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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

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 20 2011

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, with a fee of $630. 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 on July 2, 2008. The petitioner filed a motion to reopen/reconsider on August 22, 2008 that the director granted. The director subsequently dismissed the motion, and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting and solutions company. It seeks to employ the beneficiary permanently in the United States as a web developer. 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 according to United States Citizenship and Immigration Services (USCIS) the original beneficiary of the instant petition [redacted], adjusted to lawful permanent resident status on July 2, 2007.[1] Thus, the labor certification may be used to support only one adjustment of status. 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 July 22, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to substitute the instant beneficiary on the previously approved labor certification after the original beneficiary had adjusted to legal permanent residency. The AAO will also briefly examine whether the petitioner established that the instant petition was approvable in terms of the petitioner's ability to pay the proffered wage as of the 2003 priority date.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On appeal, the petitioner reasserts that the present I-140 petition satisfied the general requirements for the substitution process and submits excerpts from documents including the DOL Field Memorandum dated May 4, 1995; a Memorandum of Understanding between the legacy INS and the DOL, and a further memorandum entitled "Substitution of Labor Certification Beneficiaries," dated March 7, 1996 written by [redacted] The petitioner also references the USCIS Standard Operating Procedures for I-140 Petitions and Chapter 22 of the USCIS Adjudicator's Field Manual.

In reference to the Straus memo, the petitioner notes that when the original approved labor certification has been submitted to USCIS with a prior petition, the petitioner must submit an I-140

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[1] The record is not clear why the director stated the original beneficiary adjusted his status on July 2, 2007. USCIS computer records indicate an approval date of July 20, 2007.

[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).

petition on behalf of the substituted beneficiary, along with evidence that the substituted beneficiary meets all of the minimum education, training or experience requirements stated in Part A of the original ETA 750, and must submit a Part B of the ETA 750 signed by the substituted beneficiary. Counsel also notes that the petitioner must also submit a copy of the original ETA 750, a photocopy of the DOL certification, a copy of any notice of approval of the prior I-140 petition, and written notice of withdrawal of the prior I-140 petition.

The petitioner notes that it submitted a letter dated June 7, 2007 requesting that the initial I-140 petition on behalf of [redacted] be withdrawn, and that it then filed the second I-140 petition with a copy of the withdrawal request on July 12, 2007.[3] The petitioner notes that the original beneficiary was not approved for lawful permanent residence until July 2, 2007.[4] The petitioner states that under 8 C.F.R. § 205.1(a)(3)(iii)(C), upon its written notice of withdrawal, the initial I-140 approved for [redacted] was automatically revoked as of the approval date of the petition, namely March 12, 2004. The petitioner asserts that based on this regulation, the petition could not have been used to accord lawful permanent resident status to [redacted] the original beneficiary, on July 2, 2007. The petitioner references issues of substitution of beneficiaries and portability of an approved I-140 petition as set out in the *American Competitiveness in the Twenty-First Century Act of 2000 (AC21 (Public Law 106-313.* Counsel refers to an interoffice memorandum written by [redacted] R. Yates[5] and appears to state that USCIS crafted a policy that the I-140 petition remains valid, even after withdrawal by the petitioner, when the withdrawal request is made after the initial beneficiary's I-485 application has been pending for 180 days.

On appeal, the petitioner alleges that USCIS will not allow the petitioner in the instant matter to substitute a beneficiary for the original beneficiary because the labor certification has already been used in support of an approved I-485 applicant. The AAO notes that substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary.

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[3] The AAO notes that the letter requesting withdrawal is addressed to the Vermont Service Center, while the FEDEX envelope information indicates the correspondence was shipped to the Nebraska Service Center on June 7, 2007.

[4] As stated previously, the date for the approved I-485 is July 20, 2007.

[5] Memorandum from [redacted], *Continuing Validity of Form I-140 Petition in accordance with Section 106 (c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (AD03-16),* HQBCIS 70/6.2.8-P, August 4, 2003.

Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications.[6] As the filing of the instant case predates the rule, substitution would be allowed for the present petition. Further, an I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [redacted] Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

On appeal, counsel misconstrues the AC21 provision of portability for previously approved I-140 petitions. At the time AC21 went into effect, legacy Immigration and Naturalization Service (INS) regulations provided that an alien worker could not apply for permanent resident status by filing a Form I-485, application to adjust status, until he or she obtained the approval of the underlying Form I-140 immigrant visa petition. *See* 8 C.F.R. § 245.2(a)(2)(i) (2000). Therefore, the process under section 106(c) of AC21 at the time of enactment was as follows: first, an alien obtains an approved employment-based immigrant visa petition; second, the alien files an application to adjust status; and third, if the adjustment application was not processed within 180 days, the underlying immigrant visa petition remained valid even if the alien changed employers or positions, provided the new job was in the same or similar occupational classification. Thus, the portability issue involves the original beneficiary changing the original proffered position for a similar position at least 180 days after the filing of a Form I-485 to adjust status.

The available legislative history does not shed light on Congress' intent in specifically enacting section 106(c) of AC21. While the legislative history for AC21 discusses Congressional concerns regarding the nation's economic competitiveness, the shortage of skilled technology workers, U.S. job training, and the cap on the number of nonimmigrant H-1B workers, the legislative history does not specifically mention section 106(c) or any concerns regarding backlogs in adjustment of status applications. The legislative history briefly mentions "inordinate delays in labor certification and INS visa processing" in reference to provisions relating to the extension of an H-1B nonimmigrant alien's period of stay. *See* S. Rep. 106-260, 2000 WL 622763 at 10, 23 (April 11, 2000). In the 2001 Report On The Activities Of The Committee On The Judiciary, the House Judiciary Committee summarized the effects of AC21 on immigrant visa petitions: "[I]f an employer's

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[6] For more information on the now prohibited practice of substituting alien beneficiaries on certified labor certifications, *see* Department of Labor, Final Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 Fed. Reg. 27904, 27905 (May 17, 2007).

immigrant visa petition for an alien worker has been filed and remains unadjudicated for at least 180 days, the petition shall remain valid with respect to a new job if the alien changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." H.R. Rep. 106-1048, 2001 WL 67919 (January 2, 2001). Notably, this report further confuses the question of Congressional intent since the report clearly refers to "immigrant visa petitions" and not the "application for adjustment of status" that appears in the final statute. Even if more specific references were available, the legislative history behind AC21 would not provide guidance in the current matter since, as previously noted, an approved employment-based immigrant visa was required to file for adjustment of status at the time Congress enacted AC21.

Significantly, USCIS may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, 414 (Comm. 1986).[7] This is the case in the instant matter.

Counsel is correct that 8 C.F.R.§ 205.1 (a)(3)(iii)(C) stipulates that upon written notice of withdrawal filed by the petitioner for an employment-based petition with any officer of the service who is authorized to grant or deny the petition, an approval may be automatically revoked. While the petitioner submitted a copy of a letter requesting the withdrawal of the original beneficiary's approved I-140 petition, USCIS records do not indicate any revocation of the original beneficiary's petition prior to the receipt of the instant I-140 petition on January 5, 2007 and the approval of the original beneficiary's I-485. As the director noted, USCIS records do not indicate any revocation of the original beneficiary's I-140 petition.

Thus, the record indicates that the petitioner appears to have submitted all requisite documentation for the instant petition and the substitution of beneficiaries. Nevertheless based on the preceding discussion, the original beneficiary could still use the initial I-140 petition as the basis of his adjustment of status application.

We acknowledge that after enactment of AC21, DOL's practice of substitution effectively created a race between the employer seeking to use the labor certification to fill the proffered position on a permanent basis and the alien beneficiary named on the labor certification seeking to use the labor certification to demonstrate admissibility under section 212(a)(5)(A)(i) of the Act in order to adjust status. However, the 2007 DOL rule has remedied the inherent unfairness of permitting employers to substitute beneficiaries. In terminating the policy of substitution, DOL acknowledged that the labor certification is evidence of an individual alien's admissibility:

> The statute itself could not be clearer that the labor certification process is alien specific. In defining the Department's role in the admission of an alien for

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[7] While *Harry Bailen,* 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2). Moreover, the reasoning in *Harry Bailen,* 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga,* 23 I&N Dec. 886, 889-90 (BIA 2006).

> employment-based permanent residence, INA section 212(a)(5)[(A)](i) ties the required certification to "the place where *the* (emphasis added) alien is to perform such skilled or unskilled labor[,]" and the necessity of certifying that "the employment of *such* (emphasis added) alien will not adversely affect the wages * * *." The plain language of these provisions (i.e., the use of terms such as "the alien" and "such alien") is meant to focus not on the process but solely on its use to admit one, specific alien.

