



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
LIN 07 167 52617

Office: NEBRASKA SERVICE CENTER

Date:
DEC 04 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a slaughterhouse and meat processing business. It seeks to employ the beneficiary permanently in the United States as a religious ritual slaughterer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 16, 2008 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien Employment Certification, as certified

¹ The AAO notes that the petitioner has filed two previous Forms I-140, Immigrant Petition for Alien Worker, on behalf of the instant beneficiary. The two prior Forms I-140 were both denied by the respective directors.

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24,960 per year. The Form ETA 750 states that the position requires one year of experience in the job offered as a religious ritual slaughterer.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on April 29, 1999, to have a gross annual income of \$534,803, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 30, 2001, 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 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established

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 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 (BIA 1988).

that it employed and paid the beneficiary the full proffered wage from the priority date of April 30, 2001.

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). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[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 petitioner’s tax returns, as initially submitted, demonstrate its net income for 2001 and 2005, as shown in the table below.³

- In 2001, the Form 1120-A stated net income of -\$3,808.
- In 2005, the Form 1120 stated net income of \$3,883.

The record of proceeding does contain the petitioner’s 2002 through 2004 Forms 1120 that were submitted with the two prior petitions. The petitioner’s tax returns, from prior submissions, demonstrate its net income for 2002 through 2004, as shown in the table below.

- In 2002, the Form 1120 stated net income of -\$4,688.
- In 2003, the Form 1120 stated net income of -\$1,255.
- In 2004, the Form 1120 stated net income of \$1,890.

On appeal, the petitioner submitted amended copies of its 2006 and 2007 Forms 1120. The petitioner’s amended tax returns, submitted on appeal, demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120 stated net income of \$5,512.
- In 2007, the Form 1120 stated net income of \$6,010.

Therefore, for the years 2001 through 2007, the petitioner did not have sufficient net income to pay the proffered wage of \$24,960.

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 assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

³ The petitioner has submitted its 2001 through 2007 tax returns at various times. The AAO will discuss each submission in its decision.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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 2001 and 2005 (as initially submitted), as shown in the table below.

- In 2001, the Form 1120-A stated net current assets of \$6,801.
- In 2005, the Form 1120 stated net current assets of \$6,205.

On August 4, 2008, the director issued a request for evidence (RFE) requesting additional evidence of the petitioner's continuing ability to pay the proffered wage of \$24,960 from the priority date of April 30, 2001.

In response, counsel submitted amended copies of the petitioner's 2001 through 2007 Forms 1120.⁵ The petitioner's 2001 through 2007 amended tax returns⁶ demonstrate its end-of-year net current assets as shown in the table below.

⁴According 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.

⁵ The AAO notes that the 2001 through 2003 Forms 1120 were handwritten and that all of the tax returns were on Forms 1120 and not the appropriate Forms 1120X, Amended U.S. Corporation Income Tax Return. Thus, the validity of the returns submitted to the record is questionable at best.

⁶ The AAO notes that the address on the petitioner's 2001 through 2007 amended tax returns is listed as [REDACTED]. This address is not the same address as that on the Form I-140, Immigrant Petition for Alien Worker, or the petitioner's originally submitted federal tax returns. The petitioner's address on the Form I-140 and the originally submitted federal tax returns is listed as [REDACTED].

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

* * *

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

- In 2001, the amended Form 1120 stated net current assets of \$59,301.
- In 2002, the amended Form 1120 stated net current assets of \$60,010.
- In 2003, the amended Form 1120 stated net current assets of \$70,708.
- In 2004, the amended Form 1120 stated net current assets of \$55,106.
- In 2005, the amended Form 1120 stated net current assets of \$58,705.
- In 2006, the amended Form 1120 stated net current assets of \$59,628.
- In 2007, the amended Form 1120 stated net current assets of \$68,895.

