(b)(6)

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

DATE: MAY 20 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Other Worker 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,

Rachel M Irino
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The visa petition was denied by the Director, Texas Service Center (director) and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is again before the AAO as a motion to reopen. The motion to reopen will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner indicates that it is a wholesale distributor of dry cleaning and laundry supplies.[1] It seeks to employ the beneficiary permanently in the United States as a material handler (SOC/O*Net Code 53-7062.03). The director determined that the petitioner had not established that it had a continuing ability to pay the proffered wage. On appeal, the AAO also found that the record did not establish the petitioner's ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2) and, further, that it had not demonstrated the beneficiary's qualifications for the offered position.

On motion, counsel for the petitioner submits copies of the beneficiary's IRS Form W-2 Wage and Tax Statements (Form W-2s) for the years 2002 through 2007 and 2009 through 2011; copies of Maryland Unemployment Insurance Quarterly Employment Reports (Maryland Quarterly Reports) filed by the petitioner in 2008; a copy of its 2008 payroll ledger; payments made to the beneficiary in the years 2001 through 2008 in the form of cancelled checks; statements from President of . relating to his company, its financial circumstances and the beneficiary's employment; and a statement from regarding his knowledge of the beneficiary's job experience.

The requirements for a motion to reopen are found at 8 C.F.R. § 103.5(a)(2):

> (2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence . . . .

The record reflects that the motion to reopen is properly filed and timely, and that it meets the requirements for a motion to reopen, providing new evidence relating to the petitioner's ability to pay the proffered wage, as well as the beneficiary's qualifications to perform the duties of the offered position. Therefore, the motion is granted and the AAO will reopen the matter.

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[1] The petitioner has identified itself as on the Form ETA 750, Application for Alien Employment Certification, and the Form I-140, Immigrant Petition for Alien Worker. However, the Internal Revenue Service (IRS) Employer Identification Number (EIN) used by on the Form I-140 is that of Further, the IRS Form W-2 Wage and Tax Statements submitted to establish the beneficiary's earnings identify as his employer. Although the record contains an April 18, 2012 statement from President of which asserts that is the assumed business name for his company, the AAO finds no documentary evidence that has registered as its assumed business name with the State of Maryland. A search of the online records of the Maryland Secretary of State has also failed to reveal such a registration. Accordingly, the petitioner in this matter is found to be rather than

The first issue before the AAO is whether the new evidence submitted by the petitioner has established its ability to pay the proffered wage.

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 . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

On appeal, the AAO found that the evidence of record, including the petitioner's federal tax returns for 2002 through 2006, as well as its quarterly federal tax returns for this same period, did not establish a continuing ability to pay the proffered wage of $10.45 per hour ($19,019.00 per year based on 35 hours per week) from August 12, 2002, the priority date for the Form ETA 750, through August 16, 2007, the date on which the record before the director closed.

In determining a petitioner's ability to pay the proffered wage, United States Citizenship and Immigration Services (USCIS) first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by the Department of Labor (DOL) and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, 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).[2] If the petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where a petitioner's net income or net current assets do not establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its

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[2] 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).

business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Using this analytical framework, the AAO found, as discussed in its April 3, 2012 dismissal of the appeal, that the evidence of record did not demonstrate that the petitioner had had the ability to pay the beneficiary the proffered wage of $19,019.00 for the years 2002 and 2006. Accordingly, to establish its ability to pay the proffered wage on motion, the petitioner must demonstrate only that it paid the beneficiary at or above the proffered wage in each of these years or had the ability to do so.

The petitioner submits the beneficiary's Form W-2s for 2002 through 2007 and 2009 through 2011, as well as its Maryland Quarterly Reports for 2008, to establish the wages it paid the beneficiary from 2002 through 2011. The wages reported by the submitted Form W-2s and the Maryland Quarterly Reports, are as follows:

- 2002 -- $17,125.00[3]

[3] The social security number (SSN) on the Form W-2 issued to the beneficiary for 2002 is not that used by the beneficiary in subsequent years. 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 SSN fraud and misuse are serious crimes and may be subject to prosecution.

