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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

B6

[redacted]

FILE: [redacted] NEBRASKA SERVICE CENTER Date: AUG 23 2010

IN RE: Petitioner: [redacted]
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:

[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.

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto repair company. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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, and the petitioner had not established that the beneficiary was a vocational school graduate as stipulated on the ETA Form 750. 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 May 18, 2007 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the 2001 priority date and onward, and whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. The AAO will first examine the petitioner's ability to pay the proffered wage and then examine whether the beneficiary is qualified to perform the duties of the 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $19.73 an hour or $41,038.40 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.[1]

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.[2]

With the initial petition, the petitioner submitted its Forms 1120S, U.S. Tax Return for an S Corporation, for tax years 2001 and 2002. It also submitted the petitioner's bank statements for TCF National Bank from January 31, 2003 to March 31, 2003.

In response to the director's first RFE dated August 22, 2003, counsel submitted the following evidence: copies of the petitioner's Forms 941, Employers' Quarterly Federal Tax Returns, for the first two quarters of 2003 that indicate wages, tips, and other compensation of $13,286, and $18,446, and also reflect that the petitioner had zero (0) employees in these two quarters; and copies of the petitioner's TCF bank statements dated April 30, 2001 to October 31, 2003.

In response to the director's second RFE dated August 22, 2003, the petitioner submitted the following evidence:

1. An additional copy of the petitioner's Form 1120S for tax year 2001.
2. A copy of the petitioner's Forms 941 for the first and second quarter of tax year 2004 that indicate paid wages of $29,653 each quarter to three employees. An accompanying wage detail sheet identified the employees as Abdalla Abdussayed, Emad Nuh, and Hasan Nouh;
3. A copy of the beneficiary's W-2 Wage and Tax Statement for tax year 2003 that indicates the petitioner paid the beneficiary $8,679 in that year;
4. Copies of the beneficiary's bi-weekly pay statements from January 2004 to June 2004;

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[1] The AAO will discuss the contents of the Form ETA 750 further when it examines whether the petitioner established the beneficiary's qualifications for the proffered position.

[2] The submission of additional evidence on appeal is allowed by the instructions to the 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. Copies of the petitioner's monthly TCF checking account statements from October 28, 2003 to June 30, 2004; and
6. A copy of a document prepared by Jaffer Ahmed, Public Accountant, Tax Shop, dated July 28, 2004, entitled "Balance Sheet As of December 31, 2002," stating that the petitioner's total assets as of that date were $26,449. In calculating this figure, the accountant combines the petitioner's fixed assets, such as equipment less depreciation, with the petitioner's current assets, including cash and inventory.

On appeal, counsel submits copies of the beneficiary's Forms W-2 from tax years 2004, 2005, and 2006. Counsel also submits a letter written by Accountant, Tax Shop, dated August 20, 2007 that reviews the petitioner's assets and accumulated depreciation for the tax years 2001 to 2006 and states that the petitioner's depreciation expense is an income tax expense only and does not represent a cash flow expense. Counsel also submits the petitioner's Forms 1120S for tax year 2004, 2005 and 2006.

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 1998 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner has more than sufficient net assets to pay the proffered wage. Counsel notes that the director held the petitioner responsible for not filing tax records for tax years 2003 to 2006. Counsel states that USCIS should ask for updated tax and income records in a subsequent RFE when it delays the adjudication of a case for several years.[3] Counsel also notes that the director sent the petitioner an RFE requesting bank statements which the petitioner provided and then stated that bank statements are not among the types of evidence required to establish the petitioner's ability to pay a proffered wage. Counsel states that the director should accept and consider evidence when the director asked the petitioner to provide the same evidence in an RFE.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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[3] The AAO notes that counsel makes this assertion despite the fact that such information per regulations, is required initial evidence.

On appeal, the petitioner also submits an unaudited balance sheet for 2003 prepared by an accounting company. Counsel's reliance on unaudited financial records 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The AAO further notes that Mr. [redacted]'s statements also reference the petitioner's depreciation and assets listed at item 10-A on the petitioner's Schedules L. The AAO does not consider depreciation in its examination of the petitioner's net income or net current assets, and considers the petitioner's net current assets in its deliberations.

