



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **NOV 18 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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

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  
Chief, Administrative Appeals Office

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

The petitioner describes itself as a lube oil storage facility. It seeks to permanently employ the beneficiary in the United States as president of operations. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 21, 2012. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

### **Beneficiary Qualifications**

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications.

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

<sup>2</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 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).

*Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: None.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Not Accepted.
- H.10. Experience in an alternate occupation: 60 months of experience as an operations manager.
- H.14. Specific skills or other requirements: Knowledge & management of lube oils. Training in mechanical engineering for flow pumps; weight scales and pipeline comprehension; floor plan engineering; mineral base oil residue handling; heavy load transport; tank trucks; dry vans and mechanical and strategic logistics of loading trips. Training in mineral base oils, exploitation and product types.

The labor certification states that the beneficiary qualifies for the proffered position based on experience as a special projects manager with [REDACTED], Mexico D.F., Mexico, from March 16, 1962 to January 31, 2003. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The record contains a March 21, 2012 experience letter from [REDACTED] CEO, on [REDACTED] letterhead stating that the company employed the beneficiary on a full-time basis from March 16, 1962 until October 31, 2003 in various positions. Mr. [REDACTED] goes on to state that the beneficiary was employed as a special projects manager for “the last few years.” While the letter provides a detailed description of the beneficiary’s job duties as a

special projects manager, which are identical to those set forth for the proffered position, the letter does not specify the beneficiary's dates of employment in this position. Without specification of dates we are unable to find that it is more likely than not that the beneficiary has at least 5 years (60 months) of experience in the proffered position.

On appeal, counsel contends that the petitioner was not given an opportunity to submit further evidence regarding the deficiencies in the experience letter.<sup>3</sup> On appeal the petitioner has been given an opportunity to overcome the deficiencies in the experience letter. However, counsel only provides a copy of the previously submitted experience letter and fails to provide any new evidence regarding the beneficiary's experience and special skills.

On appeal, counsel contends that the same letter established that the beneficiary possesses the required specific skills as set forth in section H.14 of the labor certification. While the letter states that the beneficiary has knowledge and management of lube oils, it does not states that the beneficiary possesses the rest of the specific skills listed, including training in mechanical engineering for flow pumps; weight scales and pipeline comprehension; floor plan engineering; mineral base oil residue handling; heavy load transport; tank trucks; dry vans and mechanical and strategic logistics of loading trips; mineral base oils, exploitation and product types. There is no other evidence in the record to establish that the beneficiary has all of the specific skills stated in section H.14.

We affirm the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

### **Ability to Pay**

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'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

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<sup>3</sup> Counsel contends that the director simply stated a need for the same letter previously filed. However, the director's April 24, 2014 request for evidence (RFE) requested evidence regarding the beneficiary's experience as there was none in the record.

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'l Comm'r 1967).

The proffered wage as stated on the ETA Form 9089 is \$113,256.00 per year. 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 [REDACTED] to have a gross annual income of \$1,835,769.00, and to currently employ 14 workers.

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 beneficiary's paystubs indicate that the petitioner paid the beneficiary \$4,500.00 in 2012 and \$10,000.00 in 2013. The record contains paystubs for December 23, 2013; January 15, 2014; and February 17, 2014 reflecting payments of \$4,500.00 (no withholding), \$5,000.00 (\$500.00 withholding) and \$5,000.00 (\$500.00 withholding) to the beneficiary. The paystubs do not indicate from whom these payments were made. Each paystub is accompanied by a statement from the beneficiary on the petitioner's letterhead confirming that he had received the corresponding amount from the petitioner as salary for the month. We find that these statements are not sufficient to establish payment of a monthly wage of \$5,000.00. In any future filings the petitioner should provide Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, IRS Form 1099-Miscellaneous, Miscellaneous Income or IRS Form 1042S, Foreign Person's U.S. Source Income Subject to Withholding establishing that the petitioner paid the beneficiary the claimed salary in 2012 and 2013.

Even if we accept that the petitioner paid the beneficiary these amounts in 2012 and 2013, the petitioner must establish that it has the ability to pay the difference between the actual wages paid and the proffered wage, which is \$108,756.00 in 2012 and \$103,256.00 in 2013.

