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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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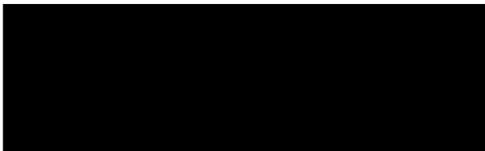
Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be withdrawn as will the director's decision with regard to the petitioner's ability to pay the proffered wage. However, the AAO will remand the matter to the director to examine whether the beneficiary is qualified to perform the duties of the proffered position and to examine whether the petitioner's posting notice conforms to the regulation at 20 C.F.R. § 656.10(d)(1)(i)(ii) and (iii).

The petitioner is a PC controls production and sales company. It seeks to employ the beneficiary permanently in the United States as a software engineer, systems. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 2006 priority date of the visa petition and denied the petition accordingly. In its decision, the AAO determined that the petitioner had not submitted sufficient evidence of its ability to pay the proffered wage and dismissed the appeal.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. On motion, counsel submits the petitioner's 2005 and 2006 Form 1040 NR, with accompanying Schedules C. Counsel also submits the petitioner's W-2 Forms for the beneficiary for tax years 2003 through 2007. These forms indicate the petitioner paid the beneficiary \$63,124.83 in 2003; \$70,907.53 in 2004; \$71,735.33 in 2005; \$77,487.54 in 2006; and \$75,838.57 in 2007.¹

With regard to the petitioner's 2005 tax form submitted to the record for the first time on motion, the director in his NOID dated August 10, 2006 requested copies of the petitioner's annual reports, federal tax returns or audited financial reports as stipulated by 8 C.F.R. § 204.5(g)(2).² In its response, the petitioner submitted what it described as "audited" financial statements for December 2004 and 2005, that the director subsequently noted were reviewed financial reports, and not audited financial statements.

The AAO in its dismissal noted that the petitioner had not submitted its 2005 Form 1040NR to the record on appeal, although counsel refers to the document. Further the AAO noted that the petitioner had not submitted any evidence as of or after the January 16, 2006 priority date. The AAO then determined that it was not able to determine the petitioner's ability to pay the proffered wage utilizing the petitioner's tax returns.

¹ In the director's NOID dated August 10, 2006, the director did not request the beneficiary's W-2 Forms for the relevant period of time. In his decision, the director also did not comment on the use of the beneficiary's wages to determine the petitioner's ability to pay the proffered wage. The AAO, in its dismissal of the petitioner's appeal, did address the use of the beneficiary's wages as a means to establish the petitioner's ability to pay the proffered wage. Thus, the beneficiary's W-2 Forms submitted on motion are new evidence not previously requested by the director.

² The petitioner provided its 2004 Form 1040 NR with the I-140 petition.

On motion, counsel submits the petitioner's 2005 Form 1040NR with no explanation for why the 2005 tax return was not submitted either in response to the director's NOID or the petitioner's appeal.

The purpose of the request for evidence (and by extension, a NOID) is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the present matter, the petitioner was put on notice of a deficiency in the evidence and had been given an opportunity to respond to that deficiency. Counsel on motion provides no explanation for why the 2005 tax return was not submitted to the record on appeal. Further the petitioner's tax return is neither signed nor dated. The AAO will not accept the petitioner's 2005 tax return offered for the first time on motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the document in response to the director's NOID dated August 10, 2006 or explained why the 2005 tax return was not available. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the petitioner's 2005 tax return submitted on motion. With regard to the petitioner's 2006 tax return, the AAO does consider this document to be new evidence previously unavailable and also probative of the petitioner's ability to pay the proffered wage as of the 2006 priority date. The AAO will discuss this document more fully further in these proceedings.

The record shows that the motion 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 September 5, 2006 denial and the AAO dismissal dated March 7, 2008, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2006 priority date and continuing until the beneficiary obtains lawful permanent residence.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 9089 was accepted on January 19, 2006. The proffered wage as stated on the Form ETA 9089 is \$65,000 per year.³ The Form ETA 9089 states that the position requires a bachelor's degree in electrical engineering, and six months of work experience.

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 on motion.⁴

On appeal, counsel states that the petitioner's tax returns for 2005 and 2006 and the petitioner's W-2 Forms for the beneficiary establish the petitioner's ability to pay the proffered wage as of the 2006 priority date.

The record indicates the petitioner is structured as a limited liability company, regarded as a single owner sole proprietorship.⁵ Normally, according to Internal Revenue Services regulation, taxpayers

³ The AAO in its dismissal indicated the proffered wage was \$60,500; however, the ETA Form 9089 establishes the proffered wage as \$65,000.

⁴ 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 the petitioner's W-2 Forms or the petitioner's 2006 tax return newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner (as is the case here), it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner is an LLC formed under Maryland state law. The petitioner reported its income on Form 1040NR, U.S. Non-Resident Alien Income Tax Return.

with that status report their income on Form 1065; however, as stated previously, the instant single owner petitioner reports its income on Form 1040NR. On the petition, the petitioner claimed to have been established in 1998, and to currently employ 44 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on May 12, 2006, the beneficiary claimed to have worked for the petitioner since January 1, 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Based on the evidence submitted on motion, the petitioner paid the beneficiary \$77,487.54 in the 2006 priority year, and \$75,838.57 in 2007. Thus the petitioner paid the beneficiary wages greater than the proffered wage of \$65,000 as of the 2006 priority year.⁶ The petitioner has established its ability to pay the proffered wage as of the 2006 priority year and onward.

