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

(b)(6)

DATE: JUN 2 4 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Texas Service Center. The director issued a Notice of Intent to Revok (NOIR) and revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail convenience store. It seeks to employ the beneficiary permanently in the United States as a Day Manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 22, 2005. *See* 8 C.F.R. § 204.5(d).

The director's decision revoking the approval of the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position as of the priority date.

The record shows that the appeal is properly filed 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.

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]

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

---

[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[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 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: None.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Not Accepted.
H.10. Experience in an alternate occupation: 24 months experience as a retail store manager.
H.14. Specific skills or other requirements: Blank.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a retail store manager with [redacted]Texas from July 1, 2003 until July 30, 2004. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a retail store manager with [redacted] Texas from March 15, 2000 to September 20, 2001. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> 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.

The record contains an experience letter from letterhead ( ) stating that the company employed the beneficiary as a sales associate from January 23, 2004 until June 26, 2004. However, the letter does not describe the beneficiary's duties. Moreover, the letter states that the beneficiary was a sales associate, while the labor certification states that the beneficiary was a retail store manager. Additionally, the labor certification states the name of the business as ' and states that the beneficiary "owned and managed [the] cellular products retailer." The experience letter, however, does not indicate that the name of the business is , and the AAO notes that there is another experience letter in the record from The dates of employment on the labor certification are also inconsistent with the dates of employment in the experience letter. The labor certification indicates that the beneficiary worked for from July 1, 2003 to July 30, 2004, while the experience letter states the dates of employment as January 23, 2004 to June 26, 2004.

The record also contains an experience letter from (the beneficiary), owner and manager, on stating that the beneficiary was the owner and manager of the retail stores: from November 2001 until January 2002; Store from January 2002 until May 2002; and from May 2002 until April 2003. The experience letter does not state whether the position was full-time. The letter is also inconsistent with the information contained in the labor certification. The retail businesses, are not listed on the labor certification. is listed, but it is listed as doing business as Additionally, the dates of the position for are inconsistent on the labor certification and in the letter. The labor certification lists the dates of employment as July 1, 2003 to July 30, 2004. The record also does not contain any independent, objective evidence verifying the beneficiary's self-employment. The only evidence in the record is an assumed name certificate for with receipt. This is not evidence that the beneficiary was employed as a manager for the business for the dates in question. Additionally, the beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record contains an experience letter from letterhead stating that the company employed the beneficiary as a store manager from May 2000 until December 2000. The letter is inconsistent with the information contained in the labor certification. The labor certification does not list employment with Additionally, the experience letter does not state whether the beneficiary worked full-time. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's

experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The inconsistencies in the beneficiary's experience contained in the experience letters and in the labor certification lessen the credibility of the evidence. These inconsistencies must be resolved through independent, objective evidence. 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). 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. *Id.* at 592.

The record contains an affidavit from the beneficiary dated July 3, 2012. In the affidavit, the beneficiary states that his employment history was misunderstood by counsel's assistant and that he was not asked to review the information prior to submission of the labor certification. He states that he did not know that the employment information on the labor certification was incorrect until he was asked to provide employment letters for the petition. It was then, according to the beneficiary, that he discovered that the employment information listed on the labor certification was incorrect. The beneficiary states that counsel instructed him to sign the labor certification even though he knew the information was incorrect and that counsel said that he would explains the discrepancies to USCIS.

In the affidavit, the beneficiary states that should have been a company owned by his brother; was the company that the beneficiary owned and it was not a wireless phone retailer as stated on the labor certification; and he worked at from January 2004 until June 2004 as a sales associate, not as a retail manager. The AAO notes that the beneficiary does not explain the discrepancies in the dates of employment with his brother's company. The labor certification states that the beneficiary worked 40 hours per week for " (which the beneficiary claims should have been " from March 15, 2000 to September 20, 2001, and the letter states that the beneficiary was employed as a manager from May 2000 to December 2000. The record contains a Form W-2 issued by to the beneficiary for 2000 showing wages paid to the beneficiary of $1,800. The wages paid to the beneficiary do not reflect wages paid to a full-time manager over seven months. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel argues that the director erred by citing to *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976) to support his position that employment not listed when the labor certification was certified or when the petition was filed is not credible. Counsel argues that because the beneficiary submitted experience

