

(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: **MAY 08 2013** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

[REDACTED]

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,

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

Ron Rosenberg,  
Acting Chief, Administrative Appeals Office

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

The petitioner is a telecommunications engineering and consulting firm. It seeks to employ the beneficiary permanently in the United States as a network engineer. 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 denial, the 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 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. Section 203(b)(3)(A)(ii) of 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 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.

....

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration. To show that the alien is a member

of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

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 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 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on October 12, 2005. The proffered wage as stated on the ETA Form 9089 is \$76,200 per year. The ETA Form 9089 states that the position requires a bachelor's degree in engineering or computer science plus three years experience in the proffered position. The ETA Form 9089 further states in section H-14 that the sponsored worker's experience must "involve RF engineering and operations and maintenance (O&M)."

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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$2,863,705, and to currently employ 23 workers. According to the tax returns in the record, the petitioner's fiscal year runs on a calendar year. On the ETA Form 9089, signed by the beneficiary on April 24, 2006, the beneficiary claimed to have worked for the petitioner from February 1, 2003 until the signature date.

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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).

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. Comm. 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onward. The petitioner did, however, pay the beneficiary wages during relevant periods as follows:

- 2005 - \$60,020.00 (per original W-2 submitted by the petitioner, which was amended to show wages paid of \$66,520)<sup>2</sup>
- 2006 - \$40,300 (per amended W-2 submitted by the petitioner showing \$40,300 as having been the wages originally reported, amended to show \$76,200 paid)
- 2007 - \$39,938.00 (per amended W-2 submitted by the petitioner showing \$39,938 as having been the wages originally reported, amended to show \$76,200 paid)
- 2008 - \$77,400.00 (per original W-2 submitted by the petitioner)
- 2009 - \$60,558.40 (per original W-2 submitted by the petitioner)
- 2010 - \$73,545.00 (per original W-2 submitted by the petitioner)

The documentation submitted shows that the petitioner paid the beneficiary the full proffered wage in 2008. The ability to pay the proffered wage has been established for that year based upon the W-2 Form provided by the petitioner. The petitioner did not pay the full proffered wage in 2005, 2006,

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<sup>2</sup> The petitioner initially submitted W-2 forms for 2005 and 2006 showing the income noted above. The petitioner subsequently asserts that it amended W-2 forms for 2005 and 2007 on appeal increasing the income it says it paid the beneficiary. Those amendments are discussed in the body of this decision. The amended W-2 form submitted for 2007 shows that it had previously reported paying the beneficiary \$39,938.00. The 2008 W-2 form submitted is the original W-2 form prepared for that work year.

2007, or 2009. Thus, it will be necessary for the petitioner to establish that it had the ability to pay the difference between the wages actually paid and the proffered wage in those years. As discussed below, the petitioner must establish the ability to pay the difference between wages paid to the beneficiary after the priority date and the proffered wage prorated for the remainder of 2005. Those figures are as follows:

- 2005 - \$377.40.
- 2006 - \$35,870.00
- 2007 - \$36,232.00
- 2009 - \$15,641.60
- 2010 - \$2,655.00

The petitioner submitted, on appeal, what it asserts to be amended tax filings and amended W-2 forms for 2005 and 2007. With those forms, the wages paid to the beneficiary increased to \$66,520.00 in 2005, and \$76,200.00 in 2007. The petitioner's previous counsel asserts that the beneficiary was paid the full proffered wage beginning in October of 2005 (the priority date is October 12, 2005), indicating that the wage should be prorated for the year. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. USCIS will, however, prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs. In this instance, the petitioner submitted copies of the beneficiary's pay stubs for 2005 covering the pay periods after the priority date. Those paystubs indicate that the beneficiary was not paid the full proffered wage. There were 80 workdays remaining in the year after the October 12 priority date. Eighty days is 22 per cent of one year (365 days). Thus, prorating the proffered wage from the priority date until the end of 2005 would yield a wage of \$16,757.40 ( $\$76,170$  (proffered wage)  $\times$  .22 = \$16,757.40). According to the pay stubs submitted, the beneficiary was only paid \$16,380 from the priority date through the end of 2005, a sum which is less than the proffered wage.

