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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 2 8 2010

IN RE: Petitioner: Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Elizabeth McCormack

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 a construction company. It seeks to employ the beneficiary permanently in the United States as an electrical engineer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).[1] The director denied the petition as the petitioner failed to provide copies of its federal tax returns, audited financial statements, or annual reports for the years 2006 and 2007. The director also determined that the beneficiary did not qualify to perform the duties of the proffered position as he did not meet the educational, training, and the work experience requirements.

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 April 23, 2008 denial, the issues in this case are (a) 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 and (b) whether the beneficiary qualifies 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. Additionally, section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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[1] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

> the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the 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 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).

Here, the ETA Form 9089 was filed and accepted for processing by the DOL on August 22, 2006. The proffered wage stated on that form is $40.56 per hour or $84,364.80 per year. The ETA Form 9089 also states that the position requires the beneficiary to have a bachelor's degree in electrical engineering and two years work experience in the job offered.

To show that the petitioner has the ability to pay $40.56 per hour or $84,364.80 per year beginning on August 22, 2006, it submitted the following evidence:

- Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2005-2007;
- The beneficiary's Form W-2 for 2007 and
- A copy of a construction contract dated April 4, 2008 between the petitioner and [redacted] for $1.8 million to construct a building.

The evidence in the record of proceeding shows that the petitioner is an S Corporation with two shareholders. [redacted] On the petition, the petitioner claimed to have been established in 1999,[2] to currently employ six workers, and to have a gross annual income and net annual income of $600,358 and $107,781, respectively.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[2] A search of the New York Department of State's website reveals that A & A United Construction, Inc. or the petitioner was incorporated on June 30, 1999.

[3] 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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, 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).

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.

Here, although the petitioner has established that it employed the beneficiary in 2007, it has not established that it paid or employed the beneficiary in 2006. The W-2 forms submitted show that the beneficiary received $20,000 from the petitioner in 2007 or $64,364.80 less than the proffered wage.

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date, the petitioner must be able to pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is: $84,364.80 in 2006 and $64,364.80 in 2007.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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).

As noted above, the petitioner submitted copies of its federal tax returns for the years 2005 through 2007. Since the petitioner is only obligated to demonstrate that it has the ability to pay the proffered wage from August 22, 2006 (the priority date), the 2005 tax return will not be considered. The petitioner's tax returns demonstrate its net income in 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net income (loss) [4] of $19,395 (line 21 of page one).

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[4] 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. 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

- In 2007, the Form 1120S stated net income (loss) of $9,964 (line 21 of page one).

Based on the information above, the petitioner did not have sufficient net income to pay the beneficiary's wage in either 2006 or 2007.

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.[5] 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 (liabilities) for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net current assets (liabilities) of $56,817.
- In 2007, the Form 1120S stated net current assets (liabilities) of $67,448.

Therefore, the petitioner had sufficient net current assets to pay the remainder of the beneficiary's wage of $64,364.80 in 2007 but not in 2006.

Based on the net income and net current asset analysis above, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, specifically in 2006.

As noted above, the petitioner provided a copy of a contract dated April 2008, in which the petitioner agreed to furnish all labor and materials necessary to construct a three story building for [redacted]. The contract made in April 2008 between the petitioner and [redacted] shows that the petitioner has a viable business. However, the contract in and of itself is not

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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), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, there is no additional income, credit, or deduction on the petitioner's schedule K and thus, the petitioner's net income is found on line 21.

[5] 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.

sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wage as of the priority date.

Though not raised on appeal, 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. 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 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 includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage in 2006. The company also does not reflect a large compensation package for its shareholders that could have been dedicated to paying the proffered wage. The tax returns show that the shareholders or officers of the corporation received $11,000 in 2006 and no money in 2007.

Unlike *Sonegawa*, the petitioner in this case has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1996. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

As for the second issue, the AAO finds that the petitioner has provided sufficient evidence to demonstrate that the beneficiary has the educational, training, and the work experience necessary to perform the duties of the proffered position. The director's finding on this issue is withdrawn.