The following provisions of law deal directly with SSN 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. Specifically, the Act made it a Federal crime when anyone

- 2003 -- $17,150.00
- 2004 -- $21,360.00
- 2005 -- $21,120.00
- 2006 -- $22,630.00
- 2007 -- $24,700.00
- 2008 -- $23,750.00
- 2009 -- $23,750.00
- 2010 -- $25,050.00
- 2011 -- $26,000.00

The petitioner has therefore failed to establish its ability to pay the beneficiary the proffered wage in 2002 and 2006 based on wages paid to the beneficiary.

Counsel contends that the earnings reported on the beneficiary's 2002 Form W-2 do not reflect the bonuses he received from the petitioner during that year and that this additional income, when added to his reported wages, brings his total income for the year to $19,860.00. In support of this claim, the record contains two statements from the petitioner's president and owner, both dated April 18, 2012. In one statement, indicates that the $17,125.00 reported in Box 1 of the beneficiary's Form W-2 for 2002 represents his net income to which federal, state and FICA tax deductions must be added to determine his actual compensation of $19,860.00. In his second statement asserts that the wages reported on the beneficiary's Form W-2 for 2002 do not reflect an annual $1,000.00 bonus and $1,800.00 in monthly sales bonuses, and that the beneficiary's annual income therefore exceeds that reported on his Form W-2 by $2,800.00.

While the AAO acknowledges the assertions made by counsel and the petitioner regarding the beneficiary's true income in 2002, we do not find them to be persuasive. Pursuant to IRS instructions for the Form W-2, income reported in Box 1 of that form is to reflect the total amount of taxable income paid to an employee in earnings or other compensation, including any bonuses he or she may receive during the tax year. While certain deductions from income reported in Box 1 are allowable, e.g., money paid into pre-tax retirement or medical plans, these deductions do not include taxes withheld by an employer. As the record offers no evidence that the beneficiary in the present case was enrolled in any retirement or medical plans that would have reduced his taxable income in 2002, the AAO finds his 2002 Form W-2 to establish that he earned a total of $17,125.00 for the year.[4]

...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.

[4] The AAO notes that has submitted the cancelled checks issued to the beneficiary during 2002, which, he states, reflect the beneficiary's net income of $17,771.00 for that year. However, without earnings statements to support them, it is not possible to conclude that these

The record does not establish that the petitioner paid the beneficiary at or above the proffered wage during 2002 or 2006. Moreover, as discussed on appeal, the petitioner cannot establish its ability to pay the proffered wage based on its net income or net current assets in 2002 or 2006. Accordingly, pursuant to *Matter of Sonegawa*, the AAO will consider whether the record on motion demonstrates that the totality of the petitioner's circumstances establish its ability to pay the beneficiary the proffered wage.

In *Sonegawa*, the petitioning entity had been in business for more than 11 years and routinely earned a gross annual income of approximately $100,000.00. However, during the year in which the petition was filed in that case, the petitioner's income declined significantly as a result of changing business locations and paying rent on both the old and new locations for five months. There were also significant moving costs and a period of time when the petitioner was unable to do regular business. The legacy Immigration and Naturalization Service (now USCIS) nevertheless found that the petitioner's prospects for resuming successful business operations had been established as the record demonstrated that she was a fashion designer whose work had been featured in national magazines, that she had a client list that included celebrities and individuals who appeared on lists of the best-dressed California women, and that she was a lecturer on fashion design at design and fashion shows throughout the United States, and at colleges and universities in California.

