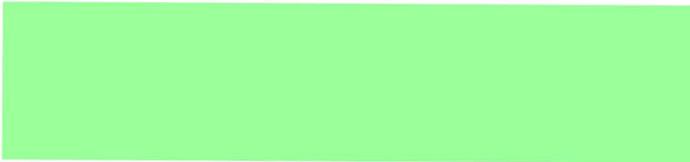


(b)(6)

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



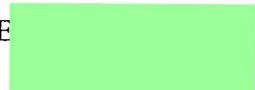
U.S. Citizenship
and Immigration
Services



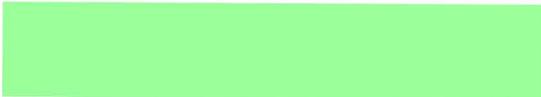
DATE: **SEP 25 2012**

OFFICE: TEXAS SERVICE CENTER

FILE

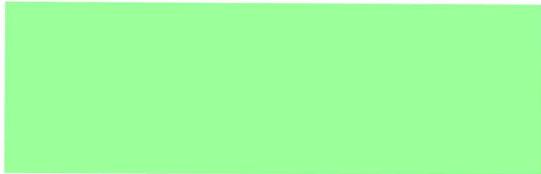


IN RE: Petitioner:
Beneficiary:



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,

Kumar Poulos 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 appeal will be dismissed.

The petitioner is a real estate brokerage firm. It seeks to employ the beneficiary permanently in the United States as a real estate agent. 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 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.

As set forth in the director's May 27, 2009 denial, at issue in this case is 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.

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.

Evidence of the Petitioner's Ability to Pay the Proffered Wage

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 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on June 25, 2007. The proffered wage as stated on the ETA Form 9089 is \$82,576 per year. The ETA Form 9089 states that the position requires an associate's degree in real estate and 5 months of experience as a real estate agent; or in the alternative, an associate's degree and four years of experience as a real estate agent.

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 an S corporation. On the petition, the petitioner claimed to have been established in 1989 and to employ 20 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 June 22, 2007, the beneficiary claimed to have worked for the petitioner since January 1, 2002.

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.

On appeal, counsel asserts that the beneficiary was paid in excess of the proffered wage in 2007. In support of this assertion, she submits a July 28, 2009 email with the subject line "[redacted] correct 1099 info," addressed to [redacted] from [redacted] Administrator/Accountant for [redacted]. Counsel also submits a spreadsheet entitled "[redacted] 1099 Earnings for the Year 2007." This document lists dates, addresses of properties, check amounts and 1099 amounts. It indicates that [redacted] was paid a total of

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).

\$124,377.78 in real estate commissions in 2007. However, the record contains no primary evidence of any such earnings such as an IRS Form 1099-MISC issued to the beneficiary in 2007 or commission checks issued to the beneficiary in 2007.

Furthermore, any such commission payments are not corroborated by the petitioner's 2007 tax return. Under "other deductions" the petitioner reports a total of only \$58,000 in commissions paid. The petitioner reports payments of salaries and wages of \$197,629 on line 8 of its 2007 Form 1120S. The instructions to Form 1120S² state that a taxpayer must enter on line 8 the total salaries and wages paid or incurred to *employees* (emphasis added). Employee wages are reported on Form W-2 and not Form 1099-MISC. In light of all of the above, the evidence does not establish that the petitioner paid the beneficiary any wages during any relevant timeframe, including the period from the priority date of June 25, 2007 or subsequently.

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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the

² See <http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf> (accessed September 4, 2012).

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 petitioner’s tax return demonstrates its net income³ for 2007 was -\$25,380. Therefore, in 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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.⁴ 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

³ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 22, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedule K for 2007, the petitioner’s net income is found on Schedule K of its 2007 tax return. It is noted that in his May 27, 2009 decision, the director incorrectly used the figure from line 21, page one: -\$27,117; a difference of \$1,737.

⁴According 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.

proffered wage using those net current assets. The petitioner's tax return demonstrates its end-of-year net current assets for 2007 were \$10,485. Therefore, for in 2007 the petitioner did not have sufficient net current assets to pay the proffered wage.

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, or its net income or net current assets.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 petitioner did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. 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.