Further the petitioner submitted several TCF bank statements for 2003 and 2004 to the record, initially with the I-140 petition and then in response to the director's RFEs.[4] The earlier bank statements ranged from $233.64 in November 20, 2002 to $6,057.67 in September 30, 2003. Subsequent bank statements included varying balances with the lowest balance being $4.41 in May 28, 2004 and the highest being $1,623.90 in June 30, 2004; Counsel's reliance on the balances in the petitioner's bank account 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. In the instant petition, the petitioner's monthly balances vary and do not establish that the petitioner had significant enough balances every month to establish, for example, the petitioner's ability to pay the entire proffered wage every month based on its checking account balances. Further, every month that the petitioner would have used monies in its checking account to pay the beneficiary's proffered wage would have produced lower balances for the following months, ending with a negative bank balance over time. 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.

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 during the relevant period of time.

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[4] The AAO is not clear why the director requested the petitioner's bank statements after the petitioner submitted its tax returns to the record.

Based on the beneficiary's W-2 Statements, the petitioner did establish it paid the beneficiary $8,679 in 2003; $40,239 in 2004;[5] $38,661 in 2005; and $27,615 in 2006. Therefore the petitioner cannot establish its ability to pay the proffered wage based on the beneficiary's wages. The petitioner has to establish its ability to pay the entire proffered wage in tax years 2001,[6] and 2002, and the difference between the beneficiary's actual wages and the proffered wage in tax years 2003, 2004, 2005, and 2006.[7]

In his decision, the director refers to the petitioner's not submitting its tax returns for tax years 2004 to 2006; however, this fact is not dispositive in these proceedings. Counsel responded to the director's second RFE on July 22, 2004, prior to these later returns becoming available. Both the tax returns and the beneficiary's W-2 Forms for 2004 to 2006 are new evidence submitted on appeal, and will be examined in these proceedings.

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 (1st 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is

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[5] The beneficiary's bi-weekly pay statements from January 2004 to June 2004 are also in the record. They begin with the week of December 27, 2003 to January 2, 2004 in which the petitioner paid the beneficiary an initial $789 in wages. There are two more pay stubs with weekly wages. The remaining pay stubs are dated in sequence from April 10, 2004 to June 25, 2004 and indicate bi-weekly wages of $789, although the year-to-date total pay on these particular statements establish that the petitioner appears to have paid higher bi-weekly wages. As of June 25, 2004, the beneficiary had received year-to-date wages of $20,514. Although the pay records as previously stated appear to be erroneous with biweekly wages, the AAO will accept the beneficiary's W-2 Form for tax year 2004.

[6] The director in his decision referred to a prorated wage for the 2001 priority year. USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

[7] The differences between the beneficiary's actual wages and the proffered wage are as follows: $32,359.40 in 2003; $799.40 in 2004; $2,377.40 in 2005, and $13,423 in 2006.

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 USCIS 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 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).

The AAO acknowledges that with regard to the petitioner's ability to pay the proffered wage, the record in the instant matter closed as of the petitioner's response to the director's second RFE dated July 22, 2004. The petitioner's 2003 tax return could have been available at this time, but this tax return has never been submitted to the record. On appeal, the petitioner submitted its Forms 1120S for tax years 2004, 2005, and 2006. Since the petitioner made these returns available, the AAO will include them in its analysis of the petitioner's net income and net current assets, as illustrated below:

- In 2001, the Form 1120S stated net income[8] of $3,594.

[8] 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 IRS Form 1120S.

- In 2002, the Form 1120S stated net income of $6,030.
- The petitioner did not submit a Form 1120S for tax year 2003, and thus, the AAO cannot determine the petitioner's net income.
- In 2004, the Form 1120S stated net income of -$8,197.
- In 2005, the Form 1120S stated net income of $2,234.
- In 2006, the Form 1120S stated net income of $914.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the entire proffered wage of $41,038.40. During tax years 2003, 2004, 2005, and 2006, the petitioner did not establish its net income or did not have sufficient net income to pay the difference between the beneficiary's wages and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[9] 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. The petitioner's tax returns demonstrate its end-of-year net current assets for tax years 2001 to 2006, as shown in the table below:

- In 2001, the Form 1120S stated net current assets of $5,472.
- In 2002, the Form 1120S stated net current assets of $11,107.
- The petitioner did not submit its Form 1120S for tax year 2003, and, thus, the AAO cannot determine the petitioner's net current assets.
- In 2004, the Form 1120S stated net current assets of $963.
- In 2005, the Form 1120S stated net current assets of $5,080.

