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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: NEBRASKA SERVICE CENTER Date:

MAR 03 2011

IN RE: Petitioner: [redacted]
Beneficiary:

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

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 your 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 Director, Nebraska Service Center, denied the visa preference petition. The petitioner appealed. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the DOL accompanied the petition.

The director determined that the petition had not been submitted with any of the required initial evidence. The director cited the lack of evidence demonstrating that the beneficiary meets the educational, training, experience and any other requirements set forth in the Form ETA 750. The director also noted that the petitioner failed to submit evidence of its continuing ability to pay the proffered wage. The director denied the petition on April 6, 2010.[1]

On appeal, the petitioner submits evidence relevant to the beneficiary's education, experience and the petitioner's ability to pay the proffered wage and contends that the petition should be approved.

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

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

> (ii) *Other documentation*—
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> > (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

[1] The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present.

[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).

> trainer or employer, and a description of the training received or the experience of the alien.

The petitioner must demonstrate that a beneficiary has the necessary education, training experience and other specific credentials as required on the labor certification as of the day the Form ETA 750 was accepted for processing by any office within DOL's employment system, which establishes the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the priority date is February 24, 2005.

Item 14 states that the position requires a high school education, no training, and one year of experience in the proffered job as a nursing assistant. The petitioner submitted evidence of the beneficiary's high school education on appeal.

As evidence of the beneficiary's required one year of work experience as a nursing assistant, the petitioner provided two employment verification letters. Both are dated January 25, 2005. One is from [redacted], Administrator, of the [redacted] Beach, California and one is from [redacted] RN, BSN Administrator, of the [redacted], California. Both letters contain similar language and both state that the beneficiary had worked part-time for both companies without specifying the amount of hours worked. The letter from [redacted] states that the beneficiary was employed for her firm from November 2004 until January 31, 2005. The other letter from [redacted] states that the beneficiary worked at that firm from November 1, 2004 to the present (date of letter). These letters are not sufficient evidence that the beneficiary possessed one year of full-time work experience as a nursing assistant as of the priority date of February 24, 2005. First; the total quantity of time amounts to no more than approximately three months. Second; neither letter specifies the duties that the beneficiary performed as a caregiver, so it is not possible to evaluate whether these involved the same or similar duties of a nursing assistant as described in the Form ETA 750. Additionally, neither letter specifically sets forth how many hours per week that the beneficiary worked or, as stated above, demonstrated that the beneficiary obtained one full year of full-time experience as a nursing assistant. Further, the letter from [redacted] is dated "January 25, 2005," but purports to attest to the fact that the beneficiary worked there until "January 31, 2005." Finally, neither of these jobs is listed on Part B of the Form ETA 750, which was signed by the beneficiary on January 5, 2005.[3] That document lists two positions. The first claims that the beneficiary worked as a key account manager for [redacted] in the Philippines from October 1980 until June 2002. The second job listed is that of a live-in caregiver, employed by [redacted] of Harbor City, California from September 1993 until the present (date of signing). These dates not only conflict with the beneficiary's claimed employment in the Philippines during this period of time, but also overlap his two additionally claimed part-time jobs at [redacted] and [redacted] Based on these inconsistencies, omissions and obvious conflicts, the AAO does not find any of the beneficiary's claimed employment to be credible.

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[3] *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The evidence must clearly support that the beneficiary has acquired the requisite experience as set forth on Item 14 of the ETA 750 in that the applicant must have one year of full-time experience as a nursing assistant as of the priority date of February 24, 2005. The petitioner also submitted several of the beneficiary's training certificates: for ElderCare training, dated June 8, 2007; for Medication Training, dated December 15, 2007; a second certificate for Medication Training, dated October 2009; a Medic First Aid card issued October 2009; and an American Red Cross certificate for Standard First Aid Training, dated April 6, 2007. All of these documents are dated and the training obtained after the 2005 priority date would not constitute the required work experience as of the priority date, and in any event would not be regarded as work experience as these experience and training are separate and distinct requirements. In this case, the petitioner has failed to establish that the beneficiary possesses the requisite work experience.

For the reasons stated below, the AAO also finds that the petitioner has failed to demonstrate its continuing ability to pay the proffered wage. The petitioner must demonstrate the ability to pay the proffered wage beginning on the priority date. The proffered wage as stated on the Form ETA 750 is $1,963 per month, which amounts to $23,556 per year.[4]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).