The director denied the petition on September 16, 2008 finding that the petitioner had not established its continuing ability to pay the proffered wage of \$24,960 from the priority date of April 30, 2001.

On appeal, counsel asserts that “although the petitioner amended their taxes, and the net assets were more than adequate to pay the salary, the adjudicating officer based the decision on the old wrong returns.”

On December 23, 2008, the AAO informed the petitioner, through an RFE, that there was no evidence in the record of proceeding to demonstrate that the petitioner actually filed the amended tax returns with the Internal Revenue Service (IRS) and that the amended tax returns submitted to the record were on the Form 1120 and not the appropriate Form 1120X for amended tax returns. The AAO specifically requested:

Updated evidence of the petitioner’s continuing ability to pay the proffered wage beginning on the priority date in 2001 to the present, including IRS certified copies of the petitioner’s 2001 through 2007 tax returns and copies of the petitioner’s 2001 through 2007 Forms 941, Employer’s Quarterly Federal Tax Returns, including employees’ names and social security numbers.

In response, counsel submitted copies of the petitioner’s 2008 Forms 941 without its employees’ names and social security numbers.⁷ Counsel further submitted copies of the petitioner’s amended 2001 through 2007 tax returns (Forms 1120X) filed with IRS on March 12, 2009, more than two months after the AAO issued its RFE.⁸

⁷ The petitioner’s 2008 Forms 941 show that in each quarter of 2008, the number of employees who received wages, tips, or other compensation for the pay period was only one.

⁸ The AAO notes that the address listed on the 2001 through 2008 amended tax returns, filed on March 12, 2009, show an address of [REDACTED] the owner of the petitioner’s home address, which is different than the address given on the I-140, the originally submitted tax returns and the amended tax returns submitted to the director. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner's amended 2001 through 2008 tax returns show an increase in inventory of \$52,500 for each year,⁹ and counsel claims that "the update of the taxes is intended to more accurately reflect the ability to pay and provide evidence that the offer is bona fide." The AAO is not in complete agreement.

Since inventory is static, the AAO assumes that inventory consists of items that do not change over time and that are needed to support the company's mission. Therefore, in the instant case, if the petitioner divested itself of its inventory to pay the proffered wage, the monies from the inventory would only serve to pay the proffered wage in 2001 and 2002 with \$2,580 left after paying the proffered wage for those two years. Hence, the petitioner would only establish its ability to pay the proffered wage in 2001 and 2002, but not in 2003 through 2007 or continuing until the beneficiary obtains lawful permanent residence status.

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 Form I-140, filed by the petitioner on May 23, 2007, indicates that the business was established in 1999. The petitioner has provided its amended tax returns for 2001 through 2007, which are not sufficient to establish the petitioner's ability to pay the proffered wage of \$24,960 to the beneficiary in 2003 through 2007. In addition, the tax returns are not enough

⁹ The AAO notes that in the instant case, the petitioner has amended only one item on its tax returns (inventory) that has no effect on its net income. However, inventory (on Schedule L) does make a difference when determining the petitioner's ability to pay. While the AAO may not discount the amended tax returns, in light of the multitude of inconsistencies in this case, the AAO finds it suspect that the petitioner only realized an increase in inventory after the director issued his RFE.

evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. 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 for 2003 through 2007.

After a review of the appeal, the AAO initiated its own investigation, and on May 21, 2009, issued a notice of derogatory information (NDI) informing the petitioner that evidence in the file raised questions related to the beneficiary's prior experience, whether he qualifies for the certified Form ETA 750 position, and related to the petitioner's existence.¹⁰ The petitioner was allotted thirty days to respond from the date of the NDI.