However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade 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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. The AAO notes that the petitioner in the instant petition had no additional deductions, income, credit or other adjustments on any tax returns submitted to the record. Therefore, the petitioner's net income for all relevant years for which the petitioner submitted a tax return is found on line 21, of the Form 1120S.

[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, 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.

- In 2006, Schedule L of the Form 1120S is blank.

For the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the entire proffered wage. In tax years 2003 and 2006, the petitioner has not identified its net current assets, and thus cannot establish that it had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage. In tax years 2004 and 2005, the petitioner has established it had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage of $41,038.40.

Therefore, from the date the Form ETA 750 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 wages paid to the beneficiary, or its net income or net current assets, except for tax years 2004 and 2005.

The AAO notes that the record and USCIS computer records indicate that the petitioner filed another I-140 petition for Hasan Nouh, (LIN04 063 51170) [10] on January 3, 2004 that had a priority date of April 16, 2001. The record further reflects that [redacted] is the beneficiary's brother. If the petitioner filed the additional petition at the same wage at a date close to the priority date of the instant petition, the petitioner must show that it had sufficient income to pay all the wages at the priority date. In the instant matter, if the petitioner paid similar wages to [redacted] the petitioner could only establish its ability to pay both the beneficiary and his brother the difference between their wages and the proffered wages in tax year 2005. Thus, the petitioner has not established its ability to pay the proffered wage for either the beneficiary, or the beneficiary and his brother during the relevant period of time.

Counsel's assertions on appeal with regard to shareholder's equity cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. Counsel's assertion that USCIS is overly harsh with the petitioner, a small business, is equally not persuasive.

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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her

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[10] Counsel as well as other documentation in the record identify [redacted] as the beneficiary's brother.

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 record reflects that the petitioner was established in 1998, three years prior to filing the Form ETA 750 and five years prior to filing the instant petition. During the relevant period of time, the petitioner's Forms 941 reflect either no employees, two employees, or three employees. The petitioner's salary level in the 2001 priority year was $13,292, with $28,046 in officer compensation, while the petitioner's 2006 tax return indicates wages of $61,815 and $27,100 in officer compensation. Thus the petitioner's salaries and wages have increased, while officer compensation has remained stable. The record reflects no further evidence with regard to the petitioner's business profile or reputation in the community, or any other factors relating to the petitioner's ability to pay the proffered position. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director also determined that the petitioner had not established that the beneficiary possesses the educational minimum requirements as stipulated on the Form ETA 750.

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001.[11] The Immigrant Petition for Alien Worker (Form I-140) was filed on April 25, 2003.

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[11] If the petition is 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 importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

The job qualifications for the certified position of auto mechanics are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows: "Diagnosis and repair automobiles, with emphasis on foreign built automobiles."

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	8
High school	4
College	(Blank)
College Degree Required	(Blank)
Major Field of Study	(Blank)

Training

No Yrs.	2
Type of Training	See No.: 15*

Experience

Job Offered Yrs.	2
(or)	
Related Occupation	

Block 15:

Other Special Requirements * Vocational school graduate in auto mechanics. ASE Certification in automobile diagnostics and repair, can be substituted for vocational school training. Must have own tools, common to the trade.

As set forth above, the proffered position requires a vocational school graduate in auto mechanics, or ASE certification, with two years of work experience in the job offered .