On motion, counsel contends that the petitioner's negative net income in 2002 is not reflective of its financial situation and that the totality of its circumstances establishes its ability to pay the difference between the beneficiary's 2002 income and the proffered wage. She asserts that the petitioner's negative net income for 2002 is the result of efforts, as the petitioner's only shareholder, to minimize his company's taxable income by taking that income as compensation. The AAO, counsel states, should consider compensation of $70,500.00 as a more accurate indicator of his company's financial health in 2002, noting his ability to adjust his compensation according to his company's needs. In support of her assertions, counsel references two unpublished AAO decisions issued in 2003 and 2008 respectively, which, she indicates, favorably consider officer compensation in determining ability to pay.

Counsel additionally states that the petitioner's net income at the end of the year fluctuates, depending on cash on hand, inventory on hand, sales, and cost of goods sold and that when the loss is as minimal as the petitioner's, some flexibility should be applied to allow for the daily fluctuations involved in managing a small business.

The AAO recognizes that the sole shareholder of an S corporation has the authority to allocate the expenses of that corporation for various legitimate business purposes, including that of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the IRS Form 1120S, U.S. Income Tax Return for an S Corporation, and the petitioner's IRS Form

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payments are limited to the beneficiary's wages and the bonuses that indicates the beneficiary received in 2002. Moreover, if the submitted checks do accurately reflect the beneficiary's net income for 2002, it appears that the beneficiary's taxable income for 2002 has been incorrectly reported to the IRS.

1120S for 2002 reflects that it paid $70,500.00 in officer compensation to However, although counsel asserts that compensation was available to cover the shortfall between the beneficiary's 2002 earnings and the proffered wage, the record contains no evidence establishing that would have been willing or able, based on his personal financial obligations, to do so. No evidence establishes total personal income for 2002 and his 2002 Form W-2 issued by the petitioner indicates that his income for that year was limited to the $70,500.00 he received in officer compensation. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the petitioner cannot establish its ability to pay the proffered wage in 2002 based on the compensation paid to Further, as the AAO previously mentioned, the petitioner failed to submit verifiable evidence of wages it paid to the beneficiary in 2002 and 2006.

Counsel further asserts that, pursuant to *Sonegawa,* the petitioner is a leader in its industry, developing and marketing Eco-Friendly environmentally-safe cleaning products. She also states that is a prominent figure in the dry cleaning industry and that he has served on the board of the

In support of counsel's assertions, the record contains an April 18, 2012 statement from in which he indicates that the petitioner has been in business since 1986. He also states that the petitioner has developed and marketed environmentally safe products, including a cleaning system called as well as the first and product for other shearling type footwear and shearling accessories, which is called and is marketed by 100 dealers from coast to coast. also asserts that he is a consultant to the dry cleaning industry "via speaking engagements, as well as via internet forums and local associations," that he has served on the board of the and that the petitioner is a member of the

The record also includes an August 2004 article from the which reports that the petitioner is introducing two new products for an advertisement from the indicating that the petitioner has the running at its facilities and inviting its customers to try it on a complimentary basis; an ad for , which indicates that the petitioner is a provider of this product; a color-printed flyer for which states that the product can be obtained from the petitioner and a color brochure for " which indicates that it is also available from the petitioner.

The AAO acknowledges the preceding claims regarding the petitioner's activities and stature within the dry cleaning industry and the submitted documentation, but does not find this evidence to indicate, as counsel and assert, that the petitioner has developed products for the dry

cleaning or laundry industry. Instead, the submitted materials appear to support the petitioner's description of itself as a wholesale supplier of dry cleaning and laundry supplies, and to establish only its marketing of these supplies. The record also offers no evidence in support of claims that he consults within the dry cleaning industry or that he has served on the board of the The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings *See Matter of Soffici, supra.* Accordingly, the record fails to demonstrate the petitioner's leadership or reputation in the dry cleaning and laundry industry.