In response, counsel submitted a brief; a contract, title, and miscellaneous documents of ownership of [REDACTED] (10/18/2004); an application to adopt an assumed name for [REDACTED] (9/28/04) to [REDACTED]; articles of incorporation for [REDACTED] by [REDACTED], a document showing a name change from [REDACTED] to [REDACTED]. (4/29/2006); [REDACTED] company information; [REDACTED] a copy of a newspaper article on [REDACTED] slaughter with sales locations; a Department of Agriculture application for license for [REDACTED] at [REDACTED] by [REDACTED] (6/19/00); a copy of the beneficiary's social security card; a copy of the beneficiary's Bachelor of Science degree in Civil Engineering from Manuel Quezan University in the Philippines; a copy of a judgment of dissolution of marriage between the beneficiary and his spouse (7/2006); a copy of a marriage certificate for the beneficiary and his spouse in Pakistan; a letter dated June 12, 2009 from the petitioner; a copy of a website for [REDACTED]; a copy of an internet article written by [REDACTED]; a copy of a website showing grocers on [REDACTED] in Chicago, IL; and copies of website articles regarding slaughterhouses and the halal meat trade.

Counsel states:

At the time of filing the initial labor certification, the petitioner clearly noted that the place of employment would be at [REDACTED]. This is a slaughterhouse called [REDACTED], which is the largest slaughterhouse in the Chicago area, and was the first to accommodate [REDACTED]. Although the slaughterhouse allows private meat packagers or brokers/distributors to use the facility for purposes of religious slaughter (halal, kosher, or otherwise), they do not employ individuals that conduct such religious slaughter. The private organizations must bring their licenses and their own employees to the plant in order to effectuate their religious slaughters there. The

¹⁰ The contents of the NDI are incorporated into the record. Further elaboration of the NDI will be made only as necessary.

beneficiary has been slaughtering meat for the petitioner at [REDACTED] for many years.¹¹

The petitioner has always operated through [REDACTED], who obtains halal slaughtered meat from the slaughterhouse and then distributes it to various Muslim retailers, wholesalers, and organizations. . . .He has always operated under the name, [REDACTED] from 1989 until the current time. [REDACTED] lives in Glendale Heights, and uses his home address for corporate registration and mailing purposes. Since he is often on the road, since his business is distribution, resale, and delivery, he prefers to have his mail delivered to his home address for convenience. This does not negate the fact that he has a viable and ongoing business enterprise and that he conducts the business nor the fact that he obtains slaughtered animals for distribution. Obviously, [REDACTED] can neither store, package or slaughter animals from his home address. In addition, he cannot use the slaughterhouse address for his business mailings or as his business site. He only uses their facility, as is required by Federal, State, County and local codes. Please note the invoices from [REDACTED] which clearly show that the animals are sold to the petitioner, but shipped to other retailers or distributors. [REDACTED] is initiator of the halal meat process and then acts as a wholesaler to the stores that he supplies.

Beneficiary's Clarification

The information regarding the beneficiary's prior degrees from the Philippines is irrelevant, and the beneficiary admits the truth of same; however, a copy of the degree is also enclosed for your review. The notation in the NDI that states that the beneficiary never attended the I-20 noted school, namely, University of Detroit in Michigan is not only irrelevant, however, it is wholly incorrect. We have enclosed proof from the University that the applicant did register and attend the school. In addition, we have attached proof that he indeed reside in Detroit after entering the U.S., again, contrary to the findings of the NDI. The beneficiary did fall out of student status, as often happens with students, however, there was never any finding of fraud or misrepresentation against the beneficiary. . . .

The beneficiary has worked for and has disclosed his employment with [REDACTED] [REDACTED] is located at [REDACTED], only a few minutes from the Chiappetti slaughterhouse. Since the beneficiary works two full time jobs, and he lives with others and his mail is often lost, he has sometimes used the [REDACTED] address to receive mail. This neither negates the bases of eligibility for the petition, nor does it modify any of the representations given thus far. The addresses used or not used by the beneficiary are irrelevant and are not part of the Adjudicator's Manual

¹¹ Although counsel claims that the beneficiary has been slaughtering meat for the petitioner at [REDACTED] for many years, the record of proceeding does not contain any evidence of this employment by the petitioner (Forms W-2, Forms 1099-MISC, payroll records, etc.).

for use in determining the approvability of this petition and this factor need not be considered. During all periods of time that the beneficia was employed by KC Mart, he was working for the only owner, [REDACTED] and no others. The beneficiary is unaware of the history of the KC Mart prior to ownership by [REDACTED] nor the history of the store after his completion of employment there, and again, such facts are not central to the basis of approval.