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: Higher industrial Tech. Institute, Tripoli, Libya, studying auto mechanics and engineering from spring 1994 to

spring 1996, and receiving a higher diploma from the Higher Tech Institute. The Form ETA 750B also reflects the beneficiary's experience as follows:

Employer:	Date of Employment	Job Title
Bait Alkhebra Tripoli, Libya	April 1996 to April 1998	Auto Mechanic

In support of the beneficiary's educational qualifications, with the I-140 petition, the petitioner submitted a copy of a one page document in Arabic with a translation by the for Typing and Legal Translation. The translation indicates the document is a graduation certificate dated April 13, 1997 and the document states that the beneficiary (registration number left blank) finalized his studies and obtained the High Diploma in Industrial Technology during spring semester in 1996. The institutions identified on the document are the "Great Socialist People Libyan Arab Jamahiriya," and "the High Technical Industrial Institute." The document on which the translation is ostensibly based is a poorly Xeroxed smudged document with smudged illegible circular stamps[12] at the bottom and an illegible stamp at the top of the document.[13] (Copy of this document is included with this decision.)

The petitioner also submitted a translation done by the same translation company for what appears to be the beneficiary's transcripts for spring and autumn of 1994, 1995 and spring of 1996. This document is dated September 7, 1998. The document identifies the institutions of the "Great Socialist People Libyan Arab Jamahiriya" and "The General People's Committee for Education and Educational Research." It also identifies the number in its contents. The petitioner submitted no Arabic language document for the translation submitted to the record with the 1-140 petition. The translation of the beneficiary's transcripts did not comply with the terms of 8 C.F.R. § 103.2(b)(3): Translations. "Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." The AAO notes that in the instant matter, there is no Arabic language document accompanying the English translation. The AAO does not accept this English language translation as evidence.

With the petition, the petitioner also submitted a copy of a credentials evaluation report, dated October 21, 2002 from World Educational Services, Inc. (WES) The one-page document states that the beneficiary's higher diploma in mechanical technology awarded by the Higher Industrial Technology Institute in 1996 in Libya required a high school graduation for admission, was two and

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[12] The director refers to "seals" on the Arabic language documents in his decision. The AAO, based on the photocopies found in the record, cannot distinguish whether the "seals" are actually seals or are stamps. For purposes of greater clarity, the AAO refers to these items as stamps in these proceedings.

[13] The Arabic language text also appears smudged and somewhat illegible.

one half years in length, and was the U.S. equivalency of an associate degree. The remaining pages of the evaluation report describe WES and its generic procedures for evaluation reports. No evaluator signed the document and the report does not refer to any documents (including the beneficiary's graduation certificates from high school or the Institute) that were examined to reach the report's conclusions.

The petitioner also submitted a letter of work verification in Arabic with English translation also by the for Typing and Legal Translation. The document appears to be copied several times, with a smudged or illegible letterhead and a rectangular stamp or logo at the top and bottom of the document. Based on the translation, the stated that the beneficiary worked for the company in technical engineering services from April 1996 to April 1998 as an auto mechanic. The letter writer listed specific job duties. There appears to be a signature on the Arabic language document, but no identification of the technical manager in the translation.

On August 22, 2003, the director in his first RFE noted that the petitioner had not submitted a copy of the beneficiary's original transcript and requested that the petitioner submit *official* evidence establishing that the Higher Industrial Technology Institute is, or was, a functioning educational facility; the nature of the institution's mechanical technology program; and that the beneficiary attended, and graduated from the institution. (Emphasis in director's RFE.)

In response, counsel submitted a letter dated October 6, 2003 from Assistant Director, WES. The letter writer refers to the evaluation reports for the beneficiary and for Mr. , and states that both individuals completed the Higher Diploma at the Higher Industrial Technology Institute in Libya. The letter writer reiterates the information contained on the earlier evaluation report and adds that the Higher Industrial Technology Institutions are colleges of technology located in the several Libyan cities with two and one half year post-high school Higher Diplomas.

With regard to providing a copy of the beneficiary's Arabic language transcript of studies and further evidence of his attendance at the Institute, counsel also submitted a three-page photocopied Arabic language document dated September 7, 1998. The number is at the right hand side of each page. This document has what appears to be a logo at the top of the page and two stamps illegible, at the bottom of each page. The left hand stamp is pentagonal, while the right stamp is triangular.

Counsel also submitted a letter with translation from the beneficiary's brother in Libya describing his efforts to obtain a copy of the beneficiary's graduation certificate. The brother states in his letter that the university required the beneficiary to appear in person for the documents and he could not obtain the documents. In an affidavit, the beneficiary stated that through the intercession of another individual with more influence, the university promised to send the requested materials.

