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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

B6

[redacted]

DATE: MAY 12 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pet grooming business. It seeks to employ the beneficiary permanently in the United States as a pet groomer. 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 IRS Forms 1099 submitted by the petitioner along with the petitioner's second Form I-140 appeared to be fraudulent. The director also determined that the petitioner failed to submit the Forms 1099 on appeal to support its first Form I-140 even after the first Form I-140 was dismissed on appeal to the AAO. 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 28, 2009 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and the authenticity of the Forms 1099-MISC submitted by the petitioner along with its second Form I-140.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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(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 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 and in Part 6 of the Form I-140 is $12.00 per hour ($24,960.00 annually). The Form ETA 750 states that the position requires six months experience as a pet groomer.

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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on July 1, 1987. The petitioner did not indicate on its Form I-140 the number of workers it currently employs. According to the tax returns in the record, the petitioner's tax year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary does not claim to have been employed by the petitioner.

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.

If the wages paid do not equal or exceed the proffered wage, the petitioner is obligated to show that it can pay the difference between the proffered wage and wages already paid in each year. In this matter, the petitioner has not provided sufficient evidence to demonstrate wages or compensation paid to the beneficiary. Evidence of the wage paid to the beneficiary is generally

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

established with Forms W-2, Wage and Tax Statement; Forms 1099-MISC, Miscellaneous Income; Forms 941, Employer's Quarterly Federal Tax Return; and/or state wage and withholding reports. Paystubs issued by the petitioner to the beneficiary are also accepted if the petitioner submits evidence that the attached paychecks were cashed, such as a copy of the front and back of the cancelled paycheck. Further, paystubs and paychecks only establish the wage paid to the beneficiary for the indicated time period. Conversely, internally generated payroll statements or payroll reports are not, by themselves, sufficiently reliable evidence to establish the actual wage paid to the beneficiary.

Although the petitioner claims to have employed the petitioner and submits Forms 1099-MISC, Miscellaneous Income for 2001 through 2007; the beneficiary does not claim to have been employed by the petitioner, and in fact indicates on the Form ETA 750B signed March 31, 2001 that she was unemployed since July 2000. In addition, it is noted that the individual tax identification number (ITIN) on the Form 1099-MISC, Miscellaneous Income, for 2007 is 942-73-6818 while the ITIN on the Forms 1099-MISC for 2001 through 2006 is [redacted]. On the IRS Form 1040, U.S. Individual Income Tax Return and IRS Form W-2, Wage and Tax Statement for 2008, the beneficiary's social security number is listed as [redacted] On the Form I-140 petition dated December 9, 2005, the petitioner indicates in the box designated for the beneficiary's social security number, "none." Likewise, on the Form G-325A, Biographic Information, signed by the beneficiary and dated December 26, 2007, the beneficiary lists "N/A" in the box designated for her U.S. Social Security Number. On the current Form I-140 filed on January 7, 2008 there is no social security number listed for the beneficiary. These inconsistencies call into question the petitioner's claimed employment of the beneficiary from 2001 to 2008 and the credibility of the Forms 1099-MISC and Form W-2.

It is also noted by the AAO that it appears that the IRS Forms 1099-MISC have been altered in that the beneficiary's name and salary amounts replaced the original information listed on the forms. 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). Absent clarification of these inconsistencies in the record, the AAO will not accept the IRS Forms 1099-MISC or the Form W-2 as persuasive evidence of wages paid to the beneficiary.

The record of proceeding contains copies of IRS Forms 1099-MISC, Miscellaneous Income representing wages purportedly paid to the beneficiary by the petitioner, as shown below.

- In 2001, the IRS Form 1099-MISC stated total wages of $21,950.00.
- In 2002, the IRS Form 1099-MISC stated total wages of $24,960.00.
- In 2003, the IRS Form 1099-MISC stated total wages of $25,320.00.
- In 2004, the IRS Form 1099-MISC stated total wages of $24,990.00.
- In 2005, the IRS Form 1099-MISC stated total wages of $25,080.00.

- In 2006, the IRS Form 1099-MISC stated total wages of $25,503.00.
- In 2007, the IRS Form 1099-MISC stated total wages of $25,800.00.
- In 2008, the IRS Form W-2 stated total wages of $26,650.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner has not established that it paid the beneficiary the full proffered wage as the Forms 1099-MISC and Form W-2 for 2008 lack credibility and persuasiveness. It is also noted that the petitioner has failed to rebut the director's fraudulent findings with respect to the Forms 1099-MISC.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the designated period, then 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 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*, 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 7, 2008 with the receipt by the director of evidence along with the Form I-140 petition. The petitioner's 2007 federal income tax return was the most recent tax return before the director for review.

The proffered wage is $24,960.00 per year. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120 stated net income of $13,441.00.
- In 2002, the Form 1120 stated net income of ($1,704.00).
- In 2003, the Form 1120 stated net income of ($1,449.00).
- In 2004, the Form 1120 stated net income of ($2,343.00).
- In 2005, the Form 1120 stated net income of ($4,487.00).
- In 2006, the Form 1120 stated net income of $6,313.00.
- In 2007, the Form 1120 stated net income of $8,033.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner did not establish that it had 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.[2] 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

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[2]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.

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.

- In 2001, the Form 1120 stated net current assets of $22,114.00.
- In 2002, the Form 1120 stated net current assets of $20,843.00.
- In 2003, the Form 1120 stated net current assets of $19,766.00.
- In 2004, the Form 1120 stated net current assets of $19,823.00.
- In 2005, the Form 1120 stated net current assets of $14,477.00.
- In 2006, the Form 1120 stated net current assets of $19,616.00.
- In 2007, the Form 1120 stated net current assets of $21,718.00.

The evidence demonstrates that for the relevant years the petitioner did not have sufficient net current assets to pay the proffered wage.

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

On appeal, counsel asserts that the director erred in not properly taking into account the totality of circumstances and by failing to assess the new evidence that accompanied the new Form I-140 and which demonstrated the petitioner's ability to pay the proffered wage.

Counsel's assertions and the evidence presented on appeal do not outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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. 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 assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Finally, as the Form 1099-MISC in the record contains inconsistencies and irregularities that have not been resolved by the petitioner which call into question the credibility to the forms and the evidence as a whole, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary is qualified for the proffered position with six months of experience as a pet groomer. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a pet groomer. The petitioner submitted a letter of employment dated April 11, 2001, from [redacted] in which she stated that the [redacted] employed the beneficiary as a groomer assistant and veterinarian assistant from January 1997 through July 2000. The letter does not indicate that the beneficiary was ever employed as a pet groomer, nor does it include a specific description of the duties performed by the beneficiary or the specific dates of the beneficiary's employment. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Accordingly, the petition will be denied for this additional reason. 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, which as noted above, is July 7, 2004. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Furthermore, the letter from [redacted] in Portuguese and is not accompanied by a certified translation in accordance with the regulation at 8 C.F.R. § 103.2(b)(3). Therefore, the letter is not reliable evidence.

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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.