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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 0 4 2010

IN RE: Petitioner:
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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a marble setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 December 4, 2008 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. On appeal, we have identified an additional ground of ineligibility: the petitioner did not submit sufficient evidence of the beneficiary's experience as of the priority date.

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.

The regulation at 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 Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien 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 Form ETA 750 was accepted on April 24, 2001.[1] The proffered wage as stated on the Form ETA 750 is $13 per hour and $19.50 per hour for overtime, which is stated as five hours above the regular 40 hours per week ($32,110 per year). The Form ETA 750 states that the position requires two years of experience in the position offered as a marble setter.

The AAO conducts appellate review on a *de novo* basis. *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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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

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[1] The original labor certification was filed listing a different employer than the one petitioning on the Form I-140. The regulation at 20 C.F.R. § 656.30(c)(2) provides that a labor certification application is valid only if the particular job opportunity and the area of intended employment remain the same. In general, a change in employers requires a new application for certification by the new employer unless the same job opportunity and the same area of intended employment are preserved. A change in employers does not necessarily require the filing of a new application where the alien is working in the exact same position, performing the same duties, and in the same area of intended employment for the same salary or wage. *See International Contractors, Inc., and Technical Programming Services, Inc.*, 89-INA-278 (BALCA 1990); *Matter of American Chick Sexing Association and ACCU-CO*, 89-INA-320 (BALCA 1991). In *American Chick Sexing Association*, BALCA determined that 20 C.F.R. § 656.30(c)(2) is not violated where one company timely transfers its interests in labor certification applications to another company, and the successor company preserves the particular job opportunities and area of intended employment.

In this case, it is unclear whether the petitioning employer was substituted or whether the current petitioner is a successor-in-interest to the original petitioner. *Matter of Dial Auto,* 19 I & N Dec. 481 (1986). DOL approved the change of employer on June 21, 2007 prior to certification although the exact date of requested substitution or successorship is unclear. In any further filings, the petitioner should clarify its relationship to the original petitioner and the date of any such change.

[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).

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 Sonegawa*, 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. The petitioner provided no evidence that it ever employed or paid the beneficiary any wages.

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*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (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, 558 F.3d at 116. "[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,* 719 F.Supp. at 537 (emphasis added).

The record before the director closed with the receipt by the director of the petitioner's response to the Request for Evidence dated August 20, 2008. As of that date, the most current tax return available was the petitioner's 2007 federal tax return. Although the priority date is April 24, 2001, the petitioner did not submit any evidence of its ability to pay the proffered wage for 2001 or 2002[3] either initially, in response to the director's RFE, or on appeal despite the director's specific request for that documentation. 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).

- In 2001, no regulatory proscribed evidence was submitted.
- In 2002, no regulatory proscribed evidence was submitted.
- In 2003, the Form 1120S stated net income[4] of $4,945.

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[3] No evidence was submitted to demonstrate that the original applicant on the labor certification could pay the proffered wage from the time that the labor certification was accepted until the current petitioner was substituted or successorship established. *See Matter of Dial Auto,* 19 I & N Dec. 481 (1986) (a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor). Similarly, if the employer was "substituted," the initial labor certification applicant should submit evidence of its ability to pay from the priority date until the date of change.

[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has

- In 2004, the Form 1120S stated net income of -$994.
- In 2005, the Form 1120S stated net income of -$338.
- In 2006, the Form 1120S stated net income of -$5,045.
- In 2007, the Form 1120S stated net income of -$5,899.

Therefore, the petitioner demonstrated insufficient net income to pay the proffered wage in any year.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- In 2001, no regulatory proscribed evidence was submitted.
- In 2002, no regulatory proscribed evidence was submitted.
- In 2003, the Form 1120S stated net current assets of -$74,482.
- In 2004, the Form 1120S stated net current assets of $14,079.
- In 2005, the Form 1120S stated net current assets of -$6,493.
- In 2006, the Form 1120S stated net current assets of -$975.
- In 2007, the Form 1120S stated net current assets of -$6,610.

Therefore, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage in any year from the priority date onward.