In an additional response dated March 29, 2005, counsel submitted what she describes as "attorney-

certified"[14] copies of a transcript and translation of the beneficiary's claimed course of study in the mechanics department of the Higher Industrial Technology Institute and Scientific Research; an attorney-certified copy of the beneficiary's Certificate of Graduation and accompanying translation from the Higher Industrial Technology Institute; and an attorney-certified copy of a letter from the Secretary of the Higher Industrial Technology Institute and its translation. The translations of the document indicate that another company, the Magarief Bureau for Translation, , translated the Arabic language documents.

The three-page Arabic language transcript document is legible, dated November 5, 2003, and is on different letterhead than the earlier Arabic language document submitted in the petitioner's second response to the director's first RFE. The new transcript has an eagle symbol at the top of the document with what appears to a logo on the top right hand side. Each page of the document has two oblong stamps at the bottom. The stamps show an eagle symbol with Arabic lettering. What appears to be the same signature is written on top of each stamp.[15]

The above-mentioned graduation certificate submitted by counsel is dated November 11, 2003 and has legible text, stamps and letterhead. It contains a pentagonal stamp on the translation, with a circular stamp and an oblong stamp ostensibly for the signatures of the Secretary of the Institute and the Study & Examinations Department. This document does not refer to or identify the beneficiary's student registration number.

The translation of the petitioner's copy of the letter from the Secretary of the Institute identified the title of the letter as "Identification of the Higher Industrial Technology Institute." The letter is dated November 5, 2003, is ostensibly signed and stamped by the Secretary of the Institute, and explains the establishment of the institute in 1989 and its various programs. This letter has a signature with a circular stamp containing an eagle. The Secretary of the Institute is not identified in the letter.

In his decision, the director stated that the petitioner submitted a photocopy of a translated statement by the that established the beneficiary possessed the required two years experience as an auto mechanic.[16] The director then stated that USCIS was in possession of adverse information regarding the beneficiary's documents from the High Technical Industrial Institute, and that counsel had been given copies of the adverse information. The director described the adverse information as follows: "emails from the Department of State which indicate that while the school does, indeed, exist; the certificate number relates to a different student and the wet seal is not that which was used by school officials at the time that this certification was produced."

On appeal, counsel states that the director erred in not providing the petitioner with the opportunity to rebut the adverse information. Counsel asserts that she was not provided with copies of emails that indicate the beneficiary's certificate number relates to a different student and that the wet seal

[14] In her certification of the documents, counsel stated that the copies of original documents were identical in all aspects to the original documents in her possession.

[15] The record also contains the English language translation of this document.

[16] The AAO will discuss this letter of work verification further in these proceedings.

used was not that used by the school officials at the time the certificate was produced. Counsel asserts that the email she reviewed referred only to , the beneficiary's brother, who had a different student ID number than the beneficiary. Counsel also notes that the AAO had already remanded the issue of the emails utilized in 's petition denial back to USCIS on the basis that the DOS investigation did not establish what method was used, who was contacted, the title of the person contacted, and what records were examined to determine that the beneficiary's brother's documents were likely counterfeit. Counsel asserts that if this email is used in the petitioner's I-140 petition for the beneficiary, USCIS must provide the petitioner with an opportunity to rebut the derogatory evidence.

Prior to addressing the merits of the instant petition with regard to the beneficiary's qualifications, the AAO notes that the Form ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[17] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

[17] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree or academic credential. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

With regard to counsel's assertions with regard to the use of the DOS email to deny the instant petition, the AAO notes that the purpose of the appeal is to provide the petitioner with the opportunity to rebut the director's decision in the instant petition. Upon review of the record, the AAO does not find the DOS email and its references to the beneficiary's brother academic records including his registration number and the seals on the brother's documents to be probative of whether the petitioner has established that the beneficiary has the requisite graduation from a vocational school or the ASE certification. The information as contained in the DOS emails in the record does not reflect who provided the information, or how they were obtained. The AAO will withdraw the director's comments with regard to the DOS email.

