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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

DATE: **MAY 28 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The Director also invalidated the underlying labor certification. The case is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an information technology services company. It seeks to permanently employ the beneficiary in the United States as a computer and information systems manager. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The record shows that the appeal is properly filed, timely, and makes specific allegations 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 Form I-140, Immigrant Petition for Alien Worker, was filed on September 10, 2012. It was accompanied by a photocopied ETA Form 9089 and a note from the petitioner's owner and president requesting that the original ETA Form 9089 be obtained from an earlier Form I-140 petition (Receipt Number [REDACTED] which had been denied by the Director in 2011. The original ETA Form 9089 was filed with the DOL on October 21, 2010, and certified by the DOL on December 10, 2010.

The Director denied the instant petition, in a decision dated August 20, 2013, on two grounds:

1. There was no *bona fide* job offer to the beneficiary because the record indicated that the petitioner was not conducting business at the primary worksite locations indicated on either the labor certification or the petition when the respective forms were filed. The Director also found that the petitioner offered no explanation for the false information about the worksite locations in the labor certification and the petition, and invalidated the labor certification based on fraud or willful misrepresentation of a material fact.
2. The petitioner failed to establish its continuing ability to pay the proffered wage from the priority date up to the date the beneficiary obtains lawful permanent residence. In addition to the instant beneficiary, the Director found that the petitioner failed to establish its ability to pay the proffered wages of all the other beneficiaries of pending Form I-140 petitions.

In its appeal, filed on September 20, 2013, the petitioner contested the Director's fraud finding, stating that it had changed offices many times and had evidentiary support for the various locations. According to the petitioner, the ETA Form 9089 was certified for the work location in Federal Way, Washington, and the job opportunity has remained within the same geographical/metropolitan

statistical area, while the business address in Pennsylvania was an executive office utilized for mailing purposes. The petitioner also contended that the Director did not properly evaluate the documentary evidence of the petitioner's ability to pay the proffered wage to the instant beneficiary and other I-140 beneficiaries. The petitioner submitted copies of two lease agreements, two sublease agreements, and 70 Forms W-2, Wage and Tax Statements, issued to employees for 2012.

On March 18, 2014, the AAO issued a Request for Evidence (RFE) in which the petitioner was requested to resolve conflicting information in the labor certification and the petition, as well as in the documentation of record, with respect to the primary worksite of the beneficiary and the business activities conducted at other addresses identified in the record. To establish the *bona fides* of the job offer to the beneficiary, the AAO requested the submission of all contracts under which the beneficiary will work detailing the employment relationship between the petitioner and the beneficiary. To the extent that it intended to employ the beneficiary at a location other than the one indicated on the labor certification, the petitioner was requested to submit evidence of its advertisements for the proffered position showing that travel or relocation would be required. The AAO also requested that the petitioner submit copies of its correspondence with the DOL showing that the DOL was informed of the petitioner's intention to employ the beneficiary at a location other than its business premises and outside of the recruitment area for the position.

In response to the RFE the petitioner submitted a letter from its owner and president, dated April 17, 2014, addressing the evidentiary requests of the AAO. The letter is supplemented by some correspondence relating to a change of office location in 2010 and copies of 447 Wage and Tax Statements (Forms W-2) issued to employees for 2013.

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.<sup>1</sup>

As a threshold matter, the AAO notes that the primary worksite location of the job as identified in the 2010 labor certification – [REDACTED] in Federal Way, Washington (see Part H, lines 1-3, of the ETA Form 9089) – does not match the worksite location as identified in the 2012 petition – [REDACTED] in [REDACTED] Pennsylvania (see Part 1, and Part 6, line 4, of the Form I-140). No additional or alternative work locations were indicated on either form.