The beneficiary has had only one social security number, has only used one social security number, his legal name is [REDACTED], and has used no other names. Other people have misspelled his name as [REDACTED], and he has sometimes used his middle name as an initial, or not used it at all. He has never used any other configurations. He has never authorized anyone to use either his name or SSN. It should be noted that he was previously married to [REDACTED], however, she had her own SSN and, to the best of the beneficiary's knowledge, she never used his SSN. We have provided identification and name documentation now, as well as the fact the [the beneficiary's] passport is in the custody of the DHS, he has been fingerprinted by the DHS, and no allegations of an alias have ever been alleged or proven by the government. . . .

Successor-in Interest – No new filing necessary

Kindly note that Kay Cee Mart, S & J's Lisbon Locker, and KC Maiz Food neither are nor were ever affiliated or associated with this petitioner in any way. Although there may be similarities in name, there was never any actual enterprise, control or ownership of these two businesses. In addition, although the reviewing officer may have called the business and post office existing at the old KC Mart address (where the beneficiary established his experience), both the new business owner at that location and the post office do not realize that slaughter does not take place at the business address, only at the slaughterhouse. In addition, since the new business has nothing in common with KC Mart, other than location, their opinions, interpretations, or current telephone number are irrelevant to the adjudication of this matter. KC Mart changed owners many times. This beneficiary was validly employed with KC Mart until 2001 and the proof of employment meets the DOL and DHS standards. The fact that the employer has since terminated the business is not a relevant inquiry.

* * *

The AAO has also requested evidence of the petitioner's current business status, proof that the business is the entity on the visa petition, labor certification, or a successor-in-interest, to show that the entity on the I-140 and the labor certification are the same. The labor certification was filed by [REDACTED] and this petition was filed by [REDACTED]. All licenses of the employer, applications, assumed names and usages are [REDACTED] as notable in the evidence attached.

We are hoping that the following chart will explain the name concerns:

- [REDACTED] was incorporated in 1999 by sole proprietor, [REDACTED] the current sole proprietor, and employer under this I-140.
- Labor certification filed in 2001 by [REDACTED]
- [REDACTED] was involuntarily dissolved as a corporation in 3/2002, however, the business continued under the same name and entity as [REDACTED] at the same location, for the same purpose, with all licenses issued in that name until 2008.
- [REDACTED] was created by [REDACTED] in 2004 for the purpose of operation of [REDACTED] at the same location, for the same purpose. The business was then operated as [REDACTED]
- [REDACTED] filed Articles of Amendment, modifying its name from [REDACTED] to [REDACTED] on April 10, 2006.

Please note that at all times from 2001 to the present, the sole proprietor, sole director, and sole shareholder has always been [REDACTED]. In addition, the location, nature of the business, and the employees have never changed throughout these periods of time. . . .

* * *

Conclusion

The name change is not inherently disqualifying, as petitioner demonstrates continuity and no change in the employer. The employer has restored and perfected the evidence in effect as of the date of filing, and no new or amended petition is required. The submission of the proper tax returns is not a material change. The tax returns are certified by the IRS and the net assets and/or income of the employer exceeds the proffered wage, thereby showing a clear ability to pay.

