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

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U.S. Citizenship and Immigration Services

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[redacted]

DATE: JAN 10 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail jewelry store. It seeks to employ the beneficiary permanently in the United States as a jeweler to sections 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, a labor certification accompanied the petition.

Upon reviewing the petition, the director determined that the petitioner failed to establish that a bona fide job offer was extended to the beneficiary which was open to all qualified U.S. workers, and denied the petition accordingly. The petitioner filed a motion to reopen and reconsider. The director found that the grounds to overcome the original decision had not been overcome and affirmed the denial. The petitioner appealed this decision.

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).[1]

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.

On October 26, 2011, this office notified the petitioner that according to the records at the South Carolina website maintained by the South Carolina Department of State, the petitioner's status is classified as a "forfeiture" and was dissolved as of April 18, 2011.[2] The AAO additionally

[1]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[redacted] The AAO additionally requested evidence related to the petitioner's ability to pay the proffered wage:

1) Copies of all corporate employer's quarterly contribution, unemployment/wage reports filed with the state from 2004 to the present. They must show employee names, payroll dates, wages, and dates of employment. Social security numbers of non-sponsored foreign workers may be redacted.
2) Copies of *complete* federal corporate income tax returns filed for 2004 through the present. If federal corporate income tax returns are not provided for these years, please provide audited financial statements or annual reports (supported by audited financials).

requested evidence related to the petitioner's ability to pay.[3]

3) Copies of all Wage and Tax Statements (W-2s), Form 1099s, and/or payroll records showing all wages paid to the beneficiary during all periods of employment.
4) It is noted that if a petitioner has filed multiple employment-based petitions, it must show the ability to pay the proffered wage of each sponsored beneficiary as of his respective priority date until permanent residence status is obtained. U.S. Citizenship Immigration and Citizenship records indicate that the petitioner has filed the following immigrant petitions:

[redacted]

Please submit evidence that you have had the ability to pay all sponsored beneficiaries his/her respective proffered wage as of each respective priority date onward. *Include a list of the date of hire, job title, proffered wage, evidence of wages paid from date of hire to present, and date of termination (if applicable).*

[3] 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The review of a petitioner's ability to pay the proffered wage, includes an examination of any wages actually paid to the beneficiary for services performed in the job offered. In this case, no documentation of such compensation has been provided.

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). 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, 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).

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine 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. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L 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.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere. In this case, without information requested in the AAO NDI, the petitioner's tax returns cannot be evaluated completely, but it is observed that the petitioner's net income has generally declined from 2006 onward, with a loss of $24,450 reported in 2009 and a modest figure of $15,379 declared in 2010. Its net current assets have also declined in the same period of time with 2009 and 2010 both reflecting losses.

Further, it may not be concluded that such analogous factual circumstances to *Sonegawa* have been presented in the record that would overcome the other evidence such as that reflected in the tax returns. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the current record does not demonstrate that uncharacteristic losses were present during the year of filing or that they occurred during a framework of profitability. Reputational factors and/or other circumstances that prevailed in *Sonegawa* have not been presented in this matter.

This office also notified the petitioner that if it is currently dissolved, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.) It is incumbent upon 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 Id.*

This office allowed the petitioner 45 days in which to provide evidence relevant to the issues set forth in the AAO's notice, including evidence that the records maintained by the state of South Carolina were not accurate and that the petitioner remains in operation as a viable business or was in operation during the pendency of the petition and appeal.

In response, the petitioner's counsel submitted a request for an indefinite extension of time[4] and also submitted some of the documents requested relevant to the ability to pay the proffered wage of $20,218 per year, consisting of copies of the petitioner's federal tax returns for 2004 through 2010. The request for an extension of time is denied.

The petitioner has failed to provide state quarterly contribution, unemployment/wage reports, the beneficiary's wage records, and evidence relevant to other sponsored beneficiaries as requested by the AAO. Therefore, the petitioner has failed to establish its continuing financial ability to pay the proffered wage.[5] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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[4] The reason given is that the petitioner's accountant/bookkeeper is out of town and the petitioner does not have access to all the records. It is unclear, for example, why it would not have access to its own workers' pay records.

[5] It is also observed that the petitioner's federal tax returns reflect that its 2009 net income and net current assets were both losses, and its 2010 net income was approximately $5,000 less than the proffered wage of $20,218. Its net current assets were -$150,021. None of these figures could cover payment of the proffered wage or establish the petitioner's *continuing* financial ability to pay pursuant to the requirements of 8 C.F. R. § 204.5(g)(2). 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 petitioner's response also failed to submit proof that the petitioner is in good standing or legally authorized to conduct business in the state of South Carolina. More than 45 days have passed and the petitioner's response failed to respond to this office's notice with a certificate of good standing or other proof that the petitioner remains in operation as a viable business. The state online records continue to reflect that the petitioner is dissolved. Thus, the appeal will be dismissed as abandoned.[6]

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 as moot.

[6] Additionally, as noted in the notice of derogatory information, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.