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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: **AUG 02 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen and a motion to reconsider the director's decision. The director granted the motions, reviewed the record of proceeding, and affirmed the prior decision. The petitioner filed an appeal with the Administrative Appeals Office (AAO), which was subsequently dismissed on May 8, 2013. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted; the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is an engineering consulting business. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer pursuant to section 203(b)(3)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(ii). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanied the petition. On August 30, 2011, the director determined that the beneficiary did not qualify for the third preference classification, as the beneficiary did not possess a bachelor's degree in mechanical engineering from a university accredited in the United States. The director affirmed his decision on December 16, 2011 in response to the petitioner's motion to reopen and motion to reconsider.

On appeal, the AAO affirmed the director's decision that the beneficiary's bachelor's level education from an unaccredited United States college cannot support classification as a professional. Beyond the decision of the director, the AAO also found that the petitioner has failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Accordingly, the AAO dismissed the petitioner's appeal. On June 10, 2013, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision.

On motion, counsel asserts that the beneficiary's degree is sufficient for the classification sought. Counsel submits additional evidence in support of the petitioner's claim. The record shows that the motion to reconsider is properly filed and timely. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy. However, as set forth below, following consideration, the petition remains denied and the AAO's decision of May 8, 2013 is affirmed. The remaining 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The labor certification requires a bachelor's degree in mechanical engineering. The labor certification does not permit an alternative field of study, an alternate combination of education and experience, or a foreign educational equivalent.

The beneficiary earned a four-year Bachelor of Science degree in mechanical engineering from [REDACTED], Florida in May 2005. The director found that the petitioner has not provided sufficient evidence that Pensacola Christian College is an accredited university or college, and that classification as a professional requires that the beneficiary's degree be issued by an accredited college or university. *See Matter of Yau*, 13 I&N Dec. 75, 77 (BIA 1968); *Philip Tang v. District Director of the U.S. Immigration and Naturalization Service (Tang v. INS)*, 298 F. Supp. 413 (D.C. Cal. 1969); *Tang v. INS*, 433 F.2d 1311 (9<sup>th</sup> Cir. 1970).

In its May 8, 2013 decision, the AAO concurred with the director and found that the value of the education that the beneficiary received was not in question, only the accreditation status of the beneficiary's college. The AAO determined that the beneficiary does not possess a U.S. Bachelor of Science degree in mechanical engineering from an accredited university, and therefore he does not qualify for preference visa classification as a professional under section 203(b)(3)(ii) of the Act.

On motion, counsel submits an academic equivalency evaluation from the Trustforte Corporation, dated January 30, 2012. The evaluator finds that the beneficiary has "attained the equivalent of a Bachelor of Science Degree, with a major in Mechanical Engineering and a minor in Mathematics, from an accredited institution of higher education in the United States." The evaluator states that [REDACTED] is an institution of higher education recognized by the Florida State Board of Education; bachelor's degrees awarded by the college are recognized as a basis for graduate admission by [REDACTED] both of which are accredited institutions of higher education in the United States; and the college has been validated and granted "candidate" status by the Transnational Association of Christian Colleges and Schools,<sup>1</sup> an accrediting body recognized by the United States Department of Education. However, these facts do not make the college accredited at the time the beneficiary's degree was awarded, as defined by U. S. Citizenship and Immigration Services (USCIS). The evaluator does not state that [REDACTED] is accredited. Nor does the evaluator submit evidence to support his statements in the evaluation. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, the labor certification does not permit the "equivalent" of a Bachelor of Science degree from an accredited institution of higher education.

The labor certification states that the position requires a bachelor's degree in mechanical engineering, no training, and no experience in the proffered position of mechanical engineer. As stated in the AAO's prior decision, the labor certification reflects that a bachelor's degree in

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<sup>1</sup> A search of the Transnational Association of Christian Colleges and School website lists [REDACTED] year of candidacy as 2011, and its year of accreditation is listed as "N/A." *See* [http://www.tracs.org/TRACS\\_Members\\_3.html](http://www.tracs.org/TRACS_Members_3.html) (accessed July 29, 2013). Accordingly, the website does not state that the college is accredited, or that it was accredited at the time the beneficiary's degree was awarded.

mechanical engineering is the minimum level of education required; no combination of education or experience is acceptable in the alternative; and a foreign educational equivalent is not acceptable.