Counsel states that the beneficiary was paid in excess of \$800.00 per week as "other compensation per diem" which was not treated as income for the beneficiary for tax purposes. Counsel stated that this compensation (which is noted on the beneficiary's pay stubs) should have been treated as income. As such, the petitioner states that it filed amendments to its tax returns increasing the beneficiary's wages and issued amended W-2 forms showing the increased wages. The amendments, however, will not be considered. In a February 15, 2007 request for evidence, the petitioner was asked to submit evidence of its ability to pay the proffered wage. The director specifically requested copies of the petitioner's tax returns and the beneficiary's W-2 forms for each year the beneficiary was employed. Only after the petitioner received the director's decision denying the petition for failure to establish the ability to pay the proffered wage did the petitioner seek to amend the beneficiary's W-2 Statements increasing the beneficiary's wage. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

It should further be noted that Section 1.62-2(c)(1) of the Income Tax Regulations provides that a reimbursement or other expense allowance arrangement satisfies the requirements of 62(c) if it meets the requirements of business connection, substantiation, and returning amounts in excess of substantiated expenses. If an arrangement meets these requirements, all amounts paid under the arrangement are treated as paid under an accountable plan. *See* § 1.62-2(c)(2). Amounts treated as paid under an accountable plan are excluded from the employee's gross income, are not reported as wages or other compensation on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes. *See* § 1.62-2(c)(4). Conversely, if the arrangement fails any one of these requirements, amounts paid under the arrangement are treated as paid under a nonaccountable plan and are included in the employee's gross income, must be reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes. *See* § 1.62-2(c)(3) and (5). *See* <http://www.irs.gov/pub/irs-irbs/irb06-46.pdf>. The petitioner provided no basis, on appeal, or with the 2006 W-2 amendment before the director, for adding what had been previously designated as per diem to the beneficiary and not taxable except to say that a mistake had been made. The addition of the funds to the beneficiary's income as wages paid is material to the claim as it has a direct bearing on whether the petitioner would or would not be able to establish the ability to pay the proffered wage. The W-2 Forms are inconsistent and the petitioner has failed to adequately explain the inconsistency. 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. 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 fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO issued a Notice of Intent to Deny (NOID) asking that the petitioner submit evidence relative to its per diem allowances, and per diem paid to other employees, ability to pay, wages paid to other sponsored workers and evidence of the beneficiary's transcripts supporting his engineering degree with copies of the petitioner's job advertisements for the position and recruitment report prepared for DOL in connection with filing the labor certification.

In response to the NOID, the petitioner submitted the following exhibits:

- Exhibit B - Support letter from the employer
- Exhibit C - The petitioner's "amended" tax returns for 2005, 2006 and 2007
- Exhibit D - The petitioner's tax returns for 2008, 2009 and 2010
- Exhibit E - The beneficiary's W-2 Forms for 2009 and 2010
- Exhibit F - Copies of sample contracts for the petitioner
- Exhibit G - IRS Guidance on Per Diem Reimbursement
- Exhibit H - The beneficiary's translated college transcripts
- Exhibit I - The beneficiary's resume
- Exhibit J - Copies of print-outs for similar positions requiring an engineering degree
- Exhibit K - PERM newspaper advertisements

