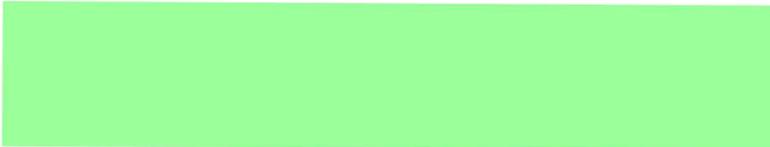


U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

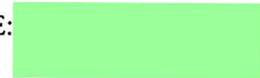
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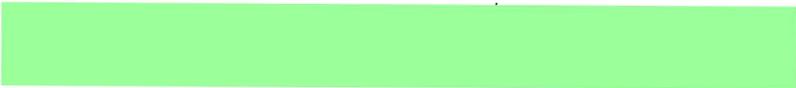
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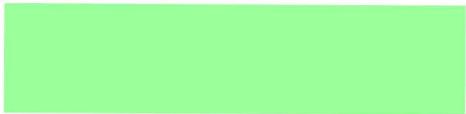
Petitioner:

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 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 with the field office or service center that originally decided your case by filing a 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

Ron Rosenberg

Acting 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 landscaping firm. It seeks to employ the beneficiary permanently in the United States as a stone mason helper. 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 petitioner failed to establish that the beneficiary has two years of work experience in the job offered. The director denied the petition accordingly.

On appeal, former counsel submitted additional evidence and maintained that the petition merits approval.

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.<sup>1</sup>

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

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* 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.

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<sup>1</sup> 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).

(B) *Skilled workers.* 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.

The regulation at 8 C.F.R. § 204.5(g)(2) further 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.<sup>2</sup>

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<sup>2</sup> USCIS reviews a petitioner's ability to pay a proffered wage through the examination of wages paid to a beneficiary by the petitioner, the petitioner's net income or the petitioner's net current assets for a given period. 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, or as appropriate, its net current assets, 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 (1<sup>st</sup> 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on December 30, 2005, which establishes the priority date.<sup>3</sup> The proffered wage as stated on the labor certification is \$17.52 per hour (\$36,441.60 per year). Part H of the ETA Form 9089 states that the position requires that the beneficiary possess

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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).

<sup>3</sup> 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, including a prospective U.S. employer's ability to pay the proffered wage is clear. In some cases, in determining the petitioner's ability to pay the proffered wage, USCIS may consider the overall circumstances of the petitioner's business activities where expectations of increasing business and profits overcome evidence of small profits. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

24 months (2 years) of employment experience in the job offered as a stone mason helper. On Part H. 10 of the ETA Form 9089, the employer indicates that it will not accept employment experience in an alternate occupation.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on January 16, 2007, it is claimed that the petitioner was established on January 1, 1991, has 20 workers, reports a gross annual income of \$32,290.75 and a net annual income of \$26,555.57. It also describes itself as a "stone mason firm," however the copies of tax returns submitted to the record describe the petitioner's business activities as "landscaping."

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 beneficiary's qualifications for the job offered and 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). Relevant to the ability to pay, 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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

At the outset, and as referenced in the AAO's Request for Evidence (RFE) issued on December 27, 2012, the counsel who submitted the Form I-140 and the accompanying ETA Form 9089 has admitted to committing immigration fraud.<sup>4</sup>

The petitioner's response to the AAO's RFE and the documentation in the underlying record indicates that the petitioner has established its ability to pay the proffered wage through either payment of wages to the beneficiary in the years 2006 through 2012 and through its ability in 2005 to cover the difference of \$4,150.85 between the proffered wage and the \$32,290.75 in actual wages paid to the beneficiary. For the reasons set forth below, however, the petitioner has not established that the beneficiary possessed the requisite work experience as of the priority date as required by the terms of the ETA Form 9089.

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<sup>4</sup>On January 3, 2013, he pleaded guilty. [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=\[REDACTED\]](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=[REDACTED]) (Accessed April 1, 2013). According to a Superseding Information issued by the U.S. attorney's office in the Southern District of New York (*United States v. [REDACTED]*) was charged in count one of the information with conspiracy to commit immigration fraud; in that from 2003 up to at least August 2008, [REDACTED] and co-conspirators submitted thousands of fraudulent petitions and applications to DOL and USCIS, violating provisions of Section 15465(a) and 1001 of Title 18, United States Code.

As stated above, the terms of the ETA Form 9089 require that the beneficiary has 2 years of work experience in the job offered as a stone mason helper. The petitioner initially submitted a letter, dated February 24, 2005, from [REDACTED], an architect in Ecuador, who stated that the beneficiary had worked as a stone mason helper from August 1, 1997 to March 30, 2000. The beneficiary's duties were described and were very similar to those described in Part K of the ETA Form 9089, where this job was listed. Whether the job was part-time or full-time was not stated. In the AAO's RFE, in view of the immigration fraud connected with prior counsel, the AAO requested corroboration of this experience confirming whether it was full-time or part-time employment. The AAO specifically requested corroboration such as would be kept by an official governmental source that would confirm the beneficiary's claimed full-time employment with [REDACTED]

Instead of receiving official payroll, tax, or other information from a governmental source such as the Instituto Ecuatoriano de Seguridad Social (IESS)<sup>5</sup> which receives employer contributions relating to workers, the petitioner submitted another letter from [REDACTED] his former secretary, and the beneficiary's brother. [REDACTED] second letter, dated February 18, 2013, stated that the beneficiary was a bricklayer from August 1997 until March 2000 and that he retained no records because old files were destroyed every ten years. It is noted that no duties were described in this letter and that the job title was as a bricklayer and not a stone mason helper as stated in the first letter, a similar but distinct occupation. A second letter from a former secretary of [REDACTED], submitted in response to the AAO's RFE, simply states that the beneficiary worked as a bricklayer from 1997 to 2000. A third letter from the beneficiary's brother and former beneficiary of the petitioner in another Form I-140, affirms the beneficiary's employment as a bricklayer for [REDACTED]. None of these letters are responsive to the AAO's request that some form of official documentation be submitted that corroborates the beneficiary's employment with [REDACTED]. The response received is not consistent with previous submissions and in view of the fraud-related concerns expressed on the previous page, cannot be considered probative of the beneficiary's claimed qualifying work experience. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The AAO concludes that the petitioner has failed to establish that the beneficiary possessed the required experience as of the priority date. 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 not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> See [http://www.\[REDACTED\]](http://www.[REDACTED]) (accessed March 29, 2013).