The regulation at 8 C.F.R. § 204.5(k)(4) requires that the instant petition be accompanied by an individual labor certification from the DOL. The regulation at 20 C.F.R. § 656.30(c)(2) further provides that “[a] permanent labor certification involving a specific job offer is valid only for the particular job opportunity . . . and the area of intended employment stated on . . . the Application for Permanent Employment Certification (Form ETA 9089).” In this case, the area of intended

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

employment certified by the DOL in the ETA Form 9089 is Federal Way, Washington. That work location does not accord with the area of intended employment stated in the Form I-140 petition, [REDACTED] Pennsylvania. Thus, the labor certification is not valid for the job opportunity in the instant petition. Without a valid labor certification, the petition cannot be approved. 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145. On this basis alone, therefore, the appeal must be dismissed.

The regulation at 8 C.F.R. § 204.5(c) provides that “[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act.” The DOL regulation at 20 C.F.R. § 656.3<sup>2</sup> states as follows:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* 20 C.F.R. § 656.17(1); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

In his letter responding to the AAO, the petitioner’s owner and president, [REDACTED] acknowledges that his company was set up using his personal residence as a business address, and provides the following chronology of the company’s business locations:

1. [REDACTED] in Federal Way, Washington – active location from November 2008 to January 2009; mail access only from February 2009 to December 2011.
2. [REDACTED] in Federal Way, Washington – active location with mail and employees from January 2009 to June 2010; transitioning to a new location from July 2010 to October 2010; moved to suite 305 from November 2010 to February 2011.
3. [REDACTED] in Bellevue, Washington – active location from May 2010 to March 2012.

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<sup>2</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

4. [REDACTED] in Bellevue, Washington – active location from April 2012 to June 2012; mail access only from July 2012 to November 2012.
5. [REDACTED] in Bellevue, Washington – unspecified usage from June 2012 to 2014.

The leases and subleases in the record appear to confirm the second, third, and fifth business locations. With regard to the second business location, a notice to vacate in July 2010 and email correspondence in August 2010 provide evidence of the petitioner's subsequent move from [REDACTED] to [REDACTED]. With regard to the third business location, the petitioner's sublease agreement identifies the street number as [REDACTED] not [REDACTED], and states that the petitioner's sublease began on December 1, 2010, not in May 2010. There are no leases in the record pertaining to the fourth business location, and the first location appears to be Mr. [REDACTED]'s personal residence.

The leases and subleases do not establish what sorts of business activities the petitioner has conducted in Federal Way and Bellevue, Washington, from 2009 to 2014 – in particular, whether the premises housed employees or whether they served merely as executive offices or mailing addresses. The petitioner describes the first four addresses as “active locations” but does not explain what that means. The petitioner has provided no details about its activities at the fifth address from 2012 to 2014. The petitioner only identifies one location as housing employees – [REDACTED] in Federal Way, Washington, from January 2009 to June 2010. No supporting documentation has been submitted by the petitioner to establish how any of its business premises were utilized from 2009 to 2014. The leases and subleases alone do not represent persuasive evidence that the petitioner has a worksite in Federal Way or Bellevue, Washington, at which it intends to employ the beneficiary as a computer and information systems manager. 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*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

On appeal the petitioner points out that the ETA Form 9089 was certified for a primary worksite in Federal Way, Washington, and claims that the job opportunity has remained in that metropolitan statistical area up to the present time. On the Form I-140 petition filed in September 2012, however, the petitioner indicated that the beneficiary's work would be performed in [REDACTED] Pennsylvania, and made no mention of Federal Way, Washington, or any other worksite location. In response to the AAO's RFE the petitioner asserts that it never stated the beneficiary would be working at the Pennsylvania location. However, the Form I-140 petition names [REDACTED] Pennsylvania as the worksite, in that the petitioner did not state in Part 6, line 4, that the beneficiary would be working at any other address. The petitioner now describes the address in Pennsylvania as an executive office used for mailing purposes, but has not explained why it was also identified in the petition as the place where the beneficiary's work would be performed or how that geographical location could be reconciled with the worksite location indicated on the labor certification.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without

competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

The petitioner has not submitted any contracts under which the beneficiary will be working, as requested by the AAO in its RFE. This documentation was requested for the purpose of establishing whether the petitioner will have an employer/employee relationship with the beneficiary. Nor has the petitioner submitted its advertisements for the proffered position, as requested by the AAO in its RFE. This documentation was requested for the purpose of establishing whether the petitioner intended for the job to involve travel or relocation, which might require some work to be performed at locations other than the primary worksite, and possibly in another metropolitan statistical area. Finally, the petitioner has not submitted its correspondence with the DOL during the labor certification process, as requested by the AAO in its RFE. This documentation was requested to show whether the DOL was informed of the petitioner's intention to employ the beneficiary at a location other than that indicated in the labor certification application.