Therefore, from the date the Form ETA 750 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

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relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 3, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional adjustments shown on its Schedule K, the petitioner's net income is found on line 21 of its tax returns.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel urges us to use the "net current assets test," but defines that test as an examination of the petitioner's current assets without weighing them against the current liabilities. Counsel provides no reasoning for its assertion that the balance sheet should be viewed in such a one-sided manner without determining the entire financial picture as opposed to looking solely at the positives on the balance sheet. Counsel also cites the May 4, 2004 memorandum from William Yates, Associate Director of Operations of USCIS, which states that petitioners may submit financial statements in lieu of other evidence. We first note that this memo was rescinded by a memo dated May 14, 2005 from William Yates. Where the documentation submitted pursuant to 8 C.F.R. § 204.5(g)(2) is sufficient to render a decision, the director need not consider additional information. Instead, the memorandum dated May 14, 2005 by Mr. Yates, guides adjudications of petitioning entities' continuing ability to pay the proffered wage through the following three-tiered analysis:

> Adjudicators should make a positive ability to pay determination on an I-140 under the following circumstances:
>
> - The petitioner's net income is equal to or greater than the proffered wage;
> - The petitioner's net current assets are equal to or greater than the proffered wage; or
> - The employer submits credible, verifiable evidence that the petitioner is both employing the beneficiary and has paid or is currently paying the proffered wage.

The memorandum then states the acceptance of any other type of financial information is discretionary on the part of the adjudicator. This memo does not state that the petitioner's assets should be considered in isolation. We have considered all three elements above, none of which demonstrate the petitioner's ability to pay the proffered wage.

Counsel provided bank statements for [redacted], who counsel terms "the previous employer," spanning December 31, 2002 to January 31, 2003 and February 28, 2003 to December 31, 2003 to show the petitioner's ability to pay the proffered wage in 2003.[6] Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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

[6] As noted above, this case involves the substitution or successorship of petitioning entities. The Form ETA 750 change from [redacted] to [redacted] as the petitioner was approved by the DOL on June 21, 2007. The bank statements were all for [redacted] These bank statements cannot be considered without knowing the date of the change in employers. Furthermore, the petitioner submitted tax returns for [redacted] for 2003 and no tax returns for [redacted] to determine whether the bank statements would represent cash assets beyond those listed on Schedule L and considered in the net current assets analysis. The petitioner must establish its ability to pay for the entire time period. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980) (the assets of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage).

petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the bank statements somehow reflect additional available funds that would not be reflected on [redacted] tax returns, had they been submitted.

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 did not submit any evidence for the years 2001 or 2002 to evidence its ability to pay the proffered wage. The tax returns in the record show a significant decline in gross sales from $1.7 million in 2004 to $245,694 in 2007. The salaries and wages paid by the petitioner during this time similarly declined. In addition, the petitioner's net income and net current assets were minimal or negative for each year. The petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. On appeal, counsel states that the "[p]etitioner has a historical record of profitability as shown by assets and total income. Furthermore, there is a reasonable expectation that the profits will increase in the future because of the nature of the business of the petitioner and finally [the] petitioner is willing to reserve a portion of its income for the proffered wage." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The tax returns, as addressed above, show otherwise. Furthermore, counsel failed to indicate how the petitioner would be able to reserve a portion of its negative income for the proffered wage. 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.

Beyond the director's decision, 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). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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

> (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

The Form ETA 750 requires two years of experience before the April 24, 2001 priority date as a marble setter. The Form ETA 750B indicates that the beneficiary worked for Stelianos Agapakis, Irakleion Crete, as a marble setter from September 1989 to April 1994. Form ETA 750B does not list any other experience. The petitioner submitted a letter from [redacted][7] president of [redacted] stating that the beneficiary worked as a marble setter from February 5, 1998 to November 28, 2000. The beneficiary failed to list this experience on Form ETA 750B. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). As a result, we are unable to conclude that the petitioner has adequately established that the beneficiary had the necessary two years of prior experience at the time the labor certification was accepted by the DOL.

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.

ORDER: The appeal is dismissed.

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[7] We note that the author of the letter has the same surname as the beneficiary so may not be an objective verification of the beneficiary's experience. In any further filings, the petitioner should submit independent, objective evidence to verify prior employment.