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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] Office: NEBRASKA SERVICE CENTER Date: SEP 24 2010
LIN 07 180 54092

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 $585. 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.

Thank you,

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 labor contractor. It seeks to employ the beneficiary in the United States as a welder. 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 also determined that the petitioner had not demonstrated its intent to employ the beneficiary on a full-time, permanent basis. The director denied the petition accordingly.[1]

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.

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.

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[1] The director also noted that, although the beneficiary was in the United States as a nonimmigrant temporary or seasonal worker at the time the Form I-140 was filed, the petitioner failed to disclose this fact and to provide required information on the Form I-140. The director noted that it was unclear whether the petitioner was aware that the beneficiary was in the U.S. at the time the Form I-140 was filed, as an unrelated employer had sponsored the beneficiary's H-2B visa. The director also noted, however, that it appeared that counsel was aware that the beneficiary was in the U.S. at the time the Form I-140 was filed, as counsel was listed as the representative on all filings for the H-2B employer. On appeal, counsel denies that he had knowledge of the beneficiary's presence in the U.S. This office notes that the director was correct in noting that the Form I-140 was improperly completed. However, this office finds that it is not necessary to address this issue further as the petition will be denied for the reasons discussed below.

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 accepted on August 9, 2005. The proffered wage as stated on the ETA Form 9089 is $18.81 per hour ($39,124.80 per year). The ETA Form 9089 states that the position requires 24 months (two years) of experience in the job offered.

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.

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 1997 and to currently employ 199 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, 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 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. In the instant case, there is no evidence that the petitioner employed and paid the beneficiary at any time since the priority date.

If, as here, 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 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 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).

The petitioner's tax returns demonstrate its net income for 2005 through 2007, as shown in the table below.

- In 2005, the Form 1120S stated net income[2] of $1,010,689.00.

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[2] 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

- In 2006, the Form 1120S stated net income of $182,023.00.
- In 2007, the Form 1120S stated net income of -$148,313.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2007.

The petitioner's net income was sufficient to pay the proffered wage in 2005 and 2006. However, as noted by the director, the petitioner has filed numerous other Form I-140 petitions. There are more than 50 Form I-140 petitions filed by the petitioner which have been approved, are currently pending, or are on appeal. As noted by counsel in his appellate brief, all of these petitions are for either welders or fitters. The rate of pay for the welders is $39,125 per year, and the rate of pay for the fitters is $35,609. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no specific, corroborated information about the proffered wages for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries.

Because the petitioner has failed to provide any evidence regarding the proffered wages and/or wages actually paid to the beneficiaries of the other Form I-140 petitions, the AAO finds that the petitioner has failed to establish that its net income was sufficient to pay the proffered wages in 2005 or 2006. Applying even the lowest proffered wage disclosed by counsel for the other pending petitions, and multiplying this number by 50, it is clear that the petitioner did not have sufficient net income to pay all of these wages in 2005 or 2006. Crucially, and as noted above, the instant record of proceeding fails to establish that, in 2007, the petitioner had the ability to pay even the proffered wage to the beneficiary alone, not even considering the other dozens of simultaneously pending petitions.

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 Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (for the tax return from 2005) or line 18 (for the tax returns from 2006 and 2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed August 11, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

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.[3] 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 2005, 2006 and 2007, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of $28,624.00.
- In 2006, the Form 1120S stated net current assets of -$86,797.00.
- In 2007, the Form 1120S stated net current assets of $10,809.00.

The petitioner did not have sufficient net current assets to pay the proffered wage in 2005, 2006 or 2007. In addition, as discussed above, the petitioner has more than 50 other Form I-140 petitions which have been approved, are currently pending, or are on appeal. The petitioner had insufficient net current assets in 2005, 2006 and 2007 to pay the proffered wages of all the beneficiaries.

Therefore, from the date the ETA Form 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 wages paid to the beneficiary, net income or net current assets.

Counsel asserts on appeal that there is another way to determine the petitioner's ability to pay the proffered wage. Specifically, counsel notes that the petitioner paid total wages in excess of the proffered wage. However, in general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel further asserts that the income and assets of the petitioner's shareholders should be considered in determining the petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS]

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[3]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.

to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." 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.

