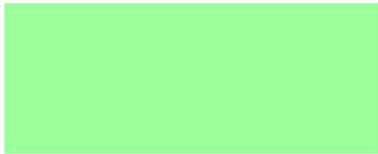
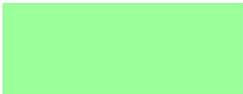


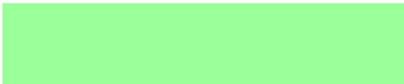
(b)(6)



U.S. Citizenship
and Immigration
Services



DATE: OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: **JAN 14 2013**
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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering company. It seeks to employ the beneficiary permanently in the United States as a delivery supervisor pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).¹ 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 denied the petition, finding that the petitioner had failed to establish that the beneficiary had the necessary qualifications for the position as of the priority date.

On appeal, counsel contends that the petitioner has submitted overwhelming evidence to demonstrate that the beneficiary had the minimum qualifications to qualify for the proffered position as of the priority date.

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.²

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 November 15, 2010 denial, the chief issue in this case is whether or not the petitioner has met the burden of proving by a preponderance of the evidence that the beneficiary has the requisite work experience in the job offered as of the priority date.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

¹ Section 203(b)(3)(A)(i) of 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.

² 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).

Here, the ETA Form 9089 was filed and accepted for processing by the DOL on August 22, 2005. The name of the job title or the position for which the petitioner seeks to hire is "Delivery Supervisor." Under the job duties at part H.11 of the ETA Form 9089, the petitioner wrote:

Assist in supervision of workers preparing and packaging material for delivery.
Confer with owner on compliance. Assist in assigning orders for special processing. Review time sheets.

Under part H.6 of the ETA Form 9089 the petitioner specifically required each applicant for this position to have a minimum of 24 months (two years) of work experience in the job offered. Under part K, Alien Work Experience, the petitioner claimed that the beneficiary worked as a supervisor at [REDACTED] in Brazil from January 11, 1992 to March 18, 1996. The job details at that business were listed by the beneficiary as follows:

I was responsible for overseeing the staff, hiring and firing, training new workers, overseeing inventory, payroll, purchasing.

Submitted along with the Form I-140 and the certified ETA Form 9089 was a letter of employment verification dated February 23, 2001 from [REDACTED] co-manager, stating that the beneficiary worked at our company [REDACTED] from November 11, 1992 to March 18, 1996.

The AAO notes that the letter was written in Portuguese. The record contains two translations. The first translation, dated March 22, 2001, says that the beneficiary worked as "a manager in an auto parts." The second translation, dated November 11, 2005, says that the beneficiary worked as "a supervisor at the sales department."

In response to the director's Notice of Intent to Revoke (NOIR) dated September 22, 2010, the petitioner submitted the following evidence to show that the beneficiary had the requisite work experience in the job offered:

- A statement dated October 20, 2010 from the beneficiary stating that he worked for a company that did repair cars, trucks, trailer trucks, and busses and sold auto parts in Brazil; and that his job duties as a supervisor or manager included setting up delivery schedules, monitoring employees, and sometimes delivering the auto parts himself to customers.

The AAO notes that the record contains information from a conversation that United States Citizenship and Immigration Services (USCIS) officer had telephonically with the beneficiary on May 21, 2010. The beneficiary was asked about his employment prior to his arrival in the United States in 1999. He was unable to name his employers but claimed that he had worked as a delivery driver, a bus driver, and a trailer truck driver. In addition, the record reflects that the beneficiary informed U.S. Customs and Border Protection officers upon entering the United States on or about February 11, 1999 that he was a drywall installer and that he was going to stay in the United States for only ten months.

The record also shows that a USCIS officer contacted and spoke telephonically with the President of the petitioner, [REDACTED] on May 18, 2010. [REDACTED] stated that the beneficiary did have some driving experience from his country, but that he did not have much experience [in the job offered] at the time he was hired, that he was brought in at an entry low level position, and that he had worked his way up to the supervisor position.

On appeal, [REDACTED] submitted a letter dated October 19, 2010 indicating that the beneficiary was initially hired because of his "extensive previous experience as a driver" in Brazil. However, this letter further calls into question whether the beneficiary possessed the minimum experience for the proffered position. [REDACTED] letter indicates that the beneficiary had extensive driving experience in Brazil, not that he had prior supervisory or managerial experience. Moreover, this letter is consistent with [REDACTED] previous statement to the USCIS officer in May 2010 that the beneficiary was hired at an entry level position, and that the beneficiary worked his way up to become a supervisor.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record in this case contains no independent objective evidence to establish that the beneficiary possessed the minimum qualifications as of the priority date.

Beyond the decision of the director, we also find that the petitioner has not established by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains his lawful permanent residence. 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).

In pertinent part, the regulation at 8 C.F.R. § 204.5(g)(2) provides:

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.

As stated earlier, the priority date or the date when the ETA Form 9089 labor certification was filed and accepted for processing by DOL is August 22, 2005. The rate of pay or the proffered wage specified on the ETA Form 9089 is \$16.95 per hour or \$35,256 per year based on a 40 hour work week.³

The record contains copies of Internal Revenue Service (IRS) Forms W-2 issued by the petitioner to the beneficiary for 2004 through 2009, showing that the petitioner paid the beneficiary the following amounts:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2005	\$36,912.09	\$35,256.00	Exceeds the PW
2006	\$37,942.84	\$35,256.00	Exceeds the PW
2007	\$37,372.51	\$35,256.00	Exceeds the PW
2008	\$36,258.99	\$35,256.00	Exceeds the PW
2009	\$30,889.56	\$35,256.00	(\$4,366.44)

Based on the evidence submitted above, the petitioner has established the ability to pay the proffered wage from 2005 through 2008, but not in 2009 and continuing until the beneficiary obtains lawful permanent residence. The record does not contain any other evidence of the petitioner's ability to pay (i.e. federal tax returns, annual reports, and/or audited financial statements) for 2009 onwards.

Finally, 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. 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

³ We assume that the beneficiary would work 40 hours per week. In his decision, the director assumed that the beneficiary worked 35 hours per week.

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.

Unlike *Sonegawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives his lawful permanent residence.

The petition will be denied for the reasons stated above, with each considered as an independent and alternative basis for the decision. 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.