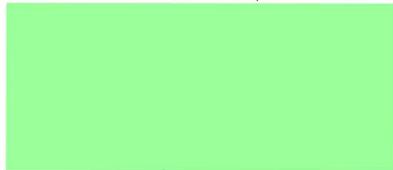




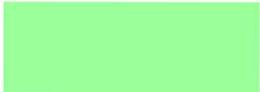
U.S. Citizenship
and Immigration
Services

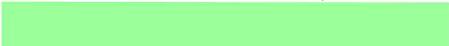
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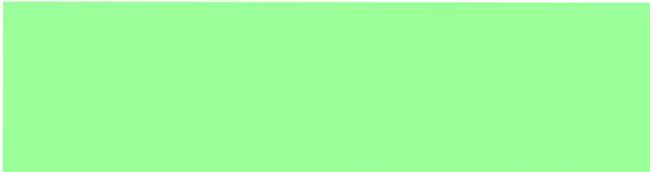
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a security and alarm installer company. It seeks to employ the beneficiary permanently in the United States as an electrical and electronic installer. 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). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and that the beneficiary met the requirements of the labor certification as of the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 23, 2008 denial, the issues in this case are 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 whether or not the petitioner was able to demonstrate that the beneficiary met the requirements of the labor certification as of the priority date.

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 crux of counsel's appeal is that during the initial adjudication of the petition, the director should have asked the petitioner to provide evidence already required by regulation. Counsel implies that the director abused his discretion by not requesting additional evidence after determining that all required evidence was not submitted with the initial petition.

We note that the relevant regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, [United States Citizenship and Immigration Service] (USCIS) in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit with the petition initial evidence of the petitioner's ability to pay the proffered wage and the beneficiary's qualifications, and therefore, the director was

not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility. Utilizing his discretion, the director adjudicated the case on the existing record.

At the outset, DOL's certification of the ETA Form 9089 does not supersede USCIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(l)(3). Thus all documentation supporting an application must be provided directly to USCIS by the petitioner.

On appeal, the petitioner submitted the following evidence:

- A copy of the beneficiary's pay stub dated May 26, 2009.
- Copies of the beneficiary's 2005, 2006, 2007, and 2008 Forms 1099-MISC (Miscellaneous Income).
- Copies of the beneficiary's 2006, 2007, and 2008 Individual Income Tax Returns (Form 1040).
- A declaration dated June 30, 2006 and signed by [REDACTED] Coordinator of Chemical Engineering with the [REDACTED] in Brazil, attesting to the beneficiary's graduation in Chemical Engineering on December 12, 1975.
- An untranslated copy of the beneficiary's transcripts.
- A copy of the letter entitled "Declaração" in [REDACTED] Serviços e [REDACTED] letterhead, attesting to the beneficiary's employment from January 1986 to January 1996.
- Copies of [REDACTED] 2006 and 2007 jointly filed U.S. Individual Income Tax Returns.
- A copy of [REDACTED] Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (Form 4868) for the year 2008.
- A copy of [REDACTED] 2005 U.S. Return of Partnership Income (Form 1065).

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, 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 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on September 16, 2007. The proffered wage as stated on the ETA Form 9089 is \$30.25 per hour, which is \$62,920 per year based on forty hours of work per week. The ETA Form 9089 states that the position requires a Bachelor's degree in engineering studies or chemical engineering and thirty-six months of experience in the job offered as an electrical and electronic installer or in the alternate occupation of a manager or technical director of security and alarm systems company. Part H.14 of ETA Form 9089 specifies that the beneficiary must have three years of experience in security alarm installation and engineering combined with professional experience as a manager or technical director in security systems and alarm wiring industry, and should be fluent in English and Spanish.

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.¹

The evidence in the record of proceeding shows that the petitioner is structured as single-member Limited Liability Company.² On the petition, the petitioner claimed to have been established in 1999

¹ 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).

² 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, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) 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 by the IRS 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, an LLC formed under Maryland law, is considered to be a sole proprietorship for federal tax purposes. See <http://www.irs.gov> (accessed July 18, 2012). An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

and to currently employ four workers. On the ETA Form 9089, signed by the beneficiary on November 19, 2007, the beneficiary claimed to have worked for the petitioner since October 18, 2004.