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). In this case, the petitioner's failure to submit requested evidence has blocked multiple lines of inquiry.

For all of the reasons discussed above, the AAO determines that the petitioner has failed to establish that it will employ the beneficiary as a computer and information systems manager in [REDACTED] Pennsylvania, as required by the labor certification. As the petition is not accompanied by a valid labor certification, the appeal must be dismissed.

The AAO will next address the director's finding that the petitioner engaged in fraud and/or material misrepresentation. As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. *See* sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I).

The administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation for any issue of fact that is material to eligibility for the requested immigration benefit. Within the adjudication of the visa petition, a finding of fraud or material

misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. at 591-592.

Outside of the basic adjudication of visa eligibility, there are many critical functions of the Department of Homeland Security that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.

Section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true.

Section 212(a)(6)(C) of the Act governs misrepresentation and states the following:

"Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

(1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

*Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the

relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Furthermore, a finding of misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

*Finding of fraud or willful misrepresentation.* If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

Upon *de novo* review, the AAO finds that the evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. There has been an insufficient development of the facts upon which the director can make a determination of fraud or willful misrepresentation in connection with the documentation submitted to support the beneficiary's qualifications based on the criteria of *Matter of S & B-C-*, 9 I&N Dec. at 447.

Concerning the petitioner's ability to pay the proffered wage, the regulation 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 ETA Form 9089, Application for Permanent Employment Certification, 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 21, 2010. The proffered wage as stated on the ETA Form 9089 is \$94,307 per year. The ETA Form 9089 states that the position requires a Master's degree in Computer Science, engineering, math, business administration or a related field.

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 in 2008, to have a gross annual

income of \$4,297,484, and to currently employ 105 workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. On the ETA Form 9089, signed by the beneficiary on April 8, 2011, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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 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, 144 (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 Sonogawa*, 12 I&N Dec. 612, 614-15 (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 petitioner submitted the Internal Revenue Service (IRS) Form W-2 stating that the petitioner paid the beneficiary \$63,063.81 in 2012. The petitioner submitted no additional evidence of salary or wages paid to the beneficiary in any other year. Because the amount paid in 2012 is less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which was \$31,243.19. The petitioner also submitted pay stubs for the beneficiary for 2011 stating wages paid of \$20,000 through July 31. As that amount is less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wages paid and the proffered wage, which is \$74,307 in 2011. The petitioner must demonstrate its ability to pay the full proffered wage in 2010. In addition, the petitioner must demonstrate its ability to pay the proffered wage in 2013 and 2014.

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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 St. Donuts*, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 7, 2013 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2012 federal income tax return was the most recent return available. The petitioner's tax returns demonstrate its net income for 2010 through 2012, as shown in the table below.<sup>3</sup>

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<sup>3</sup> The petitioner also submitted its 2009 Form 1120, but as that document covers a time before the priority date, it will be considered only generally.

- In 2010, the Form 1120 stated net income of \$30,255.
- In 2011, the Form 1120 stated net income of -\$1,015.
- In 2012, the Form 1120 stated net income of \$408,817.

Therefore, for the years 2010 and 2011, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2010 through 2012, as shown in the table below.