On part 5 of the Form I-140, Immigrant Petition for Alien Worker, filed on October 29, 2007, the petitioner claimed to have been established in 1984 and to currently employ 146 workers. It also claimed gross annual income of $7,899,132 and $1,182,125 in net annual income. According to copies of its Form 1120S, U.S. Income Tax Return for an S Corporation submitted on appeal, the petitioner's fiscal year is based on a calendar year.

[4] The record indicates that the petitioner has not employed the beneficiary.

Relevant to its continuing ability to pay the proffered wage, the petitioner's corporate tax returns initially suggest sufficient net income[5] of $1,299,801 in 2005; $1,163,975 in 2006; $1,192,217 in 2007 and $1,299,801 in 2008, to cover payment of the proffered wage in this case.[6]

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. Here, there is no evidence that the petitioner has employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). 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). Showing that the petitioner's gross sales

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[5] Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 18 of the 2008 Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 17e of Schedule K in 2005; page 2, Schedule K of the IRS tax transcript in 2006 and 2007, and line 19 of its state 2008 tax return, which would correspond to line 18 of the 2008 federal corporate tax return.

[6] Besides net income, United States Citizenship and Immigration Services (USCIS) will also review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

With respect to depreciation as claimed by counsel, 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).

Here, the petitioner's ability to pay the instant beneficiary must be considered within the context of the petitioner's sponsorship of other beneficiaries. Current USCIS records, as of February 15, 2011, reflect that the petitioner has filed at least 229 petitions, including 11 Form I-129 petitions, with the remaining being Form I-140 petitions, approximately 170 of which have been filed since 2007. The petitioner has submitted no information relevant to the respective proffered wages, the payment of wages, employment status and priority dates of other sponsored beneficiaries. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the

requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its Form ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In this case, despite its relatively large net income and net current assets as indicated by its tax returns, the petitioner's ability to pay this beneficiary has not been established, because no information has been provided relevant to the proffered wages of all sponsored beneficiaries of the multiple petitions that it has filed during the relevant period, beginning as of the beneficiaries' respective priority dates.

The insufficiency of the evidence related to the petitioner's continuing ability to pay all beneficiaries' their combined respective proffered wages precludes a favorable finding with regard to its ability to pay the instant beneficiary, as of the February 24, 2005, priority date.

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) are applicable. That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In the present matter, as set forth above, the petitioner has not established that the petition merits approval under *Sonegawa.* As noted above, the petitioner must demonstrate that it can pay the proffered wage of all sponsored workers, as well as the instant beneficiary's proffered salary. No information relevant to its other sponsored beneficiaries' wages has been provided. Further, no unusual business circumstances or reputational factors have been shown to exist in this case that parallel those in *Sonegawa,* nor has it been established that the filing year was an uncharacteristically unprofitable year for the petitioner within a framework of profitable years. Additionally, certain other negative reputational factors may affect this petitioner. The AAO will also take administrative notice of certain other factors. For example, the petitioner only received a U.S. governmental rating of two stars out of a possible five as noted by CalQualityCare.org at its website.[7] Further, the petitioner received a state " 'AA' citation, the most severe penalty under state law, and a $80,000 fine from the state of California after an

[7] *See* [redacted] (Accessed January 30, 2011.)

investigation concluded that the inadequate care led to the death of a resident. . . ." The report of investigation is dated July 2, 2009.[8] Finally, a federal administrative decision, dated January 27, 2010, issued by the Department of Health and Human Services dismissed the petitioner's hearing request as untimely in a proceeding whereby the Centers for Medicare & Medicaid Services issued a noncompliance notice to the petitioner advising that it would impose remedies therein for noncompliance with program requirements (a $2,500 per instance civil money penalty and denial of payment for new admissions, effective August 20). Although these findings do not form the basis of the AAO's decision, the reputation factors would preclude a positive reputational factor for consideration in any *Sonegawa* analysis. As the petition is not approvable because the petitioner failed to establish that beneficiary meets the labor certification's experience requirements, the petitioner's ability to pay the proffered wage forms an additional basis for denial.

The petitioner did not establish its continuing ability to pay the proffered wage and failed to demonstrate that the beneficiary had possessed one year of full-time work experience as a nursing assistant as required by the certified labor certification. 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.

[8] *See* California Department of Public Health website at [redacted]... (accessed January 30, 2011).