On appeal, counsel contends that the director failed to include the beneficiary's 2013 \$65,000.00 base salary. Counsel contends the salary is established through the beneficiary's IRS Form 1040-NR, U.S. Nonresident Alien Income Tax Return. However, the record does not include Forms W-2, 1099-Miscellaneous or 1042S, establishing the amounts paid to the beneficiary by the petitioner outside the amounts listed on the above-referenced paystubs.

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. The courts have 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). Similarly, the courts have agreed that adding depreciation back into net income does not reflect an employer's ability to pay the proffered wage. See *River Street Donuts*, 558 F.3d at 118 and *Chi-Feng Chang*, 719 F. Supp. at 537.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup>

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. 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. The petitioner's tax returns demonstrate its net income and net current assets as:

<b>Tax Year</b>	<b>Net Income</b>	<b>Calculation of Net Current Assets</b>	<b>Paystub Wage</b>	<b>Balance Due to Beneficiary</b>
2012	\$68,178.00	\$130,650.00	\$4,500.00	\$108,756.00
2013	\$95,909.00	-\$21,904.00	\$10,000.00	\$103,256.00

Therefore, for the years 2012 and 2013, the petitioner did not have sufficient net income or net current assets to pay the difference between the actual wages paid and the proffered wage.

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.

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

<sup>4</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.

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's tax returns indicate that, in each year since 2011, it has paid officer compensation and payroll exceeding its gross receipts by more than \$200,000.00. The petitioner's 2011 through 2013 tax returns reflect no significant increase in gross receipts or net income, and negative net current assets in two of the three years. In addition, there is no evidence in the record of the historical growth of the business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the business' reputation within its industry. The petitioner's tax returns reflect low net income in 2012 and negative net current assets in 2013. Nothing in the record demonstrates that the tax returns paint an inaccurate financial picture of the petitioner. Thus, assessing the totality of the 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.

### ***Bona Fide Job Offer***

There is evidence of a lack of a *bona fide* job offer in the instant case. The record contains a Common Stock Share Certificate indicating that the beneficiary was issued 5,000,000 shares (1% of the petitioner's stock) on January 2, 2009. The corporation is closely held between the beneficiary and four members of the Flores family. While the beneficiary has a small percentage of ownership interest in the petitioner, he is the only employee of the petitioner to have such an interest and is among only five individuals who have any interest in the petitioner. The petitioner failed to note this relationship at C.9 of the ETA Form 9089. The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See*

*Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Beyond the beneficiary's ownership interest in the petitioner, the beneficiary currently holds the proffered position of president of operations, a position which exerts control over the day-to-day operations of the petitioner.

The PERM regulation specifically addresses this issue at 20 C.F.R. § 656.17(l) that states in pertinent part:

(l) Alien influence and control over job opportunity. If the employer is a closely held corporation or partnership in which the alien has an ownership interest, or if there is a familial relationship between the stockholders, corporate officers, incorporators, or partners, and the alien, or if the alien is one of a small number of employees, the employer in the event of an audit must be able to demonstrate the existence of a bona fide job opportunity, i.e., the job is available to all U.S. workers, and must provide to the Certifying Officer, the following supporting documentation:

(1) A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity;

(2) A list of all corporate/company officers and shareholders/partners of the corporation/firm/business, their titles and positions in the business' structure, and a description of the relationships to each other and to the alien beneficiary;

(3) The financial history of the corporation/company/partnership, including the total investment in the business entity and the amount of investment of each officer, incorporator/partner and the alien beneficiary; and

(4) The name of the business' official with primary responsibility for interviewing and hiring applicants for positions within the organization and the name(s) of the business' official(s) having control or influence over hiring decisions involving the position for which labor certification is sought.

(5) If the alien is one of 10 or fewer employees, the employer must document any family relationship between the employees and the alien.

As the petitioner failed to check the appropriate box on the ETA Form 9089, the DOL was not given an opportunity to audit and assess the nature of the financial relationship and the extent of the alien's influence and control over the job opportunity. While not a basis for this decision, in any future filings, the petitioner must demonstrate that there is a *bona fide* job opportunity that was open to all U.S. workers, including demonstrating the beneficiary's influence and control over the job opportunity pursuant to 20 C.F.R. § 656.17(l).

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, 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). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.