Although the petitioner asserts that it submitted amended tax returns with its response to the AAO's NOID, the tax returns submitted are not designated "1120X" to reflect amendment. The tax returns submitted do not designate any changes to the wages paid (on page 1, line 13), or costs of labor paid (page 3, line 3) to reflect additional wage characterizations to the beneficiary and any resultant changes to net income, if any. As the petitioner asserts that the W-2 Forms were changed to reflect additional wages and compensation, it is unclear from the tax returns submitted where these changes were reported. The only apparent difference between the returns submitted in response to the AAO's NOID, and the tax returns previously submitted is the date and address in the preparer's box. Therefore, the AAO is unable to conclude that the amended returns and any claimed adjustments to wages have been filed. The petitioner must address this in any further filings. Additionally, the petitioner did not submit any evidence to demonstrate that any other workers wages were changed based on mistakes in per diem wage reporting. In response to the AAO's RFE, the petitioner states it was, "the former practice [of the petitioner] . . . to compensate our employees a regular salary plus per diem expenses for those expenses incurred from their travel. We did not require our employees to account for their expenses. Rather, our employees were paid a standard rate . . ." The petitioner continues, "the law regarding accountable reimbursements changed, . . . Today, we include per diem expenses on our employees W-2 Forms as wages."<sup>4</sup> The petitioner concedes that, "The W-2s for other workers were not adjusted because the IRS decision that required us to change our accounting methods did not apply retroactively." From the petitioner's explanation, the change in the beneficiary's per diem reporting appears to be not based on any mistake, but rather an attempt to recharacterize payments to make a deficient petition conform with USCIS regulations. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In Exhibit B, a letter from [REDACTED] dated August 30, 2011, the petitioner's President/CEO, Mr. [REDACTED] explains the petitioner's per diem policy at the time of the priority date (October 12, 2005) stating that it paid employees per diem and did not require the employee to specifically account for expenses paid under the per diem given employees. The per diem paid was listed as "other compensation per diem" on employee's pay stubs. Mr. [REDACTED] states that while the petition was pending, the law regarding accountable reimbursements changed and in order to comply with the law the petitioner changed its accounting and reporting practices. According to Mr. [REDACTED] the petitioner now includes per diem expenses on employees' W-2 Forms as wages and the beneficiary's 2008, 2009 and 2010 pay reflect this change. The petitioner asserts amended the beneficiary's 2005, 2006 and 2007 W-2 Forms accordingly.

By way of explanation, the petitioner submitted a copy of IRS guidance on per diem expense reimbursement paid by employers (IR-2006-175 November 9, 2006). That document indicates that "Revenue Ruling 2006-56 tells employers that if they routinely pay per diem allowances in excess of

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<sup>4</sup> Despite the petitioner's assertion, the petitioner's 2007, 2008, 2009, and 2010 Forms 1120, Schedules A, line 5 still report per diem expenses separately. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

the federal per diem rates, but do not track the allowances and do not require the employees either to actually substantiate all the expenses or pay back the excess amounts, and do not include the excess amounts in the employee's income and wages, then the entire amount of the expense allowances is subject to income tax and employment tax." It is further noted, however, that while IRS Revenue Ruling 206-56 was effective immediately upon issuance, given the fact that employers need time to adjust, IRS agents were instructed not to apply the results of the revenue ruling to taxable periods ending on or before December 21, 2006 in the absence of intentional noncompliance. The AAO asked the petitioner if the W-2 Forms of other workers similarly situated were adjusted in addition to those of the beneficiary. The petitioner responded that the wages of other workers were not similarly adjusted because the IRS ruling did not apply retroactively. Thus, it may only be concluded that the petitioner adjusted the wages of the beneficiary after the director's decision denying the petition in order to increase the wages of the beneficiary to make the present petition approvable. The IRS Revenue Ruling 206-56 was issued on November 9, 2006, prior to the director's February 15, 2007 request for evidence asking the petitioner to provide copies of tax returns and W-2 Forms in support of its ability to pay the proffered wage, yet the petitioner chose not to amend all of its employees W-2 Forms and its tax returns noting that the IRS ruling was not retroactive. Such adjustments to the beneficiary's W-2 statements will not be accepted. Additionally, as the IRS guidance was issued at the end of 2006, it is unclear why the petitioner needed to amend the beneficiary's 2007 W-2 Form as the changed per diem guidance would have been available at the time of the initial 2007 W-2 issuance. As previously stated, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Thus, the petitioner's amended tax returns and W-2 Forms will not be considered. However, even if the AAO considered all of the W-2 Forms as amended, the petitioner still has not established its continuing ability to pay the proffered wage from the priority date onward as set forth below.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner’s tax returns demonstrate its net income for 2005 through 2010 as shown in the table below.