Records available from the State of Maryland establish that the petitioner has been in business since 1987, more than 25 years. However, as the AAO indicated on appeal, the record does not establish that the petitioner has experienced significant or sustained growth in its workforce or its sales over this time period. As previously discussed, the growth in the petitioner's gross sales reported in its tax returns for 2003 and 2004 was followed by a decline in those sales in 2005 and 2006, and the petitioner has provided no evidence that this decline was the result of any extraordinary business losses or expenditures. Neither has it submitted any documentation that would establish that the decline in its sales during 2005 and 2006 was followed by sustained financial growth. The AAO also notes that the IRS Form W-3 Transmittal of Wage and Tax Statements, filed by the petitioner from 2001 through 2011, reflect that while it employed five individuals in 2001, this number dropped to three in 2004, where it has remained. Further, the record as already discussed, fails to establish the petitioner as a leader in its industry or as the developer of innovative cleaning products and processes. Accordingly, the totality of the petitioner's circumstances does not demonstrate the petitioner's ability to pay the proffered wage.

Having considered the evidence submitted on motion as well as that which was previously provided, the AAO does not find the petitioner to have established a continuing ability to pay the proffered wage from April 12, 2002, the priority date of the labor certification, onwards.

On motion, the petitioner also submits evidence to overcome the AAO's determination that it has failed to demonstrate the beneficiary's qualifications for the offered position of material handler.

In evaluating a beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. It 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). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date, 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Com. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In the present case, the minimum requirements for the offered position are set forth in Part A.14. and Part A.15. of the Form ETA 750.

On appeal, the AAO noted that Part A.14. of the Form ETA 750 requires the beneficiary to have one

month of experience as a warehouse worker and that Part A.15. imposes "Other Special Requirements" that must be met by the beneficiary if he is to qualify for the offered position:

> Must be able to get along with customers, supervisors, and other employees. Must be able to work in small groups. Must be able to take instruction. Must be able to work quickly. Must be able to work independently and with minimal supervision. Must be clean and neat. Must be available for weekend, holiday and evening hours work. Flexible hours. Employer checks references. When required must be able to accept and ask for help.

With regard to any training or experience required by an offered position, the regulation at 8 C.F.R. § 204.5(l)(3) states the following requirements:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification

On appeal, the AAO found that the record did not contain the documentation necessary to establish the beneficiary's experience or that he met the special requirements indicated in Part A.15. of the Form ETA 750. On motion, the petitioner submits additional evidence in support of the beneficiary's qualifications, which consists of an April 18, 2012 statement from [redacted] who indicates that he met the beneficiary while the beneficiary was working in the warehouse of a dry cleaning business in [redacted] Maryland distributing and restocking supplies. [redacted] indicates that his relationship with the beneficiary developed during the time that the beneficiary was ordering supplies from his company and that it was an easy decision to hire him "knowing his capabilities."

In a second statement, which is undated, [redacted] indicates that his father owned the dry cleaning business where the beneficiary was working when he met [redacted] states that when his father sold the business, he served as an advisor to the subsequent owner for a period of time and that "towards the end of 1998, [he] saw [the beneficiary] working there in the warehouse." He states that he continues to see the beneficiary when he picks up supplies from the petitioner.

The AAO notes the submitted statements, but does not find them to establish the beneficiary's qualifications for the offered position. Neither the statement from [redacted] nor that from [redacted] actually states the length of time they know the beneficiary to have been employed as a warehouse worker or offers a specific description of the duties he performed, as required by the

regulation at 8 C.F.R. § 204.5(l)(3). The statements also fail to address the special requirements listed in Part A.15. of the Form ETA 750, including whether the beneficiary has demonstrated an ability to get along with customers, supervisors, and other employees, to work in small groups, to take instruction, and to work quickly, independently and with minimal supervision. Therefore, the AAO continues to find the evidence of record insufficient to establish that the beneficiary is qualified to perform the duties of the offered position.

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. Accordingly, the prior decision of the AAO will be affirmed.

ORDER: The motion to reopen is granted and the decision of the AAO dated April 3, 2012 is affirmed. The remains denied.