages paid to the beneficiary; two checks from 2007 from a different corporation to the beneficiary also purportedly representing wages paid; and various bank statements.

It is noted that director issued a request for evidence (RFE) to the petitioner dated August 9, 2007, requesting additional evidence of the petitioner's ability to pay the proffered wage according to the

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into 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).

<sup>3</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay beginning with the priority date. However, the AAO will consider the petitioner's 2004 federal income tax return generally. As the 2005 tax return includes the priority date, i.e. September 26, 2006, it will be considered by the AAO in the evaluation of the petitioner's ability to pay the proffered wage.

regulation 8 C.F.R. § 204.5(g)(2). The director requested, *inter alia*, the petitioner's 2006 tax return. However, the petitioner did not submit this tax return with the October 1, 2007 response.

Counsel asserts on appeal "Please be advised that the decision made on October 15, 2007, had an error due to the fact that all facts in the denial which stated as it was not explained or provided in fact was explained and provided."

On appeal, counsel also submitted additional evidence, including a 2006 Form 1120 and a Form 941 Employers Quarterly Federal Tax Form statement for a different corporation, E. M. I. Empire Corp. Other than the 2005 Form 1120 which covers a period of four days after the priority date, the record is devoid of any evidence listed in the regulation at 8 C.F.R. § 204.5(g)(2) pertaining to the petitioner's ability to pay the proffered wage.

On August 27, 2009, the AAO issued a Notice of Derogatory Information (NDI) to the petitioner and requested information concerning the current status of the petitioner within the State of New York. The AAO stated that according to the records of the State of New York the petitioner was incorporated as E & I Empire Corp. on October 23, 2002, and known variously as ENI Empire Corp. and E and I Empire Corp. However, according to the records of New York State accessed at <http://appsext8.dos.state.ny.us/> on October 8, 2009, the petitioner's charter number [REDACTED] is "Inactive – dissolution (Mar 29, 2007)," and the petitioner is more likely than not ineligible to do business. The petitioner did not respond to the AAO's NDI. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). It appears that the petitioner was already in dissolution when it filed the petition on November 15, 2007.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation. On the petition, the petitioner claimed to have been established in 2007,<sup>4</sup> to have a gross annual income of \$244,000.00, and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year begins on October 1 and ends on September 30<sup>th</sup> of each year. As the priority date is September 26, 2006, the year 2005 tax return is relevant in this matter. On the Form ETA 9089, signed by the beneficiary on January 12, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial

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<sup>4</sup> According to the records of New York State, (i.e. <http://appsext8.dos.state.ny.us/> accessed on October 8, 2009) the petitioner was incorporated on October 23, 2002.

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 Sonogawa*, 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay

wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120. The record before the director closed on October 1, 2007, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The petitioner’s most recent tax return demonstrates its net income for the period October 1, 2005 to September 30, 2006 was \$0.00. Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the proffered wage.

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, USCIS will review the petitioner’s assets.

Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>5</sup> A 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’s tax return demonstrates its end-of-year net current assets for October 1, 2005 to September 30, 2006 was \$505.00.

Therefore, for the year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income or net current assets. As noted above, the record is devoid of further evidence pertaining to petitioner’s ability to pay the proffered wage after the priority date.

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<sup>5</sup>According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Counsel asserts in her brief accompanying the appeal that there are another ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date.

Counsel asserts that the beneficiary is employed in H1B status and is paid \$1,760.00 bi-weekly as evidenced by pay checks submitted into evidence. As already stated, the petitioner submitted various checks and checks from E.M.I Empire Corp., for periods in 2006 and 2007. However, evidence that the petitioner may have paid to the beneficiary for services over a six week period does not establish it has the continuing ability to pay the proffered wage. According to the to the records of the State of New York as accessed at the website <<http://appsext8.dos.state.ny.us>> on October 8, 2009, E. M. I. Empire Corp. was incorporated on October 13, 2006. E. M. I. Empire Corp.'s FEIN is [REDACTED] and is a separate corporation. USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. This similarly applies to the tax returns and other evidence submitted pertaining to E. M. I. Empire Corp.

Counsel has submitted approximately 28 pages of ATM and debit card withdrawal statements, and commercial checking account transactions statements for various periods between May 18, 2006, to November 17, 2006. While not every statement was identified to be the petitioner's account, for the sake of argument the AAO will consider each statement to reflect the petitioner's accounts. Counsel's reliance on the balances in the petitioner's bank accounts 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that fails to establish that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. 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 Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has only submitted one tax return as evidence of its ability to pay the proffered wage. There is insufficient evidence in the record of proceeding concerning the petitioner's financial status, and the petitioner has not been an active corporation in the State of New York since March 29, 2007. Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, or to establish that the petitioner's fiscal year, October 1, 2005, ending on September 30, 2006, was an uncharacteristically unprofitable period for the petitioner.