The AAO is not convinced by counsel's arguments. As noted above, the petitioner has not established its continuing ability to pay the proffered wage from 2003 to the present. In addition, the multitude of inconsistencies in the record are so large that it is impossible to distinguish them. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The beneficiary entered the United States on January 2, 1993 on an F-1 (student) visa. While counsel submitted a copy of letter, dated January 19, 1993, from [REDACTED] of University of Detroit Mercy stating that the beneficiary was enrolled at the University "as a full-time student studying a Master's degree in Civil Engineering," there is no evidence that the beneficiary

actually attended the University (no transcripts, etc.). In fact, on the Form G-325A, submitted by the beneficiary, in conjunction with a Form I-485, filed in 1997, the beneficiary stated that he began working in March 1993 (approximately two months after entering the U.S.) for Montgomery Amoco, Montgomery, Illinois as a technician.¹² The beneficiary left Montgomery Amoco in August 1995 and began working at [REDACTED] in Chicago, Illinois as a technician. Pro-Tech [REDACTED] was incorporated by the beneficiary's brother, [REDACTED] on November 5, 1997, and the beneficiary is the President and Secretary of the entity. In addition, as noted by counsel in her brief, the address for [REDACTED] is [REDACTED], Chicago, Illinois 60609, the same address as the beneficiary's home address as listed on the Form I-140. Therefore, from the evidence submitted to the record of proceeding, it appears that the beneficiary never had any intention of attending the University, and therefore, sought and procured entry to the United States by misrepresentation.

With regard to the beneficiary's prior experience, the petitioner has submitted a copy of a letter, dated June 19, 2001, from [REDACTED] that states:

This is to certify that [the beneficiary] of [REDACTED], Chicago, IL 60609, has worked at the said location during the months of April 1997 through January 2001.

[The beneficiary] was a full-time (40 hours or more per week) employee. His duties at K.C. Mart included but not limited to slaughter and prepare cattle, calves and goats in compliance with Islamic slaughtering rituals and requirements.

The petitioner has not submitted any additional evidence of the beneficiary's prior experience in response to the AAO's NDI (no Forms W-2, Forms 1099-MISC, copies of the beneficiary's tax returns, etc.) to corroborate the beneficiary's claims. In addition, the beneficiary did not list his employment with K.C. Mart when he filed Form G-325A on October 18, 1997.

Furthermore, in response to the NDI, the beneficiary claims to have lived in Detroit, near the school, from January 2003 until May 2004 at [REDACTED] and [REDACTED] in Dearborn, MI. The beneficiary further claims that his social security card was sent to his foreign student advisor at the University of Detroit Mercy. The social security card does show that it was mailed to the University of Detroit Mercy and states that it is for work only with INS authorization. However, there is no date as to when the social security card was mailed to the University of Detroit Mercy. The AAO's investigation shows that the social security card was issued in Michigan between January 1, 1993 and December 31, 1994. The beneficiary stated on Form G-325A that he was employed by Montgomery Amoco, Montgomery, Illinois from March 1993 to August 1995. The AAO's investigation also shows only one address for the beneficiary in Michigan, the [REDACTED] address. The investigation shows that the beneficiary used this address from December 1993 to September 2003. Other addresses used by the beneficiary include:

¹² The beneficiary was supposed to be attending the University in Michigan.

- 1) [REDACTED] – October 1993 – August 1995
- 2) [REDACTED] – February 1996 – June 1996
- 3) [REDACTED] – October 1996
- 4) [REDACTED] – August 1997
- 5) [REDACTED] – August 1995 – December 1999
- 6) [REDACTED] – October 2002 – December 2002
- 7) [REDACTED] – June 2004 – December 2004
- 8) [REDACTED] – January 2003 – July 2005
- 9) [REDACTED] – June 2004 – February 2006
- 10) [REDACTED] – May 2005 – August 2008
- 11) [REDACTED] – December 1996 – April 2009

The Form G-325A, signed by the beneficiary on October 18, 1997, shows the beneficiary's address as [REDACTED] from March 1993 to June 1994 and at [REDACTED] from June 1994 to the present (October 18, 1997). The AAO cannot reconcile how the beneficiary could live in so many places at the same time, including two different states.¹³

In response to the NDI, both the beneficiary and the petitioner claim that the beneficiary conducted slaughters "for many years" at [REDACTED] and [REDACTED]. However, no evidence was submitted from any of these slaughterhouses corroborating the beneficiary's and petitioner's claims. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

With regard to the petitioner, counsel states:

Please note that at all times from 2001 to the present, the sole proprietor, sole director, and sole shareholder has always been [REDACTED]. In addition, the location, nature of the business, and the employees have never changed throughout these periods of time.