letters with the correct information upon filing the petition, *Matter of Leung* is inapplicable. In *Matter of Leung,* the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. In this case, the labor certification contains incorrect information regarding the beneficiary's employers, dates of employment, and positions. Additionally, the beneficiary claimed certain employment that is not mentioned in the labor certification. As the information contained in the labor certification is incorrect or omitted, the credibility of the evidence and the facts asserted subsequent to the certification of the labor certification is lessened. Therefore, *Matter of Leung* is directly applicable to the instant case. The petitioner submits no independent and objective evidence to corroborate the claimed correct employment history of the beneficiary.

On appeal, counsel argues that the mistakes on the labor certification regarding the beneficiary's employment were not discovered until after the labor certification was certified by the DOL. Counsel, in his brief, states, "[t]he Beneficiary had no other option but to sign the ETA 9089 in order to have it accepted by USCIS." Counsel further states that "[t]he employment letters containing correct details of employment prove that the [b]eneficiary acted in good faith by providing correct job details." The beneficiary, in his affidavit, states that he was instructed to sign the labor certification by counsel even though the information was incorrect because "the I-140 petition could not be filed without an original signature on the labor certification form." However, the beneficiary signed the labor certification under penalty of perjury on December 19, 2005. Part L. Alien Declaration states, in pertinent part:

> ***I declare under penalty of perjury that Sections J and K are true and correct.*** *I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621.*

The record does not contain any attempt to correct the errors or acknowledge them to the DOL or to USCIS. It was not until the petitioner responded to the director's Notice of Intent to Revoke (NOIR) that the mistakes were acknowledged. The petitioner's response to the NOIR is dated July 9, 2012, which is more than seven years after the beneficiary signed the labor certification on December 19, 2005. Moreover, the beneficiary states, in his affidavit, that he was aware of the discrepancies in his work experience when he signed the labor certification. Yet, he signed it anyway, under penalty of perjury. Additionally, on the G-325A filed with the beneficiary's I-485 Application to Register Permanent Residence or Adjust Status, the beneficiary lists his employment with [redacted] as a manager from July 2003 to July 2004, and with [redacted] as a manager from March 2000 until September 2001. The employment information on the G-325A contradicts the information contained in the labor certification and in the employment letters. The AAO notes that the G-325A was signed by the beneficiary on July 19, 2007 under penalty of perjury, almost two years after the beneficiary signed the labor certification and was aware of the errors.

The record also contains a copy of a Form ETA 750B filed by another petitioner on behalf of the beneficiary. On the ETA 750B, signed by the beneficiary on April 16, 2001 under penalty of perjury, the beneficiary states that he worked 40 hours per week as an assistant manager of a jewelry store from October 1999 to the present (the date of signing the ETA 750B). However, on the labor certification signed on December 19, 2005, the beneficiary claims to have been working 40 hours per week as a retail store manager for from March 15, 2000 to September 20, 2001, and in the the owner states that the beneficiary was employed as a manager from May 2000 until December 2000. On the Form 1040 U.S. Individual Tax Return for 2000, submitted with the beneficiary's I-485 Application, the beneficiary claims total income for the year of $1,800 which is the amount on the Form W-2 issued to the beneficiary by There is no income declared in 2000 for the 40 hour per week position with the jewelry store as listed on the ETA 750B.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

The AAO further finds that the petitioner and the beneficiary willfully misrepresented a material fact by intentionally providing false information regarding the beneficiary's work experience.