With regard to the original documents submitted to the record with the initial I-140 petition, the AAO notes that the original Xeroxed copy of the beneficiary's claimed graduate certification in Arabic was an illegible document that appears to have been copied either very poorly or many times. Thus, the instant petition could have been denied based on that ground alone. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." Further none of the translations submitted to the record comply with the terms of 8 C.F.R. § 103.2(b)(3):

> *Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Thus, the AAO would not accept any of the translations submitted to the record. The director in his first RFE requested a copy of the original transcript of the beneficiary's claimed studies. He also noted the beneficiary's graduation certificate document, but didn't request a copy of the original document. Nevertheless, in the petitioner's 2005 response to the director's first RFE, the petitioner submitted a new graduation certificate with a later date of issue, as well as a new transcript with a later date of issue. The earlier and the latest graduation and transcripts documents have different stamps and different letterheads. For example, counsel submitted a three-page photocopied Arabic language document dated September 7, 1998 in the petitioner's first response to the director's RFE. The number 292064 is at the right hand side of each page.

This document has what appears to be a logo at the top of the page and two stamps illegible, at the bottom of each page. The left hand stamp is pentagonal, while the right stamp is triangular. In the petitioner's later response to the director's RFE, counsel submitted a three-page Arabic language document dated November 5, 2003, containing the number 292064. The claimed new course transcript has an eagle symbol at the top of the document with what appears to a logo on the top right hand side. Each page of the document has two oblong stamps at the bottom. The stamps show an eagle symbol with Arabic lettering. What appears to be the same signature is written on top of each stamp.

While the first graduation certificate has a blank for where the beneficiary's student registration might be placed, the second graduation certificate makes no reference, complete or incomplete, to the beneficiary's student registration number. Thus the two new documents differ from the insufficient documents first submitted to the record. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Further the petitioner submitted a WES evaluation of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification. This document provided no information on who evaluated the beneficiary's qualifications; what documents had been reviewed by an evaluator, or on what basis the evaluator had reached his or her conclusions. The petitioner then submitted an additional letter from WES as evidence of the beneficiary's claimed vocational qualifications. This second letter unequivocally states that the beneficiary and [redacted] graduated from the Libyan Higher Institute of Technology, but again provides no further information on what documents had been reviewed by the WES evaluator, or how the evaluator concluded that both individuals had graduated from the Libyan Higher Institute of Technology. If the evaluator reviewed the beneficiary's illegible Certificate of Graduation submitted with the I-140 petition, the AAO would question the evaluator's ability to reach any conclusion based on such a document. Thus only limited weight can be given to either WES document.

The AAO further notes that the Bait Alkebra letter of work verification contains only the title of technical manager for the individual signing the letter. The regulation at 8 C.F.R. § 204.5(l)(3) also 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.

(B) Skilled worker. If the petitioner 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 . . . . The minimum requirements for this classification are at least the two years of training or experience.

Since the Bait letter of work verification contains no name of the person providing the information as to the beneficiary's claimed prior employment, the AAO would give no weight to this evidence. The AAO further notes that the Form ETA 750 required eight years of high school which has never been documented in the instant petition.

Based on the lack of sufficient documentation on the beneficiary's work experience and conflicting evidence with regard to his educational credentials, the AAO determines that the petitioner has not sufficiently established that the beneficiary has the requisite two years of work experience or the requisite vocational school graduation or ASE certification stipulated in the Form ETA 750. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered job.

Beyond the decision of the director, the AAO would question the familial relationship between the petitioner's owner and the beneficiary, and by extension, his brother. 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 AAO notes that under 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. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). The record contains extensive evidence as to the family relationship between the petitioner's owner and the beneficiary and his brother. [redacted], the petitioner's owner, is identified as the beneficiary's uncle on various documents in the record either submitted by counsel or included in the beneficiary's NSEERS processing. The record contains a letter describing the petitioner's employment offer addressed to the beneficiary at

an address listed on numerous tax records ad Mr. s address. Thus, the beneficiary is the nephew of the petitioner's owner, and is one of a small number of family-related employees. The fact that the beneficiary is related to the petitioner's owner cast doubts on the realistic nature of the proffered position and whether a bona fide job opportunity was available to U.S. workers. The AAO would also question the petitioner's level of compliance and good faith in the Form ETA 750 certification process with the Department of Labor.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

إفادة تخرج

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