- In 2005, the Form 1120 stated net income of (\$126,465).
- In 2006, the Form 1120 stated net income of \$64,275.
- In 2007, the Form 1120 stated net income of (\$156,298).
- In 2008, the Form 1120 stated net income of (\$238,114).<sup>5</sup>
- In 2009, the Form 1120 stated net income of (\$149,893).
- In 2010, the Form 1120 stated net income of \$116,894.

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<sup>5</sup> The beneficiary’s 2008 W-2 statement alone shows sufficient wages to pay the beneficiary’s proffered wage in that year.

Therefore, for the years 2005, 2007, and 2009, the petitioner's tax returns do not show sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage. The petitioner's tax returns in 2006 and 2010 would show sufficient net income to pay the difference between wages paid to the beneficiary and the full proffered wage. However, it must be noted that the AAO asked the petitioner to supply information concerning wages and petitions filed for other sponsored workers noting that the petitioner must not only establish the ability of the petitioner to pay the proffered wage of the present beneficiary, but the wages of its other sponsored workers as well. USCIS records show that the petitioner has filed at least one other Form I-140 petition in 2006 and a number of I-129 petitions,<sup>6</sup> and the petitioner must establish that it can pay all of its sponsored workers. The petitioner did not respond to this request and it is not possible to determine from the record as it now exists whether the petitioner had the ability to pay the wages of other sponsored workers in these years in addition to the beneficiary. 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). As noted above, however, since the record does not establish the petitioner's ability to pay the wages of the present beneficiary in 2005, 2007, and 2009, it would not have had sufficient net income or net current assets to pay the wages of additional workers either.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2005, 2006, 2007, 2008, 2009, and 2010 as shown in the table below.

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<sup>6</sup> The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

<sup>7</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.

- In 2005, the Form 1120 stated net current assets of (\$362,554).
- In 2006, the Form 1120 stated net current assets of (\$52,046).
- In 2007, the Form 1120 stated net current assets of (\$131,131).
- In 2008, the Form 1120 stated net current assets of (\$225,232).
- In 2009, the Form 1120 stated net current assets of (\$261,278).
- In 2010, the Form 1120 stated net current assets of (\$365,252).

Therefore, for the years 2005, 2006, 2007, 2008, 2009 and 2010 the petitioner's tax returns do not state sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage. Again, as noted above, the petitioner's tax return would state sufficient net income in 2006 and 2010 to pay the difference between wages paid to the beneficiary and the proffered wage, however, as noted above, the petitioner has sponsored additional workers and has failed to respond to this inquiry. Therefore, the AAO cannot determine whether the petitioner can establish its ability to pay all of the respective proffered wages in 2006 or 2010 based on the petitioner's net income, or net current assets, and wages paid.

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.

The petitioner obtained new counsel who submitted an additional brief on appeal.<sup>8</sup> Counsel states that considering the totality of the circumstances, the petitioner has established its ability to pay the proffered wage from the priority date onward. Specifically, counsel notes that the amended tax filings (not clearly submitted) and W-2 forms establish the ability to pay the proffered wage. Counsel also states that the petitioner has been in business since 1985, it employed 23 employees in 2006, it paid employees \$1,399,863 in 2006 and \$519,681 in 2007, and that it performs services for major corporations. Counsel also states that the petitioner has a reasonable expectation of business growth and asserts that it continues to have gross revenues of over \$2,000,000.<sup>9</sup>

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<sup>8</sup> The appeal was filed by counsel separate than counsel that filed the Form I-140 petition. Additionally, the petitioner obtained, and a third law firm responded to the AAO's NOID.