To qualify as a third preference employment-based immigrant professional, the beneficiary was required to establish that he met the petitioner's minimum education and experience requirements. *Compare* 8 C.F.R. § 204.5(g) *with* § 204.5(1)(l)(3)(ii)(C). The beneficiary has intentionally attempted to mislead the Service by misrepresenting his experience, which is consistently inaccurate in the documentation on the record. Counsel argues that the beneficiary made a good faith effort to correct the mistakes by submitting experience letters that contained the correct employment information. However, as stated previously, no attempt was made to correct the errors until the director sent a NOIR in 2012, seven years after the beneficiary admits that he was aware of the incorrect information on the labor certification.

In this case, the Department of Labor was unable to make a proper investigation of the facts when determining certification, because the beneficiary shut off a line of relevant inquiry. If the Department of Labor had known the true facts, it would have denied the employer's labor certification. In other words, the concealed facts, if known, would have resulted in the employer's labor certification being denied. *See Matter of Silver Dragon Chinese Restaurant* at 403.

Accordingly, the beneficiary's misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By misrepresenting the beneficiary's employment experience, the beneficiary and the petitioner sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue. *See also Matter of Ho*, 19 I&N Dec. at 591-592.

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

> (d) Invalidation of labor certifications. After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

As a result of the material misrepresentation in the instant case, the labor certification is invalidated.

Beyond the decision of the director,[3] the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner states that it was established on August 1, 2004 and employs four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on December 19, 2005, the beneficiary claimed to have worked for the petitioner since August 1, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

---

[3] 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).

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'l Comm'r 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'l Comm'r 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. In the instant case, the record of proceeding includes Forms W-2 issued to the beneficiary by the petitioner for the years 2006, 2007, 2008, 2009, 2010, and 2011.

The AAO notes that the social security number (SSN) of the beneficiary listed on Forms W-2 for 2006 and 2007 does not match the SSN listed for the beneficiary on Forms W-2 for 2008, 2009, 2010, and 2011. Further, it is noted that on the petition, in part 3, no SSN is listed for the beneficiary.[4] Therefore, the actual recipient of the wages paid is in question, and the AAO cannot

---

[4] 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://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft.

consider any of the Forms W-2 as evidence of wages paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* This issue must be addressed in any further filings.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

---

Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

> 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 July 12, 2012 with the receipt by the director of the petitioner's submissions in response to the director's NOIR. As of that date, the petitioner's 2012 federal income tax return was not yet due. In response to the NOIR, the petitioner submitted a Form 7004 Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns for 2011. Therefore, the petitioner's income tax return for 2010 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2005, 2006, 2007, 2008, 2009, and 2010 as shown in the table below.

- In 2005, the Form 1120 stated net income of $32,440.[5]
- In 2006, the Form 1120 stated net income of $35,404.
- In 2007, the Form 1120 stated net income of $35,512.
- In 2008, the Form 1120 stated net income of $35,016.
- In 2009, the Form 1120 stated net income of $35,413.

---

[5] The AAO notes that counsel, in the response to the NOIR, argues that since the priority date is September 22, 2005, the proffered wage should be prorated for the portion of the year that occurred after the priority date. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

- In 2010, the Form 1120 stated net income of $36,891

Therefore, for the years 2005, 2006, 2007, 2008, 2009, and 2010, 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.[6] 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 for 2005, 2006, 2007, 2008, 2009, and 2010 as shown in the table below.

- In 2005, the Form 1120 stated net current assets of $0.
- In 2006, the Form 1120 stated net current assets of $20,293.
- In 2007, the Form 1120 stated net current assets of $50,278.
- In 2008, the Form 1120 stated net current assets of $85,294.
- In 2009, the Form 1120 stated net current assets of $115,395.
- In 20010, the Form 1120 stated net current assets of $146,752.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 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.

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 (Reg'l Comm'r 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

---

[6]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.

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 the instant case, the petitioning successor has not demonstrated sufficient net income or net assets to pay the proffered wage. The petitioning successor also failed to include any evidence of historical growth of its business, its reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. 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.

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 with a finding that the petitioner and beneficiary willfully misrepresented a material fact.

FURTHER ORDER: The labor certification application is invalidated pursuant to 20 C.F.R. § 656.30(d) based on the petitioner's and the beneficiary's willful misrepresentation.