The proffered position's requirements are found on ETA Form 9089 Part H, Job Opportunity Information. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

On the ETA Form 9089 part H, the petitioner set the following requirements for the electrical engineer position:

> Education: minimum level required: Bachelor's
> Major Field of study: Electrical engineer
> Is experience in the job offered required for the job? Yes, 24 months work experience in the job offered is required for the job.
> Is a foreign educational equivalent acceptable? Yes.

On the ETA Form 9089, under "Job Duties," the petitioner states:

> [ ] direct and coordinate construction installation, maintain support testing activities, and [ ] ensure compliance with specification codes and customer requirements wiring the walls.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (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. 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).

As set forth above, the proffered position requires a Bachelor's degree in electrical engineering and two years of experience in the job offered.

On the ETA Form 9089, signed by the beneficiary on December 20, 2006, the beneficiary represented that his highest level of education related to the requested occupation was a Bachelor's degree in electrical engineering. He listed the institution of study where that education was obtained as Turkmenistan, and the year completed as 1995.

In support of the beneficiary's educational qualifications, the petitioner submitted a translated copy of the beneficiary's diploma issued by [redacted] on June

26, 1995. It indicates that the beneficiary attended the Turkmen Polytechnic Institute in 1990 and that in 1995 he successfully completed the course of study in "Electricity Supply." Further, the translated copy of the diploma states: "By the decision of State Qualification Commission as of June 26, 1995 [he] was qualified as an engineer – electricity."

In response to the director's request for evidence (RFE), the petitioner submitted a translated copy of the beneficiary's school transcript signed by on June 26, 1995. The transcript also bears a copy of an official seal from the school. On appeal to the AAO, the petitioner provided a credentials evaluation, dated May 8, 2008, from The evaluation describes the beneficiary's diploma from Turkmen Polytechnic Institute (*Turkmenskii Politekhnicheskii Institut*) as equivalent to a Bachelor of Science degree in electrical engineering from a regionally accredited educational institution in the United States.

The director determined that the beneficiary's Bachelor of Science degree could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in electrical engineering because the academic transcript from the Turkmen Polytechnic Institute does not "adequately break down the length or number of hours required of each subject/class taken for the 'Electrical Power Supply' major."

Together, the diploma coupled with the transcript and the credentials evaluation is sufficient to establish by preponderance of the evidence that the beneficiary met the educational requirement to perform the duties of the position. In addition, the petitioner has provided consistent information about the beneficiary's education throughout the petition process.

The director also declined to accept the letter indicating the beneficiary's work experience from 1995 to 1998 at " The director stated that the author of the letter failed to provide a specific description of the beneficiary's duties.

To demonstrate that the beneficiary had at least two years work experience in the job offered prior to August 22, 2006 (the priority date), the petitioner provided a letter from of ', who stated that the beneficiary was employed by engineer from December 1, 1995 to June 29, 1998 with the salary of 21,000 rubles. On appeal, the petitioner submits another letter from In this letter, describes the beneficiary's duties as the following:

- Production of electric shields and electric networks
- Development and production of design documentation for low voltage electric shields documentation
- Supervising of the tests for production samples
- Supervising of engineer electrics group
- Development of electric shields products
- Development of construction documentation

- Matching technical assignment of the producing plant with customers
- Providing of effective utilization, maintenance, and timely repairs of electric equipment
- Providing instructions for employees using electric equipment

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

> 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.

Based on the evidence submitted above, the AAO finds that the petitioner has provided credible evidence showing that the beneficiary had at least two years experience in the job offered prior to August 22, 2006. The letter dated December 3, 2003 from sufficiently describes the job duties of the beneficiary. The director's decision on the beneficiary's qualification is withdrawn for the reasons stated above.

Nevertheless, the petition is denied because the petitioner has not established that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary receives permanent residence. 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.