Finally, counsel states that USCIS should consider "other factors" in determining the petitioner's ability to pay the proffered wage such as the length of time the petitioner has been in business and the petitioner's gross receipts. 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 this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. The petitioner did not establish a pattern of profitable or successful years, or that it has a sound business reputation. On the contrary, the record shows a dramatic decrease in the petitioner's gross receipts, wages paid and net income from the years 2005 to 2007. If anything, this trend supports the conclusion that the petitioner lacks the continuing ability to pay the proffered wage. 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.

In addition, as noted above, the director denied the petition because the petitioner failed to establish that it intends to employ the beneficiary on a full-time, permanent basis.

Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i); *see also* 8 C.F.R. § 204.5(c).

The regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.
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> *Employment* means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

In support of the Form I-140 petition the petitioner submitted a letter stating that it supplies labor to various shipbuilding companies. On May 15, 2009, the director issued a Notice of Intent to Deny (NOID) stating that the record was "devoid of evidence that the petitioner was able to make a bona fide offer of full-time employment to the beneficiary at the time the petition was filed." The director provided the petitioner with an opportunity to respond and stated that the response should include copies of all current contract(s) with clients and a copy of the beneficiary's employment contract outlining the terms of his employment with the petitioner. The director also requested copies of the petitioner's tax returns for 2006 and 2007 and copies of the petitioner's Forms W-3 for the years 2005 through 2007.

The petitioner submitted a response on June 11, 2009. The response included a letter from the petitioner's general manager which stated that the petitioner "was set up to provide contract labor." However, the letter explained, the petitioner "did not enter into employment contract with our main client, National Steel and Shipbuilding Company (NASSCO). Rather, we had purchase orders with NASSCO." A copy of a purchase order was also submitted. The purchase order is dated July 22, 2002. The purchase order purports to amend an earlier purchase order. It states:

> Change Order No. Eight (8) Issued on 7/22/02 To Increase Funds For Item 002 As Follows:
>
> Subcontract Riggers To Support Hull 490. Increase Unit Price.

As noted above, the director denied the petition on July 14, 2009. The director noted that the purchase order submitted by the petitioner gave no indication of the number of workers covered by the purchase order, the positions filled, or the duration of the work engagement. The director also considered information that he obtained from the website for NASSCO as well as the website for a company identified

On appeal, counsel states that the director erred in going beyond the record and considering information from websites.[4] Counsel also states that the director failed to give proper weight to

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[4] It is noted that the AAO will not consider the information taken from websites outside of the record and cited by the director in the decision. Accordingly, these comments by the director will be withdrawn. However, as the petitioner failed to establish eligibility for the benefit sought for the reasons set forth herein, the director's consideration of this information was harmless

the petitioner's tax returns and Forms W-3 as evidence of the petitioner's intent and ability to offer full-time, permanent employment. No additional evidence has been provided on appeal to establish that the petitioner intends to employ the beneficiary on a full-time, permanent basis.

The AAO finds that the evidence does not establish that the beneficiary would be employed as a permanent, full-time employee. As noted above, the NASSCO purchase order is dated July 22, 2002, more than three years prior to the priority date in this case. There is no indication in the purchase order of the number of workers needed, the duties to be performed, or the duration of the work involved. It is not clear that the purchase order would relate to the beneficiary at all as it references a need for "riggers," whereas the labor certification and Form I-140 claim that the beneficiary is to be employed as a welder. There is no other evidence in the record of the type or amount of labor that the petitioner provided to NASSCO. Nor is there any evidence in the record of labor provided by the petitioner to any other company.

Counsel's assertion that the petitioner's tax returns and Forms W-3 establish that the beneficiary will be employed on a full-time, permanent basis is unpersuasive. As noted above in the discussion of the petitioner's ability to pay the proffered wage, the petitioner's gross receipts, wages paid and net income all dropped dramatically from 2005 to 2007. The wages paid by the petitioner as shown in the Forms W-3 decreased from $6,087,065.92 in 2005 to only $219,984.00 in 2007. Rather than supporting counsel's assertion, this further calls into question the petitioner's intent and ability to provide the beneficiary with full-time, permanent employment.

Therefore, the director's decision that the petitioner failed to demonstrate its intent and ability to make a bona fide offer of permanent, full-time employment is affirmed.