The petitioner has not demonstrated by sufficient evidence its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>6</sup>

Beyond the decision of the director, an additional issue in this case is whether the petitioner adequately demonstrated that the beneficiary's training and experience conforms to the requirements of the labor certification, specifically, whether the petitioner has demonstrated that the beneficiary is

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<sup>6</sup> Further, the regulation at 20 C.F.R. § 656.3 states, in part that an "employer" means a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States and possesses a valid FEIN.

Under the regulations at 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. Under the circumstances, the AAO cannot conclude that the petitioner is extending a *bona fide* job offer to the beneficiary. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date or that the petitioner is extending a *bona fide* job offer to the beneficiary.

qualified to perform the duties of the proffered position requiring fluency in the English, Russian and Georgian languages and two years of experience in interpreting in those languages.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL, and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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.

USCIS will look to the labor certification to ascertain the job requirements. According to the ETA Form 9089, Part H, the minimum level of education required is a bachelor's degree and two years (24 months) of experience in the job of interpreter.

Job duties are stated in Item 11 of the Form ETA 9089, Part H as “translation [sic] of legal document such as medical records birth, death and marriage certificate. Translation [sic] for the clients and evaluation of diplomas, all legal documents such as despositions [sic] and memorandum [sic].” Under Part H, Item 14, the petitioner stated that the “specific skills or other requirements” to the job are “knowledge of English, russian [sic] and georgian [sic] language for this job as a translator is mush [sic].”

The ETA Form 9089 indicates that DOL assigned the SOC/O\*Net(OES) code 27-3091.00 with accompanying job title “Interpreters and Translators” to the offered 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/27-3091.00> as accessed October 21, 2009, the job title falls within “Job Zone Four: Considerable Preparation Needed.” DOL assigns a standard vocational preparation (SVP) range of 7.0 to < 8.0 to Job Zone 4 occupations, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” Additionally, DOL states the following concerning the education, related experience and job training for this occupation:

Most of these occupations require a four-year bachelor's degree, but some do not. A considerable amount 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. A considerable amount 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.

*See id.* Because of the requirements of the offered position and the DOL's standard occupational requirements, the proffered position is for a professional. The above regulation (i.e. 8 C.F.R. § 204.5(l)(3)) and decisional law requires that USCIS determine if the beneficiary meets the requirements of the labor certification. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

In this regard, the director issued a RFE to the petitioner. The director requested evidence that the beneficiary has knowledge of English, Russian, and the Georgian languages required by the labor certification. The director requested job experience letters on company letterhead to include the former and current employers of the beneficiary, the name, address and title of the writer and a listing of the beneficiary's dates of employment, job title and a specific description of the duties performed by the beneficiary. The beneficiary listed two prior employers on the ETA Form 9089.

The beneficiary's stated on the form that her most recent work experience was from September 30, 2003 to September 30, 2006 with [REDACTED] Brooklyn, New York as an English language teacher. No letter from Centurion was submitted into the record by the petitioner to substantiate this work experience. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Prior to the above, the beneficiary stated in the labor certification that she was employed by a translation and evaluation center located at Khushari 12, in Tbilisi, Georgia, as a translator. According to the beneficiary, she worked there from January 1, 1998 to January 28, 2000. The petitioner has submitted a letter from Translation and Evaluation Agency, "Transit," Tbilisi, Georgia, that does not address the beneficiary's language fluency or indicate the beneficiary interpreted in the required languages. The labor certification specially requested language fluency in English, Russian and Georgian (ETA Form 9089, Part H, Item 14). The director specifically mentioned these language requirements in his RFE. The letter does not conform to the regulation at 8 C.F.R. § 204.5(l)(3) and is insufficient evidence of the beneficiary's qualification as an interpreter in those three languages.

Further, there is no correlative evidence to support the beneficiary's employment history such as cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay checks, or the beneficiary's personal tax returns.

Therefore, the preponderance of the evidence does not demonstrate that the beneficiary is qualified to perform the duties of the proffered position. The petitioner has not demonstrated the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The evidence in the record from the State of New York (i.e. found at <<http://appsex8.dos.state.ny.us>> accessed on October 8, 2009) demonstrates that the petitioner was not an active corporation when it filed the I-140 petition on November 15, 2007, as it is noted as "Inactive-dissolution (Mar 29, 2007)" and the petitioner is more likely than not ineligible to do

business. There is insufficient evidence submitted to demonstrate that the petitioner is extending a *bona fide* job offer to the beneficiary, and the petitioner has not established that it is a United States employer.

The petition will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.<sup>7</sup> 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.

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<sup>7</sup> 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).