Evidence of the Beneficiary's Qualifications

Beyond the decision of the director, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the June 25, 2007 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the ETA Form 9089 reflects the following requirements:

H.4. Education: Minimum level required: Associate's.

4-A. States "if Other indicated in question 4 [in relation to the minimum education], specify the education required." [None listed.]

4-B. Major Field Study: Real Estate.

6. Is experience in the job offer required for the job? The petitioner checked "yes."

6-A. If Yes, number of months experience required: 5.

7. Is there an alternate field of study that is acceptable?

The petitioner checked "no."

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "yes."

8-A. If yes, specify the alternate level of education required:

Associate's

8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:

4 years of experience as a real estate agent.

8-C. If applicable, indicate the number of years experience acceptable in question 8:

4

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

14. Specific skills or other requirements: Texas State License.

Thus, the labor certification requires as associate's degree in real estate and five months of experience as a real estate agent; or in the alternative, an associate's degree and four years of experience as a real estate agent. 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). Thus, the labor certification requires a minimum of an associate's degree in real estate with a minimum of five months of experience as a real estate agent. Additionally, the labor certification requires that the beneficiary hold a Texas State License.

In part J of the labor certification, the beneficiary indicates that she completed an associate's degree in real estate sales in 2001. The beneficiary indicates that the required education was completed at [REDACTED] in [REDACTED]. Part K of the labor certification indicates that the beneficiary has been employed with the petitioner as a real estate agent since January 1, 2002. No other work experience is claimed in Part K.

The record contains six "certificates of achievement" from [REDACTED]. Each certificate is for a 30-hour correspondence course. The courses for which achievement certificates were awarded are the following:

- Principles I -August 23, 2001
- Principles II -September 10, 2001
- Agency -September 14, 2001
- Contracts -September 19, 2001
- Marketing -October 4, 2001
- Appraisal -October 12, 2001

There is no evidence to establish that [REDACTED] conferred an associate's degree on the beneficiary. The record also contains a certificate from the [REDACTED] indicating that the beneficiary was designated "Graduate, Realtor Institute" in August 2004. Additionally, the record contains a September 2002 certificate from the [REDACTED], indicating that the beneficiary completed 15 education hours toward an "Accredited Buyer Representative" designation. The record also contains a certificate from [REDACTED] recognizing the beneficiary for twenty years of service with the [REDACTED]. Additionally, the record contains a 2000 letter from the [REDACTED] indicating that the beneficiary was a member of the board from 1979 through 1992; and April, 1994 to date. The record also contains a November 2001 letter from the [REDACTED] indicating that the beneficiary is eligible to apply for a salesperson license.

The record contains an October 30, 2008 evaluation of the beneficiary's credentials prepared by [REDACTED] and [REDACTED]. The evaluators state that they considered the beneficiary's real estate licensure in Toronto, Canada, her designation of "graduate" from the [REDACTED] issued by the [REDACTED] the courses listed above, and her years of experience in the real estate industry. The evaluators conclude that the combination of the above is the equivalent to a two-year U.S. Associate's degree in Real Estate from an accredited college or college-level institution in the United States.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the

Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The ETA Form 9089 requires the beneficiary to have an associate's degree. The terms of the labor certification do not provide for the combination of licensure, certificates, coursework and work experience to substitute for an associate's degree. Thus, the evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date.

Furthermore, the position requires a minimum of five months of experience as a real estate agent as of the June 25, 2007 priority date. While the record contains a certificate from [REDACTED] recognizing the beneficiary for 20 years of service, the specific nature of that service is not evident. Furthermore, Part J, item 21 of ETA Form 9089 indicates that the beneficiary did not gain qualifying experience with the petitioner, [REDACTED]. Besides the instant petitioner/position, no additional employers/positions are claimed in Part K of the labor certification. Thus, the evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

Finally, the labor certification requires a Texas State License. The evidence in the record does not contain a Texas State License for the beneficiary, only a letter indicating that the beneficiary is eligible to apply for a license. Thus, the evidence in the record does not establish that the beneficiary met all of the requirements set forth on the labor certification as of the priority date.

It is also noted that the petitioner's former counsel did not sign the certified ETA Form 9089 submitted with the petition. USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. See 20 C.F.R. § 656.17(a)(1).

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 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.