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'l Comm'r 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's 2005, 2006,³ 2007, and 2008 Forms 1099. The petitioner paid the beneficiary \$43,210 in 2007, and \$43,700 in 2008. For 2007 and 2008 the petitioner must show its ability to pay the difference between what it paid to the beneficiary and the proffered wage.

The beneficiary's most recent pay-stub of record is dated May 29, 2009, and shows a net payment of \$1,080.93. This amount covered the pay-period from May 13, 2009 until May 26, 2009. The AAO cannot assume that the beneficiary was paid the same amount every pay period of year 2009. A single earning statement does not establish the petitioner's ability to pay the beneficiary for the entire year. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2007, onwards.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

³ This evidence pre-dates the instant priority date and will not be considered as evidence of the petitioner's ability to pay the proffered wage from the priority date in 2007, onward.

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).

The petitioner's 2007 net income⁴ was \$60,277, which covers the difference between what it paid the beneficiary in 2007 (\$43,210) and the proffered wage (\$62,920). However, the petitioner failed to submit evidence of its ability to pay the proffered wage in any of the subsequent years.⁵

Therefore, the petitioner has not established that it had sufficient net income or net current assets to pay the proffered wage in any year after 2007.

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her 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 evidence of record falls short in determining the petitioner's ability to pay, as well as prevents the AAO from conducting a totality of the circumstances analysis based on *Sonegawa*. The petitioner has not established a historical growth, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Thus, assessing

⁴ The net income of a single member LLC taxed as a sole proprietorship is taken from Schedule C of Form 1040, Line 31.

⁵ The petitioner submitted a copy of Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return for 2008. The Form 4868 states that the petitioner's tax return must be filed by April 15, 2009. The appeal brief submitted by counsel is dated May 29, 2009. Although the petitioner's 2008 tax return was due before the submission of counsel's brief and additional evidence on appeal, the petitioner's 2008 tax return was not submitted.

the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a Bachelor's degree in engineering studies or chemical engineering and thirty-six months of experience in the job offered as a security and alarm installer, or in the alternate occupation of a manager or technical director of security and alarm systems company. Part H.14 of ETA Form 9089 specifies that the beneficiary must have three years of experience in security alarm installation and engineering combined with professional experience as a manager or technical director in security systems and alarm wiring industry, and should be fluent in English and Spanish.

On the labor certification, the beneficiary claims to qualify for the offered position based on a Bachelor's degree in Chemical Engineering from [REDACTED] in Brazil, completed, in 1975. The record contains a copy of a declaration dated June 30, 2006 and signed by [REDACTED] Coordinator of Chemical Engineering with the [REDACTED] in Brazil, attesting to the beneficiary's graduation in Chemical Engineering on December 12, 1975, and an untranslated copy of the beneficiary's transcripts. The record does not contain the actual diploma received by the beneficiary, nor an academic evaluation of the beneficiary's degree. The evidence submitted does not demonstrate that the beneficiary meets the requirements of the labor certification.

In addition to the Bachelor's degree, the labor certification requires thirty-six months of experience in the job offered as a security and alarm installer or in the alternate occupation of manager or technical director of security and alarm systems Company. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a copy of the letter entitled "Declaração" on [REDACTED] Serviços e [REDACTED] letterhead, attesting to the beneficiary's employment from January 1986 to January 1996. Although the petitioner provided an English translation of the document, the translator failed to certify that the translation is complete and accurate, and that he or she is competent to translate from

the foreign language into English.⁶ Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Furthermore, the letter does not contain the employer's address, does not list the duties performed by the beneficiary, the job title, and does not mention whether the beneficiary was a full-time or part-time employee.

Counsel supplemented the evidence on appeal with a letter from [REDACTED]. The letter states that the beneficiary assisted as a professional between January 1998 and January 2004. The letter does not include the name or title of the individual who signed it, nor does it state the job title or whether the employment was full-time or part-time. Further, the dates of employment listed in the letter cannot be reconciled with the dates of employment listed by the beneficiary on Form 9089, Section K. On Form 9089, signed by the beneficiary on November 19, 2007, the beneficiary claimed to have gained experience with [REDACTED] in Brazil from January 1, 1998 to July 1, 2004. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.

⁶ 8 C.F.R. § 103.2(b)(3): *Translations*. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.