For illustrative purposes only, the AAO will examine whether the petitioner could have established its ability to pay the proffered wage based on its net income. 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*,

⁶ The AAO notes that the petitioner paid the beneficiary wages greater than the \$65,000 in tax years 2004 and 2005.

539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 118. "[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).

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

As previously stated, the record before the director closed on August 30, 2006 with the receipt by the director of the petitioner's submissions in response to the director's NOID. As of that date, the petitioner's 2005 federal income tax return is the most recent return available. As previously discussed, the petitioner did not submit its 2005 tax return either in response to the director's NOID or on appeal, and the AAO did not accept the 2005 tax return on motion. Nevertheless on motion, the petitioner submits its 2006 tax return, which is both new and probative evidence.. The petitioner's 2006 tax return, Schedule C, stated its net income as \$820,801. Therefore, for the year 2006, the petitioner established that it had sufficient net income to pay the proffered wage of \$65,000.

Thus, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage as of the 2006 priority date through an examination of wages paid to the beneficiary, or its 2006 net income. Thus the petitioner has established its ability to pay the proffered wage.

Beyond the director's decision and the AAO dismissal, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. 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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Section 203(b)(3)(A)(i) of the Act 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(l)(3)(ii)(B) provides:

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

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 ETA Form 9089 was accepted for processing on January 19, 2006.⁷ The Immigrant Petition for Alien Worker (Form I-140) was filed on May 22, 2006.

The ETA Form 9089, Part H set forth the minimum requirements for the position of software engineer, systems. The proffered position requires a bachelor's degree in electrical engineering and six months of experience in the job offered. Part H Item 8 indicates that the employer will not accept an alternate combination of education and experience. Item 14 of Part H reflects specific skills or other requirements as follows: "Visual Basic and IEC 1131-3; motion control experience."

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a Bachelor's degree in electrical engineering from the University of Saskatchewan in Canada.⁸ In corroboration of the ETA Form 9089, the petitioner provided the beneficiary's diploma for a Bachelor of Science degree in electrical Engineering granted on May 26, 1999.

In determining whether the beneficiary possesses a U.S. bachelor's degree in electrical engineering or a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in Saskatchewan, Canada. It notes that most undergraduate study leads to a Bachelor's degree (minimum three or four years) or an Honours degree (minimum four years) with a major subject concentration. EDGE also notes that the first stage university level studies also include undergraduate diplomas (one-three years of study) and while it confirms that a bachelor of science degree is awarded upon completion of three or four years of studies beyond the secondary level, it does not suggest that a three-year degree from Canada may be deemed a foreign equivalent degree to a U.S. baccalaureate. It does state that a four-year

⁷ 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.

⁸ In his resume, the beneficiary represents that he also has a bachelor's degree in computer science, but the petitioner did not submit any further documentation with regard to this claimed second degree.

program is the equivalent of a U.S. baccalaureate degree. (EDGE materials included with this decision.)

The petitioner did not submit the beneficiary's transcripts from the University of Saskatchewan. The AAO notes that the petitioner submitted a second diploma written in Latin to the record. This diploma states the following with regard to the degree provided "in Baccalaurei Scientiae Gradum III Annorum." The AAO notes that the phrase "Gradum III Annorum" could signify a three year degree. The AAO notes that this document is signed by a different dean, and that the record does not reflect the relationship between the English language diploma and the second diploma in Latin.

Thus, the record does not establish whether the beneficiary obtained a three year bachelor of science or a four-year bachelor of science degree in electrical engineering from the University of Saskatchewan. There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. Thus, the record does not establish that the beneficiary possesses a foreign equivalent degree that is the equivalent of a four year U.S. Bachelor of Science degree in electrical energy from an accredited U.S. institution. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

Finally, the AAO dismissal raised questions as to whether the petitioner's posting notice conformed to the criteria outlined at 20 C.F.R. § 656.10(d)(1)(i)(ii)(iii). The employer must comply with the procedure set forth to post the availability of the job opportunity to interested U.S. workers. The regulation at 20 C.F.R. § 656.10(d)(1), in pertinent part, states the posting notice must state that any person may provide documentary evidence bearing on the case to the DOL certifying officer, and must provide the address of the certifying officer. In the instant matter, the petitioner's posting notice submitted to the record does not identify the local DOL employment office or the regional DOL certifying officer. The posting notice provides the petitioner's address for further information with regard to the proffered position. The petitioner submitted no comments on this issue on motion.

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 met that burden with regard to its ability to pay the proffered wage. With regard to the beneficiary's qualifications, the petitioner has not established that the beneficiary possesses a four-year baccalaureate degree as stipulated by the Form ETA 9089. The petitioner also failed to provide a sufficient posting notice.

ORDER: The motion to reopen is granted and the decision of the AAO dated March 7, 2008 is withdrawn. However, the petition is remanded to the director for further consideration of the beneficiary's qualifications and whether the petitioner provided a sufficient posting notice.