72 Fed Reg. at 27908 (alteration in original).

It remains that the petitioner has not established that the original beneficiary who adjusted status based on the underlying labor certification that the petitioner now seeks to use for a substituted beneficiary did so illegitimately.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The Act does not provide for the substitution of aliens in the permanent labor certification process. Similarly, both the USCIS and the Department of Labor's regulations are silent regarding substitution of aliens. The substitution of alien workers is a procedural accommodation that permits U.S. employers to replace an alien named on a pending or approved labor certification with another prospective alien employee. Historically, this substitution practice was permitted because of the length of time it took to obtain a labor certification or receive approval of the Form I-140 petition. *See generally* Department of Labor Proposed Rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity,* 71 Fed. Reg. 7656 (February 13, 2006).

Section 212(a)(5)(A)(iv) of the Act cannot be interpreted as allowing the adjustment of status of an alien based on a labor certification that formed the basis for another alien's admissibility when section 212(a)(5)(A)(i) of the Act explicitly requires a labor certification as evidence of an individual alien's admissibility. To construe section 212(a)(5)(A)(iv) of the Act in that manner would violate the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dept. of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. at 340 .

When Congress enacted the job flexibility provision of section 204(j) of the Act, Congress made no correlative amendments to the admissibility requirements of section 212(a)(5)(C) of the Act that would allow a labor certification to be used as evidence of admissibility for two or more aliens.[8] We must assume that Congress was aware of the agency's previous interpretation that a labor certification can only support the adjustment of one alien under the Act when AC21 was passed and did not specifically alter that interpretation. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). The labor certification on which the underlying petition is based has already served as the basis of admissibility for a different alien and is no longer "valid." Counsel provides no legal authority, and we know of none, that would allow USCIS to rely on the labor certification of an adjusted alien to adjust a second alien. Thus the AAO concurs with the director's decision. The petition is denied. The petitioner may, without prejudice, submit a new I-140 petition with a certified ETA 9089 for the instant beneficiary and with accompanying fees.

Beyond the decision of the director, the AAO notes that the petitioner provided scant evidence with regard to its ability to pay the proffered wage as of the October 23, 2003 priority date.[9] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). For illustrative purposes, the AAO will briefly examine the issue of the petitioner's ability to pay the proffered wage.

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:

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[8] Conceivably, a substituted alien could also "port" to a new employer under AC21, allowing the employer to once again legitimately substitute a new beneficiary, resulting in a theoretically unlimited number of aliens adjusting status pursuant to a single labor certification.

[9] Thus, even if the original beneficiary had not adjusted his status prior to the filing of the instant petition, the petitioner may not have established that the instant petition was approvable.

> *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 October 23, 2003. The proffered wage as stated on the Form ETA 750 is $60,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in Engg,CIS, CompSci, Math, Sci, Bus, or Equiv." The word Bachelor's has an asterisk that is explained in Section 15, as "Bachelor's degree or Equivalent through any combination education, training and/or experience." The petitioner also required one year in the proffered position or one year of work experience as "Dev. Support Engineer, SWR Design Engr, or EDP Manger/Programmer". In Section 15, Other Special Requirements, the petitioner also requires at least one year of work experience in Java/ASP, HTML, and knowledge of RDBMS using Oracle/SQL Server.

With the instant petition, the petitioner submitted a document entitled "Financial Statements, March 31, 2006 and 2005 with Independent Auditors' Report." This document is prepared by [redacted] The AAO notes that the auditors indicate that they audited the petitioner's financial statement for the year ending on March 31, 2006, and that the 2005 statements of income, retained earnings and cash flow were reviewed rather than audited. The petitioner also submitted a financial statement dated July 20, 2004 prepared by [redacted] This report is a compiled financial balance sheet and statement of operations.

The AAO notes that in a cover letter dated July 9, 2007, [redacted], notes that the petitioner's 2002 sales were almost $7,400,000, that in 2003, the petitioner's revenue exceeded $18,000,000, and in 2004, the revenue exceeded $38,000,000[10] and that for 2005, the petitioner's revenue was $56,000,000. However, the petitioner submits no evidence, such as federal tax returns, to further substantiate these assertions. The petitioner's general counsel repeats these figures in a cover letter that accompanies the I-140 petition. The AAO notes that the assertions of the petitioner or

[10] The AAO notes that the petitioner's compiled financial statement for 2004 indicates revenue of $18,051.236, with a net income of -$169,069 for fiscal year 2004.

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).

