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

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 03 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:

[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, 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a construction and framing business. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 March 9, 2010 denial, the issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director determined that the petitioner failed to demonstrate that the beneficiary had the two years required experience as a carpenter to perform the duties of the proffered position as of the filing date of the labor certification application.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on November 18, 2009.

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.[1]

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

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[1] 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).

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

On appeal, counsel submits an undated letter with a translation date of April 27, 2010 from [redacted] who stated that the beneficiary worked with him from January 1984 through April 1985 as a carpenter producing wooden furniture. Other relevant evidence in the record includes:

- A letter from the office manager of [redacted] dated March 7, 2001, who stated that the company employed the beneficiary for one and one-half years in 1999 and 2000.
- A letter from the president of [redacted] dated March 29, 2001, who stated that the company employed the beneficiary from February 27, 2000 through September 8, 2000.
- A letter from the custodian of records of [redacted] dated March 29, 2001, who stated that the company employed the beneficiary as a carpenter from January 17, 2000 through February 3, 2000, and from September 13, 2000 through October 19, 2000.
- A letter dated March 29, 2001, from the president of [redacted], Inc. who stated that the company employed the beneficiary from February 7, 2000 through March 24, 2000.

- A translated letter dated October 27, 2009 from [redacted] who stated that the beneficiary worked with him as a carpenter from January 1984 through April 1985.
- An affidavit of the beneficiary's dated April 29, 2010 outlining his prior employment.
- A declaration of the beneficiary's dated March 30, 2010 indicating the errors made by his previous attorney.

The record does not contain any other evidence relevant to the beneficiary's qualifications.

The beneficiary set forth his credentials on the labor certification application and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury.

On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed as a carpenter for [redacted] from July 1999 through May 2000; and for [redacted] from February 2000 through September 2000. He also lists a carpentry training course with the petitioner from October 2000 through April 24, 2001. He does not provide any additional information concerning his employment background on that form.

With the exception of the second letter from [redacted], none of the letters listed above describe the nature of the beneficiary's job duties, and thus do not comply with the regulation at 8 C.F.R. § 204.5 (l)(3)(ii)(A). Moreover, the beneficiary failed to indicate on the labor certification application that he was employed by [redacted], [redacted] or [redacted]. The only letter that describes the beneficiary's duties is that of [redacted]; however, the beneficiary failed to list this job on the Form ETA 750, casting doubt on the credibility of the job experience. Further, the beneficiary indicated on the Form ETA 750 that he was employed by [redacted] from July 1999 through May 2000; in contrast, the declarant stated in the employment letter that the beneficiary was employed by the company for one and one-half years. The record of proceeding contains a letter from [redacted] of [redacted] that lists the beneficiary's social security number as [redacted]; however, the beneficiary's social security number listed on the IRS Form W-2 issued by the petitioner for the beneficiary is [redacted]. There has been no objective clarification of the many inconsistencies found in the record. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988).

Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution. The following provisions of law deal directly with Social Security number fraud and misuse:

Social Security Act: In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to

> *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://ssa-custhelp.ssa.gov (accessed on August 27, 2007). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel asserts that previous counsel was incompetent in that his legal assistant misinformed the beneficiary concerning his listing his prior employment experience; and therefore, he did not mention the above noted employers on the Form ETA 750 nor did he initially include their letters with the I-140 application. Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as of the priority date.

Beyond the decision of the director, under the current record, the petitioner has not demonstrated its ability to pay the proffered wage.

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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition (Form I-140), the petitioner claimed to have been established in 1996, and to currently employ 500 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, the beneficiary claims to have been employed by the petitioner from October 2000 to April 24, 2001, the date he signed the Form ETA 750. The proffered wage as stated on the Form ETA 750 is $20.90 per hour ($43,472.00 per year).

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

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 submitted a copy of the beneficiary's pay stubs dated January 2001 through March 2001, and shows that the beneficiary was paid $7,956.00 in wages for that year (a deficiency of $35,516.00).[2] The petitioner also submitted a copy of a Form W-2 issued to the beneficiary for the 2003 tax year in the amount of $45,244.50.[3]

Therefore, the evidence fails to demonstrate that the petitioner paid the beneficiary the proffered wage in 2001, 2002, 2004, 2005, 2006, 2007, and 2008.

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[2] The petitioner did not submit any additional evidence demonstrating the amount of wages paid to the beneficiary in 2001.

[3] As noted above, the social security number used by the beneficiary on the 2001 pay stubs was [redacted] however, the social security number used by the beneficiary on the Form W-2 for 2003 was [redacted]

If, as in the instant case, the petitioner does not establish that it was able to pay the proffered wage of all beneficiaries 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). 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, a showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these

figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on February 18, 2010, with the petitioner's response to the director's request for additional evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available to the director. The petitioner's Forms 1120S[4] tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120S stated net income of $268,530.00.
- In 2002, the Form 1120S stated net income of $1,021,991.00.
- In 2004, the Form 1120S stated net income of $1,257,991.00.
- In 2005, the Form 1120S stated net income of $9,593,621.00.
- In 2006, the Form 1120S stated net income of $3,873,389.00.
- In 2007, the Form 1120S stated net income of $334,301.00.
- In 2008, the Form 1120S stated net income of ($2,343,904.00).

Therefore, for the year 2008, the petitioner did not have sufficient net income to pay the proffered wage.

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. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

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[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 relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed April 28, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Where the petitioner has additional entries on its Schedules K, the petitioner's net income is found on Schedule K of its tax returns. In this case, the petitioner's net income is found on Schedule K.

[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.

- In 2008, the Form 1120S stated net current assets of $3,122,922.00.

The evidence demonstrates that for 2008, the petitioner had sufficient net current assets to pay the proffered wage.

Although the evidence demonstrates the petitioner's ability to pay the beneficiary's wages from the priority date, USCIS records show that the petitioner has filed 18 immigrant petitions during the time period since 2004, and therefore, the petitioner must establish that it had sufficient funds to pay all the wages of all the beneficiaries from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the ETA Form 750 job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even though the instant record establishes the petitioner's ability to pay the proffered wage for the instant beneficiary, the fact that there are 18 additional immigrant petitions calls into question whether the petitioner has the ability to pay the wage for all the sponsored beneficiaries, including the instant beneficiary. For this additional reason the petition must be denied.

The petition will be dismissed for the above stated reasons, with each considered as an alternative ground for dismissal. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.