However, the AAO notes that the Form I-140 was filed by [REDACTED] on May 23, 2007 with an address of [REDACTED] over a year after [REDACTED] changed its name to [REDACTED] on April 10, 2006. [REDACTED] address is listed as [REDACTED]

The petitioner claims on Form I-140 that it was established on April 29, 1999. The address given on the petitioner's originally submitted tax returns was [REDACTED]

¹³ In response to the NDI, the beneficiary stated that he only worked at [REDACTED] for a short time while he was employed by K.C. Mart. However, the AAO notes that the address given by the beneficiary on Form I-140 is that of [REDACTED]

^{14 15} The petitioner's EIN for the years 2001 through 2003 was

. was dissolved on March 15, 2002. However, counsel claims that the petitioner continued under the same name, same location, with the same purpose, and all licenses were issued in that name until 2008. According to the petitioner's tax returns, it continued to file its taxes as a corporation although its status as a corporation had been dissolved in 2002.

purchased a property at from and the property was incorporated on September 23, 2004 as The petitioner's EIN became On September 28, 2004, adopted an assumed name of On April 10, 2006, became with an address of

Although the petitioner's original tax returns show its address as the petitioner's 2005 Forms 941 list its address as and its 2008 Forms 941 list its address a

In response to the NDI, the petitioner states:

- We use our corporation address and this is also my home address because we use our basement as office. The previous address, was our previous office address. We do not slaughter any animals at these addresses. We slaughter our animals at different slaughter houses, e.g. and
- address, phone number is where we have our retail grocery and meat store. Which operate[s] under name of
- All our state meat and poultry broker licenses are issued under name and address is

¹⁴ The petitioner claims that this address was the address of his accountant, and the AAO notes that this is, indeed, the address given for the accountant on the petitioner's originally submitted tax returns.

¹⁵ It is noted that the petitioner's amended Forms 1120 show an address of and the petitioner's Forms show its address as . The address appears to be the home address of the petitioner's owner.

¹⁶ In response to the NDI, counsel states that the petitioner "can neither store, package or slaughter animals from his home address." However, the AAO notes that one of the invoices submitted from does show that the petitioner received meat at his home address. In addition, two

In conclusion, the AAO is not convinced that the beneficiary qualifies for the proffered position or that the petitioner legitimately conducts business based on the documentation provided. The petitioner has used several different addresses, including his accountant's, has failed to explain what happened to the business at the [REDACTED] address, has filed tax returns as a corporation even though its corporate status was dissolved, and has filed amended tax returns with the IRS only after the AAO requested additional evidence of its ability to pay the proffered wage. In addition, the petitioner has received two different EIN numbers, but claims to be the same entity as the original [REDACTED]

The beneficiary entered the United States in January 1993 as a student in Michigan, obtained his social security card valid for work with the Service's authorization, then moved to Illinois two months later, began work as a auto technician with Montgomery Amoco in March 1993, started working with his brother at [REDACTED] in 1995, and appears to have lived in several different places at the same time. The AAO is not convinced that the beneficiary ever intended to attend the University of Detroit Mercy to obtain his Master's degree in civil engineering.

While the petitioner's explanation for the confusion is plausible, the investigation combined with the discrepancies in the documentation, leads us to question the evidence provided. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

invoices from [REDACTED] do not show where the meat was shipped. They only show the petitioner's home address.