Based on the audited financial statement for 2006, as of 2006, the petitioner is structured as an S corporation. Its business structure from 2003 through 2005 is not established in the record. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 800 workers. The petitioner claims a gross annual income of $56,000,000 on the I-140 petition.

On the Form ETA 750B, signed by the beneficiary on June 30, 2007, the beneficiary does not identify the petitioner at Section 15, work experience, but does claims work experience with a company located at [redacted]g, as of February 2005 to the date he signed Part B.[11]

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 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).

The petitioner submitted its financial statements for 2004, 2005, and 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The AAO notes that the petitioner's 2006 financial statement is audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. However, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied the 2004 financial statement makes clear that this report were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The auditors' report that accompanied the 2005 balance sheets and statements makes clear that the 2005 financial report was produced pursuant to a review. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. In either case, the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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[11] This address is included on Part A, of the certified labor certification as the petitioner's address, although it is distinct from the address noted on the I-140 petition.

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 submitted two pay stubs for May 5, 2007 to June 1, 2007 that indicate the petitioner paid the beneficiary an hourly wage of $28.8462 during this month and indicated the beneficiary had been paid year-to-date wages of $21,992.39 as of June 1, 2007. The petitioner also submitted the beneficiary's W-2 Form for tax year 2006 that indicated the petitioner paid the beneficiary $42,841.93 in tax year 2006. Thus the petitioner has not established that it employed and paid the beneficiary the full proffered wage of $60,000 during any relevant timeframe including the period from the priority date in 2003 or subsequently. Therefore the petitioner would have to establish its ability to pay the entire proffered wage in tax years 2003 to 2005, and the difference between actual wages and the proffered wage in tax year 2006 and 2007.

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). 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.

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 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* at 537 (emphasis added).

The record before the director closed on July 22, 2008 with the director's decision. At this time, the petitioner's 2007 tax return could have been available. However, the director did not discuss the petitioner's ability to pay the proffered wage, and no further evidence, such as the evidence described at 8 C.F.R. § 204.5(g)(2) was requested from the petitioner with regard to this issue prior to the denial of the petition.

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.[12] 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.

As previously noted, the only evidence submitted to the record with regard to the petitioner's ability to pay the proffered wage is its audited financial statement for 2006, its reviewed financial statement for 2005, and its compiled financial statement for 2004. As previously discussed, the petitioner's reviewed and compiled financial statements are not considered sufficient to establish its ability to pay the difference between any wages paid to the beneficiary and the proffered wage in 2004 and 2005. Based on the lack of further evidence described at 8 C.F.R. § 204.5(g)(2), the AAO cannot further examine the petitioner's net income or net current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the 2003 priority date or subsequently through

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[12] 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.

2005. With regard to tax year 2006, the petitioner indicates on its audited statement that it had net income of $3,450,931. Thus the petitioner had sufficient net income in 2006 to pay the proffered wage of $60,000.

However, the AAO notes that the petitioner has filed multiple employment-based petitions. USCIS computer records indicate that the petitioner had filed some 3,681 petitions, predominantly I-129 H-1B petitions, as of July 2010. In 2010 alone, the petitioner had filed 203 petitions, while in tax year 2009, the petitioner filed some 353 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, 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.

With regard to the 353 new petitions filed in 2009, if all I-129 or I-140 beneficiaries were paid wages similar to those proffered to the beneficiary, the petitioner would require an additional $21,180,000 in new income to pay for these new employees. With regard to the additional new 203 petitions filed from January to July 2010, the petitioner would require an additional $12,180,000 in new revenue to pay wages similar to the $60,000 salary offered to the beneficiary.[13] The record does not establish that the petitioner has the ability to pay the proffered wages for all pending beneficiaries during the relevant period of time in question. Thus, the petitioner has not established its ability to pay the proffered wage in 2006.

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

[13] This sum represents approximately 203 new petitions filed in 2010 multiplied by the proffered wage of $60,000.

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 has significant gross revenue based on the audited financial statement during tax year 2006. However, the record is devoid of any other evidence as to the petitioner's ability to pay the proffered wage in any other year during the period of time from 2003 to the present. Beyond the petitioner's 2006 audited financial statement and the assertions of counsel and the petitioner's officer with regard to the petitioner's earlier gross profits, the record contains no further evidence or information on any other aspect of the petitioner's financial viability. The record contains no further discussion or information on issues such as officer compensation, longevity of business, and/or the petitioner's reputation within the IT business community. 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 as of 2003 and onward.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.