Further, although not noted by the director, the record does not establish that the petitioner is the actual employer in this case. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

As stated above, the regulation at 20 C.F.R. § 656.3 provides the following for ascertaining whether or not the petitioner is the beneficiary's "actual employer":

> Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

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error. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.

In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," USCIS must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In the present matter, as explained above, it has not been established that the petitioner will be the beneficiary's actual employer.

In *Clackamas*, the specific inquiry was whether four physicians, actively engaged in medical practice as shareholders, could be considered employees to determine whether the petitioner to qualify as an employer under the American with Disabilities Act of 1990 (ADA), which necessitates an employer have fifteen employees. The court cites to *Darden* that "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Clackamas,* 538 U.S. at 444, (*citing Darden*, 503 U.S. at 318, 322). The court found the regulatory definition to be circular in that the ADA defined an "employee" as "individual employed by the employer." *Id. (citing* 42 U.S.C. § 12111(4)). Similarly, in *Darden,* where the court considered whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA), the court found the ERISA definition to be circular and adopted a common-law test to determine who would qualify as an "employee under ERISA. *Id.* (*citing Darden*, 503 U.S. at 323). In looking to *Darden,* the court stated, "as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning in common law. Congress has overridden judicial decisions that went beyond the common law." *Id.* at 447 *(citing Darden*, 503 U.S. at 324-325).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control."[5] *Id.* at 448. The

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[5] Section 220, Definition of a Servant, in full states:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

a. The extent of control which, by the agreement, the master may exercise over the details of the work;
b. Whether or not the one employed is engaged in a distinct occupation or business;
c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the director of the employer or by a specialist without supervision;
d. The skill required in the occupation;
e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. The length of time for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not the work is a part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of master and

Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id. (citing* § 220(2)(a)). The court also looked to the EEOC's focus on control[6] in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered an employer can hire and fire employees, assign tasks to employees and supervise their performance, can decide how the business' profits and losses are distributed. *Id.* at 449-450.

In this matter, the petitioner states that it provides contract labor to various shipbuilding companies. The petitioner also states that it does not have employment contracts with the beneficiaries of its numerous Form I-140 petitions. There is no evidence in the record to indicate whether the petitioner would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. It does not appear as if the petitioner would actually control the beneficiary's employment. Therefore, the evidence in the record is insufficient to establish that the petitioner is the actual employer in this case.

Finally, beyond the decision of the director, the petitioner has also failed to establish that the beneficiary is qualified for the proffered position.

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 petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158. Here, the labor certification application was accepted on August 9, 2005.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d

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servant; and

j. Whether the principal is or is not in business.

[6] Additionally, as set forth in the recent Memorandum from Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements, HQ 70/6.2.8, January 8, 2010, the memo looks to whether the employer has the "right to control" where, when and how the beneficiary performs the job. The memo considers many of the factors set forth in *Darden, Clackamas,* and the Restatement, including who provides the tools necessary to perform the job duties, control to the extent of who hires, pays and fires, if necessary, the beneficiary, and who controls the manner and means by which the beneficiary's work product is completed.

1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

According to the plain terms of the ETA Form 9089, the applicant must have two years of experience in the job offered. The job is for a "welder," and the job duties are described as follows:

> Weld metal components together to fabricate or repair ship according to layouts, blueprints and work orders using brazing and various arc and gas welding equipment.

In order to establish that the beneficiary has the necessary experience in the job offered by the priority date, the petitioner must submit "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." 8 C.F.R. § 204.5(l)(3)(ii)(A). Furthermore, 8 C.F.R. § 204.5(g)(1) requires such letters to include a "specific description of the duties performed by the alien."

The beneficiary claims in the ETA Form 9089 to have been employed by Brothers Engineering Works in Kottayam, Kerala, India as a welder beginning July 1, 1997. The record contains a letter from this employer dated January 3, 2005. The letter fails to specifically describe any of the beneficiary's experience as a welder. As the letter does not comply with the regulations, the record does not establish that the beneficiary gained the necessary experience in the job offered before the priority date.

Accordingly, as the petitioner failed to establish that the beneficiary is qualified for the proffered position based on the requirements of the labor certification, the petition is denied for this additional reason.

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.