- In 2010, the Form 1120 stated net current assets of \$987,839.
- In 2011, the Form 1120 stated net current assets of \$551,424.
- In 2012, the Form 1120 stated net current assets of \$845,256

Although the petitioner's net current assets in each year exceed the proffered wage, or the difference between the wages paid and the proffered wage, USCIS records indicate that the petitioner has filed 356 petitions for 188 workers from 2010 onwards. As advised by the Director, the petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains legal permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Furthermore, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

In response to the director's RFE, the petitioner submitted a spreadsheet with the names of the beneficiaries of 14 Forms I-140 submitted in 2010, which included the corresponding proffered wage from the priority date through the end of the year and wages paid in that year. The petitioner submitted the IRS Forms W-2 for the 14 additional sponsored workers to support the number

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<sup>4</sup> 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). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

provided in the spreadsheet. As noted by the Director in his decision, the petitioner prorated the proffered wages due to the beneficiaries but submitted a Form W-2 for each worker for wages paid during the entire year instead of the prorated portion of the year. Specifically, the petitioner is asserting that an entire year's worth of wages should be used to demonstrate ability to pay for less than a full year. 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. In this case, however, the petitioner has not submitted such evidence. The chart provided by the petitioner states that it had a \$1,839,551 wage obligation in 2010, that it paid \$391,322.37 to the sponsored workers, and that the difference between any actual wages paid and the proffered wage was \$1,448,229.<sup>5</sup> This amount exceeds the petitioner's net income and net current assets in 2010 and, therefore, the petitioner has not demonstrated its ability to pay the proffered wage to all sponsored workers in that year.

The petitioner also submitted IRS Forms W-2 for its employees in the years 2012 and 2013, but did not indicate which were sponsored workers (I-129 or I-140) and which were not. The petitioner did not provide a list of the proffered wages to each I-140 sponsored worker, so the AAO is unable to determine the total amount of the petitioner's wage obligation and, by extension, whether the petitioner demonstrated the ability to pay the proffered wages in those years.

Based on the foregoing analysis, the AAO determines that the petitioner has not established its continuing ability to pay all of the sponsored workers their respective proffered wages from the priority date up to the present through an examination of wages paid, or its net income, or its net current assets.

The petitioner's owner and president asserts, in the letters he submitted on appeal and in response to the AAO's RFE, that the petitioner has established its ability to pay the proffered wage by virtue of the fact that it has over 100 employees. The regulation at 8 C.F.R. § 204.5(g)(2) provides that "[i]n a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The record does not establish that the petitioner had 100 or more employees at all times pertinent to this petition – *i.e.* from October 21, 2010 (the priority date) up to the present. On its initial Form I-140 petition, filed on April 11, 2011, the petitioner stated that it currently had 30 U.S. employees. On its second Form I-140 petition, filed on September 9, 2011, the petitioner stated that it currently had 46 U.S. employees. The evidence of record does not show how many employees the petitioner had in total in 2010 and 2011. Since the petitioner has not established that it had 100 or more employees continuously from October 21, 2010 onward, the AAO will not accept the letters from its owner and president as evidence of the petitioner's continuing ability to pay the proffered wage from the priority date up to the present.

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<sup>5</sup> The list provided by the petitioner names workers it sponsored for immigrant visas only.

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 Sonegawa*, 12 I&N Dec. at 614-15.<sup>6</sup> 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 financial information submitted does not demonstrate that the petitioner had the ability to pay all of its sponsored workers their respective proffered wages in any year. The petitioner's gross receipts have increased every year, as have the overall salaries paid to its employees. The petitioner has not demonstrated that its inability to pay the proffered wage to all its sponsored workers in any year was due to a situation similar to that presented in *Sonegawa*.

For all of the reasons discussed above, the AAO determines that the evidence of record does not establish the petitioner's continuing ability to pay the proffered wage from the priority date of October 21, 2010 up to the present.

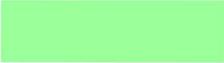
#### Conclusion

For the above state reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

For the above stated reasons, the Director's finding of fraud against the petitioner is withdrawn. The Director's invalidation of the labor certification is also withdrawn.

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<sup>6</sup> The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.



In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

**FURTHER ORDER:** The director's finding of fraud and misrepresentation against the petitioner is withdrawn. The director's action invalidating the labor certification is withdrawn.