As stated in its prior decision, the AAO concurs with the director who found that the value of the education that the beneficiary received was not in question, only the accreditation status of the beneficiary's college. Again, on motion, counsel contends that the beneficiary's degree is equivalent to a bachelor's degree from an accredited institution. However, the labor certification does not indicate an "equivalent" degree from an unaccredited institution is acceptable. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved later if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time based on new facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The evidence submitted on motion fails to establish that the beneficiary's Bachelor of Science degree was issued by an accredited institution. Because the beneficiary does not possess a U.S. Bachelor of Science degree in mechanical engineering from an accredited university, he does not qualify for preference visa classification as a professional under section 203(b)(3)(ii) of the Act.

The beneficiary does not possess the bachelor's degree in mechanical engineering required for the job as specified on the labor certification. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act.

Even if the petitioner established that the beneficiary's college was accredited, the petition could not be approved because the AAO, in its prior decision, also determined that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In its prior decision, the AAO found that the petitioner failed to submit evidence demonstrating that it had the ability to pay the beneficiary the difference between wages paid and the proffered wage for 2010. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income, or net current assets.

On motion, counsel submits the petitioner's Form 1120S tax returns for 2009 through 2011 to show that the petitioner has the ability to pay the prevailing wage.<sup>2</sup> As noted in the director's and AAO's decisions, counsel mistakenly relies on the prevailing wage and not the proffered wage. In the instant case, the proffered wage is \$61,900.00, and the priority date is August 10, 2009.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine

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<sup>2</sup> It is noted that the petitioner was structured as an "Inc." in 2009 and as a LLC in 2010 and 2011; however, the petitioner's FEIN remained the same. Therefore, the petitioner appears to have undergone corporate restructuring.

whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>3</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record contains the beneficiary's Forms W-2, Wage and Tax Statement, issued by the petitioner for the years 2009 and 2010. The Forms W-2 demonstrate wages paid to the beneficiary as shown in the table below.

<u>Year</u>	<u>Proffered Wage</u>	<u>Form W-2</u>	<u>Amount needed to meet proffered wage</u>
2009	\$61,900	\$67,472.26	\$0
2010	\$61,900	\$58,035.62	\$3,864.38
2011	\$61,900	not provided	\$61,900

Therefore, the petitioner has established its ability to pay the beneficiary the proffered wage in 2009. However, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage in all other years based on wages paid.

The petitioner's Form 1120S tax returns demonstrate its net income for 2010 and 2011, as shown in the table below.

- In 2010, the Form 1120S stated net income<sup>4</sup> of \$17,290.
- In 2011, the Form 1120S stated net income of \$(58,138).

<sup>3</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>4</sup> 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 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 29, 2013) (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 2009 through 2011, the petitioner's net income is found on Schedule K of its tax returns.

Therefore, the petitioner did have sufficient net income to pay the difference between the wages paid and the proffered wage in 2010. However, the petitioner did not have sufficient net income to pay the proffered wage in 2011.

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.<sup>5</sup> 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 proffered wage using those net current assets. The petitioner's Form 1120S tax returns demonstrate its end-of-year net current assets for 2011 as \$(14,999). Therefore, for the year 2011, the petitioner did not have sufficient net current assets to pay the proffered wage.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.

Further, as noted in the AAO's prior decision, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income, or net current assets. The AAO acknowledges that the petitioner has conducted business since 1990; however, according to its tax returns, the petitioner has shown inconsistent growth in gross sales, net income, and net current assets from 2009 through 2011. The petitioner has failed to establish any unusual business losses or expenditures that otherwise explain its inadequate financial resources in 2011. Therefore, considering the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not demonstrated its continuing ability to pay the offered wage since the priority date. The AAO therefore affirms its previous decision.

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<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Accordingly, the AAO concludes that the evidence in the record and submitted on motion does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date onwards. In any future filings, the petitioner must provide evidence of its continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

Therefore, the AAO affirms its prior decision stating that the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act, and that the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The petition will remain denied for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden. Accordingly, the motions will be granted and the previous decision of the AAO will be affirmed.

**ORDER:** The motions are granted. The previous decision of the AAO, dated May 8, 2013, is affirmed. The petition remains denied.