<sup>9</sup> Counsel listed the following corporate clients for the beneficiary: AT&T, Sprint, T-Mobile, the Ugandan government, and unnamed school districts, banks and European companies. Counsel did not, however, provide contracts or other corroborating documentation establishing that these business relationships actually exist. Further, counsel has presented no documentation to establish an expectation of business growth. While counsel states that the petitioner continues to have annual gross revenues exceeding \$2,000,000, the last tax return in the record shows a substantial drop in gross receipts in 2010 to almost only 25% of that revenue to \$590,493.00 and no salaries paid, with only costs of labor in the amount of \$188,587. 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)).

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 had negative net income in 2005, 2007, 2008, 2009 and 2010, and negative net current assets in 2005, 2006, 2007, 2008, 2009, and 2010. It had minimal net income of \$64,275 in 2006. The tax returns of the petitioner show a substantial decrease in gross revenues from 2005 to about one-fourth of that total in 2010. There is nothing in the record to establish that the petitioner's reputation in the industry is such that it is more likely than not that it has maintained the continuing ability to pay the proffered wage from the priority date onward. The salaries stated on the petitioner's tax returns substantially decreased from 2005 to 2010. The petitioner was asked to address its other sponsored workers, but failed to do so. Therefore, the AAO cannot determine the petitioner's total wage burden or determine whether the petitioner can pay both the beneficiary and the petitioner's other sponsored worker in 2006 or 2010, where the petitioner had positive net income, or in any other year relevant.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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 Restaurant*, 19 I&N Dec. 401, 406 (Comm. 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in engineering or computer science plus three years of experience in the proffered position. The ETA Form 9089 further states in section H-14 that the sponsored worker's experience must "involve RF engineering and operations and maintenance (O&M)." On the labor certification, the beneficiary claims to qualify for the offered position based on a bachelor's degree in engineering from [REDACTED] completed in 1992. The record contains a copy of the beneficiary's Civil Engineering degree and transcripts from [REDACTED] issued in 1992.

While the AAO accepts that the beneficiary's education is equal to a bachelor's degree, the issue is whether the stated and certified fields of study, engineering and computer science, would encompass "any field" of engineering, as the beneficiary's field of study, civil engineering, does not appear to directly relate to the job duties of the position offered. The petitioner submitted translated transcripts of the courses taken by the beneficiary in obtaining his civil engineering degree. A review of the courses does not show that the courses (mainly civil engineering) are related to the position of network engineer.<sup>10</sup> The petitioner was asked to provide a copy of the signed recruitment report required by 20 C.F.R. § 656.17(g)(1), along with all online, print and additional recruitment for the position to establish that the petitioner would accept a bachelor's degree in any field of engineering for the position. The petitioner stated that it had not retained the recruitment report as it was not required to do so after a period of five years. The petitioner did submit, however, copies of newspaper advertisements from 2005 for the proffered position. The brief ad merely stated, "BS CS/BS engineering req'd & 3 yrs RF & O&M." The petitioner has not, however, demonstrated that engineering degrees in any field of engineering (civil engineering) would be acceptable for the position or that those requirements (allowance of any engineering field) were clearly stated to any potential U.S. workers in the labor market test. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

It should also be noted that the petitioner submitted several contracts for work with third parties. One contract states that the third party, "may request that Subcontractor [the petitioner] provide services . . . at various sites and locations within the continental United States." A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the labor certification. 20 C.F.R. § 656.30(C)(2). The labor certification in this matter does not state that the employee will perform work at any other location than the [REDACTED] Texas address listed in part H.1. The petitioner must address this issue in any further filings.

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

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<sup>10</sup> The beneficiary's transcripts reflect courses in topography, strength of materials, reinforced concrete, project drawing, fluid mechanics, hydraulics, soil mechanics, aqueducts and sewers, civil constructions, foundations and walls, among other courses.

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 (9<sup>th</sup> 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).

Accordingly, 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.

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**ORDER:** The appeal is dismissed.