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

U.S. Citizenship and Immigration Services

[redacted]

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DATE: NOV 0 1 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: PETITIONER: THE WASHINGTON LANGUAGE CENTER
BENEFICIARY: MUSTAFA KEMAL SUNGUR

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.

Thank you,

Kevin Porlos for

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 The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

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 petitioner is a foreign language school. It seeks to employ the beneficiary permanently in the United States as a Turkish language tutor. 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 priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In his February 4, 2009 decision, the director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal the AAO identified three additional issues, whether or not the petitioner has established the proffered position is a full-time position, whether or not the petitioner established that the beneficiary possessed the minimum experience required to perform the proffered position by the priority date, and whether or not the petitioner established that the beneficiary possessed the minimum education required to perform the proffered position by 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.

Continuing Ability to Pay the Proffered Wage

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

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[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).

> *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 April 16, 2007. The proffered wage as stated on the ETA Form 9089 is $32.65 per hour or $67,912 per year (based on a 40-hour work week). The ETA Form 9089 states that the position requires 24 months of experience as a Turkish language tutor. The education required as set forth on the labor certification is Military Studies in the major field of military academy – infantry.

The petitioner is a single-member limited liability company (LLC). On the petition, the petitioner claimed to have been established in 2003 and to currently employ 49 workers. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on November 6, 2007, the beneficiary claimed to have worked for the petitioner as a Turkish language tutor from January 15, 2004 to February 5, 2005.

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'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 Sonegawa*, 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 did not establish that it had employed and paid the beneficiary at any time starting with the priority date and thereafter.

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 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

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).

The record before the director closed on January 12, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return is the most recent return available. The petitioner's tax return stated net income[2] of $328,833 for 2007.

Therefore, for the year 2007, the petitioner established that it had sufficient net income to pay the proffered wage. The director's decision denying the petition based on the petitioner's inability to pay the proffered wage is withdrawn.

Full-Time Employment

Beyond the decision of the director, the petitioner has not established that the job offered is for a full-time 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*, 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

The labor certification states the proffered wage is $32.65 per hour. The Form I-140 at Part 6, question 9 indicates the wages per week the petitioner will be paying is $628 which, when divided by $32.65 per hour, is 19.23 hours per week. The job offered appears to be for less than full-time work.

Therefore, the petitioner has not established that the job offered is for a full-time position.

Beneficiary Qualifications – Experience

Further, beyond the decision of the director, the petitioner has not established that the beneficiary possessed the minimum experience required by the labor certification. The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159

[2] The petitioner's net income is reported on its single member's IRS Form 1040, Schedule C at line 31 for 2007. The director erroneously determined that the petitioner was a sole proprietorship.

(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 labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* 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 has the following minimum requirements:

H.4. Education: Other - Military Studies.
H.4-B. Major Field of Study: Military Academy – Infantry.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months of experience as a Turkish language tutor.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

As to experience, the labor certification states that the offered position requires 24 months experience, and as previously discussed, full-time employment is a minimum of 35 hours a week. Utilizing a 35-hour standard, this equates to 1820 hours a year (35 hours x 52 weeks) or 3640 hours over two years. The labor certification also states that the beneficiary qualifies for the offered position based on the experience as detailed below. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

1. Turkish language tutor at the petitioner from January 15, 2004 to February 5, 2005 (55 weeks) working 20 hours a week. 55 weeks times 20 hours a week equals 1100 total hours.
2. Turkish language tutor at [redacted] in Arlington, VA from April 1, 2005 to August 15, 2006 (71 weeks) working 14 hours a week. 71 weeks times 14 hours a week equals 994 total hours.
3. Turkish language tutor at [redacted] in Washington, DC from September 15, 2006 to April 16, 2007 (30 weeks) working 12 hours a week. 30 weeks times 12 hours a week equals 360 total hours.

Therefore, based on the experience set forth on the labor certification, the beneficiary has only 2454 hours of the 3640 hours of required experience.

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

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains four experience letters referencing employment before the priority date:[3]

1. An undated letter from a of on company letterhead stating the beneficiary instructed Turkish language classes; however, the letter lists no duties, no employment dates, and does not indicate the number of hours worked. Therefore, the letter does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and does not establish that the beneficiary has the required experience for the proffered position. Further, as this employment is not listed on the labor certification, the letter by itself is not sufficient to establish the beneficiary worked at .[4]
2. A letter dated January 24, 2005 from on company letterhead for employment from January 2003 to August 2003. According to the letter, the beneficiary worked as a Turkish instructor, but the letter does not indicate how many hours per week the beneficiary worked. Thus, it is not clear how many hours of experience the beneficiary gained with this employer. Further, as this employment is not listed on the labor certification, the letter by itself is not sufficient to establish the beneficiary worked at [5]
3. A letter dated January 24, 2005 from of the petitioner for employment from February 2003 to September 2003 as a Turkish language instructor. The letter does not list the number of hours the beneficiary worked; instead, it states that most recently, the beneficiary taught two full-time students beginning in February 2003 and that those students graduated in September 2003.[6] Thus, it is not clear how many hours of experience the beneficiary gained with this employer. Further, as these dates of employment are not listed on the labor certification, the letter by itself is not sufficient to establish the beneficiary worked full-time for the petitioner from February 2003 to September 2003.[7] The labor certification lists the beneficiary working for the petitioner only from January 14, 2004 to February 5, 2005, and this January 24, 2005 letter does not cover the period of time listed on the labor certification. The AAO also notes that the petitioner was organized as a limited

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[3] The record also contains reference letters from the beneficiary's former students attesting to his abilities as a Turkish language instructor.

[4] In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

[5] *Id.*

[6] The letter states that "because Turkish is a less commonly studied language here in the USA, it is hard to keep him employed."

[7] *Id.*

liability company in the Commonwealth of Virginia on June 11, 2003. *See* http://cisiweb.scc.virginia.gov (accessed September 13, 2012). Therefore, it is unclear how the beneficiary began working for the petitioner in February 2003, before the petitioner was organized.[8]

4. A letter dated November 20, 2007 from of on company letterhead for employment from April 2005 to August 2006 as a Turkish instructor. The letter does list duties, but it does not list the number of hours per week the beneficiary worked. Thus, it is not clear how many hours of experience the beneficiary gained with this employer. Further, this employment is not listed on the labor certification and is not sufficient to establish the beneficiary worked at [9]

The petitioner has marked Part J, question 21 on ETA Form 9089 which asks "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" as "Yes." The petitioner is relying on two employment periods, the first as a Turkish language instructor from February 2003 through September 2003 (not listed on the labor certification), and the second as a Turkish language tutor from January 14, 2004 through February 5, 2005 (listed on the labor certification, but not verified by an employment letter).

The regulation at 20 C.F.R. § 656.17(i) states in pertinent part:

> *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
>
> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
>
> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
>
> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will

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[8]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 on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

[9]It is noted that the name and address of this employer located at is very similar to the name and address of the employer listed on the labor certification at which the petitioner lists the beneficiary working from April 1, 2005 until August 15, 2006

> review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:
>
> > (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
> > (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.
>
> (4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

The beneficiary purports to have gained experience with the petitioner in a position substantially comparable to the proffered position. However, the record contains no evidence that the petitioner demonstrated to the DOL that it is no longer feasible to train a worker to qualify for the position. Therefore, according to the regulations, the petitioner has not demonstrated that the beneficiary is qualified for the proffered position through previous experience with the petitioner.

The petitioner has not established that the beneficiary possessed the minimum experience required to perform the duties of the proffered position.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.