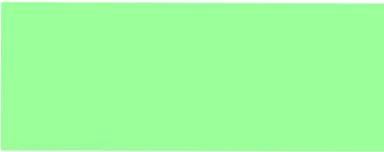




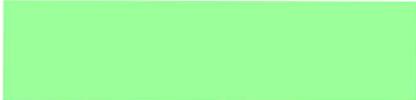
U.S. Citizenship
and Immigration
Services

(b)(6)



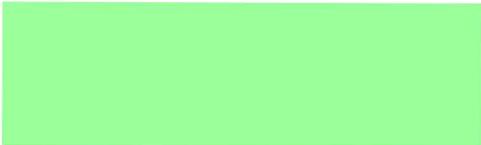
DATE: **AUG 22 2013**

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:

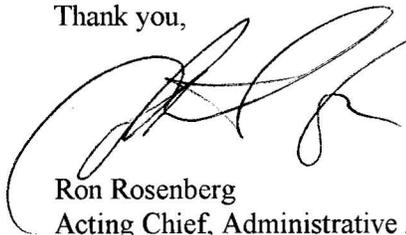


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,



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 produces dental prosthetics. It seeks to employ the beneficiary permanently in the United States as a dental porcelain acrylic laboratory technician. 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). However as noted in the AAO's Notice of Intent to Dismiss and Notice of Derogatory Information (NOID/NDI) issued on May 23, 2013, the labor certification was submitted with the Immigrant Petition for Alien Worker (Form I-140) without a preparer's signature. As such, the labor certification did not comply with the requirements of 20 C.F.R. § 656.17(a) and should have been rejected.

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 on January 29, 2009.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. 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.

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*, 299 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 at 145 (AAO's *de novo* authority is well-recognized.).

For the reasons set forth below, the AAO concurs with the director's decision and further notes that the petition was not eligible for approval because the labor certification submitted with the petition was not signed by the preparer as noted above and the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of employment experience in the job offered.

Beneficiary's Employment Experience

At the outset, the AAO notes that several inconsistencies and conflicts of information were set forth in the AAO's NOID/NDI. The AAO informed the petitioner that the attorney who had represented the petitioner and beneficiary in filing the Form I-140 and supporting documentation had denied any involvement with filing applications with the Department of Labor or the United States Citizenship and Immigration Services (USCIS). The AAO also cited discrepancies with the claims of work experience set forth in the record, and noted that a letter from an accountant submitted appeared to be fraudulent.

In response to the NOID/NDI, the beneficiary states that she personally met with the attorney who had submitted the documents and paid him \$13,000 in cash to secure a green card.¹

In determining whether a beneficiary is eligible for an employment based immigrant visa as set forth above, United States Citizenship and Immigration Services (USCIS) is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(i) of the Act. USCIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). 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 Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

Relevant to a beneficiary's qualifying work experience, 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

¹It is noted that the petitioner's owner who submitted a response to the NOID/NDI, claims that he never personally met the attorney who represented the petitioner and submitted the Form I-140. It appears that the beneficiary paid the expenses of this attorney's services who represented the petitioner and beneficiary. The regulation at 20 C.F.R. § 656.12(b) (2007) prohibits such a practice and states that the employer shall bear the costs. It provides that an alien "may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer."

description of the training received or the experience of the alien.

(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 petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. It must also demonstrate that it has had the continuing ability to pay the proffered wage. The filing date or priority date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on February 15, 2008, which establishes the priority date.²

As set forth on Part H of the ETA Form 9089, the only requirements for the offered job of dental porcelain and acrylic laboratory technician is two years of experience in the job offered. On Part K of the ETA Form 9089, signed under penalty of perjury by the beneficiary and the petitioner on June 9, 2008, the beneficiary lists two jobs. The first is the petitioner, which she states employed her beginning May 19, 2006 until February 15, 2008. The petitioner's owner explains that this was an error and that the beneficiary still works for him. The other prior job listed by the beneficiary identifies the employer as [REDACTED] in [REDACTED] where she claims that she worked for him as a dental lab technical specialist from April 1, 2002 to May 16, 2006. In response to the AAO's NOID/NDI citing the lack of documentation showing that [REDACTED] was a doctor, the beneficiary states that the name of this business was [REDACTED] and that the earnings were reported in [REDACTED]'s wife's name. It is noted that the petitioner has submitted no employment verification letter from the [REDACTED] firm in compliance with 8 C.F.R. § 204.5(1)(3).

As noted in the NOID/NDI, a letter from another employer was submitted to the record:

Third, the letter from [REDACTED] in [REDACTED] which has been submitted as verification of the required 24 months of experience in the job offered as set forth on the ETA Form 9089, represents employment that was completely omitted on the ETA Form 9089. 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

² 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.

fact, lies, will not suffice. 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. *Id.* Any evidence submitted in support of claims related to the beneficiary's qualifying employment must be corroborated by relevant, independent government records and evidence of wages paid.

In response to the NOID/NDI, the petitioner submits a copy of the letter discussed above, identical in language with an updated date. No other evidence of this employment has been submitted as requested in the NOID/NDI. Therefore, it will not be further considered. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.). It may not be concluded that the petitioner has established that the beneficiary acquired two full-time years of employment experience in the job offered as of the priority date of February 15, 2008.

Petitioner's Ability to Pay

The basis of the director's denial is that the petitioner failed to establish that it has had the continuing ability to pay the proffered wage. As set forth on the ETA Form 9089, the proffered wage is \$19.77 per hour, which amounts to \$41,121.60 per year.

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 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, 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 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. If the petitioner can establish that its net income or net current assets can cover any difference between the actual wages paid and the proffered wage during a given period, then a petitioner may be deemed to have established its ability to pay the full proffered wage for that period. The record indicates that the petitioner paid the beneficiary the following compensation:

Year	Compensation	Difference from Proffered Wage of \$41,121.60
2008	\$36,600	\$4,521.60 Less
2009	\$36,572	\$4,549.60 Less
2010	\$21,716	\$19,405.60 Less
2011	\$31,977	\$9,144.60 Less
2012	\$33,660	\$7,461.60 Less

Based on the above, the petitioner has not established that it paid the full proffered wage to the beneficiary during the years 2008, 2009, 2010, 2011 and 2012.

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 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).

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).

In this case, despite requested by the director to submit federal tax returns, audited financial statements or annual reports, the petitioner has not submitted such information in compliance with 8 C.F.R. § 204.5(g)(2).

It is noted that the petitioner submitted copies of its 2008 bank statements. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise could not have been provided, such as an audited financial statement.

It is also noted that the petitioner’s owner disclaims any knowledge of an accountant’s letter with the name of [REDACTED] as submitted to the underlying record. The AAO considers this letter to be fraudulent as indicated in the NOID/NDI.

(b)(6)

Because the petitioner submitted no federal tax returns or audited financial statements from which net income or net current assets³ could be reviewed from the priority date onward, the petitioner has not established the ability to pay the full proffered wage of \$41,121.60 to the beneficiary.

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 full 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, or the petitioner's reputation within its industry.

In the instant case, as noted above, the petitioner has not established that it has paid the full proffered wage to the beneficiary. Further, as well as other dubious documentation contained in the record, the petitioner has never submitted any federal income tax returns or audited financial statements. Thus, assessing the overall 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 from the priority date onward.

³ If the net income the petitioner demonstrates it had available during that period cannot cover any difference between the wages paid to the beneficiary and the full proffered wage, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 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.

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.