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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 31 2009  
EAC 02 289 51484

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to  
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

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

The regulation at 8 C.F.R. § 103.2(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence and affidavits with the motion demonstrates that the beneficiary met the two-year experience requirement of the labor certification (ETA 750) as of the priority date of April 19, 2001.<sup>1</sup>

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<sup>1</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (“USCIS”) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL’s final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from ██████████ Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as an auto service station manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the requisite two years of experience as required by the labor certification and denied the petition accordingly. The AAO concurred with the director's decision on appeal.

The record shows that the motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the AAO's May 20, 2005 dismissal, the single issue in this case is whether or not the beneficiary met the two-year experience requirement of the labor certification as of the priority date of April 19, 2001.

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

On motion, the petitioner submitted affidavits from the petitioner's owner and beneficiary, an experience letter for the beneficiary, dated August 28, 2002, from ██████████ in Jhelum, Pakistan, and an experience letter for the beneficiary, dated December 26, 1999, from ██████████ in Karachi, Pakistan.

Subsequent to the petitioner's submission on motion, an investigation regarding the beneficiary's experience with ██████████ was conducted by the American Consulate General in Karachi. The results of that investigation concluded that the beneficiary had never been employed by ██████████ that the signature on the experience letter was fraudulent, and that the ██████████ letterhead had been stolen.

As a result of this information, on December 4, 2008, the AAO issued a Notice of Derogatory Information (NDI) to the petitioner informing the petitioner that it appears the beneficiary misrepresented his prior work experience in order to meet the requirements of the certified Form ETA 750. The petitioner was also informed that the record of proceeding indicated that the petitioner had filed an additional 14 immigrant petitions (Forms I-140) and that the petitioner must establish that it had sufficient funds to pay all the wages of the beneficiaries petitioned for with the same priority date year and subsequent priority dates. The petitioner was allotted thirty days to

respond to the NDI. Counsel requested and was given an additional 45 days within which to respond to the NDI.

In response, counsel submitted a brief; a letter, dated December 29, 2008, from the petitioner to

Karachi, Pakistan; a letter, dated February 12, 2009, from (address same as above); an affidavit, from from Karachi, Pakistan; an undated affidavit from the beneficiary; copies of the petitioner's owner's 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns; copies of the petitioner's 2003, 2004, first three quarters of 2005 and 2006 through 2008 Forms 941, Employer's Quarterly Federal Tax Returns; and copies of the 2007 and 2008 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary.

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 regulation at 8 C.F.R. § 204.5(1)(3) states, in pertinent part:

(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.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 19, 2001.

USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany 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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of experience in the job offered of auto service station manager or two years of experience as a manager in any commercial enterprise. Block 15 does not state any additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of auto service station manager must have two years of experience in the job offered or two years of experience as a manager in any commercial enterprise.

On the Form ETA 750B under "Work Experience," the beneficiary signed, under penalty of perjury, on September 9, 2002 that he had been unemployed from April 2002 until the present (September 9, 2002). The beneficiary also listed his previous employment as a manager with [REDACTED] Jhelum, Karachi, Pakistan, from January 2000 to April 2002. The beneficiary does not list any additional work experience on the Form ETA 750B.

In the instant case, counsel submitted a letter, dated August 28, 2002, from [REDACTED] Jhelum, Pakistan, signed by [REDACTED], who states that the beneficiary "worked in our gas station as a manager from January 2000 to April 2002." A subsequent letter submitted by counsel, dated December 26, 1999, signed by [REDACTED] from [REDACTED] Karachi, Pakistan, states that the beneficiary worked as an assistant manager from February 1999 to December 1999. On November 13, 2003, the director denied the visa petition finding that the beneficiary did not possess the required two years of experience as certified by the labor certification at the priority date. A subsequent appeal was dismissed as no new evidence was submitted in support of the visa petition.

On motion and in response to a NDI (as a result of an investigation by the American Consulate General Karachi, Pakistan), counsel submits new evidence.

A letter, dated February 12, 2009, from [REDACTED] of [REDACTED] Karachi, Pakistan, states:

I have investigated the matter thoroughly. It is fact that [the beneficiary] was employed by one of my Manager, [REDACTED], then working here. [The beneficiary] was employed at my Gas Pump from February to December 1999 as an assistant manager upon a referral and recommendation of a gentleman from Shell Pakistan.

An affidavit, dated February 10, 2009, from [REDACTED] of Karachi, Pakistan states:

I was working as a manager at [REDACTED] during July 1998 and December 2003. The address of the station is [REDACTED], Phase II, DHA, Karachi, Pakistan.

I remember that [the beneficiary] was referred to the station for employment by one [REDACTED]. He was hired and worked as assistant manager from beginning of 1999 until the end of that year.

[The beneficiary] contacted me in September 2003 and [requested] a certificate of employment on a letterhead urgently. I searched for a letterhead for the station and was unable to find it. I did have a letterhead of [REDACTED] and provided his experience on that letterhead with the name of [REDACTED], who had referred him.

The undated affidavit submitted by the beneficiary claims:

That I was employed as assistant manager with [REDACTED] Karachi, Pakistan, from February to December 1999.

That I did not foresee the necessity of obtaining an experience certificate immediately at the time of leaving my job.

When I saw that it was imperative to obtain an experience certificate, I called the manager, [REDACTED] in about September 2003. He was still employed at the station. He responded that he will send one immediately.

When I received the experience certificate with the name of [REDACTED], I was a little surprised, but more so with the signatory. I thought may be business name may have changed but the manager is not "[REDACTED]." Accordingly, I called [REDACTED]. He said "you asked for experience certificate, I sent you one. I have no more letterheads of Sunset."

Therefore, I had to use the same experience certificate sent by [REDACTED] under pressure.

I did not either ask for the [REDACTED] letterhead nor did I ask him to sign for someone else. I did not willfully or knowingly use any fraudulent document. Much less, I did not intend to perpetrate fraud.

On motion, counsel and the beneficiary states:

By the time the petition was denied, [the beneficiary's] prior employer, [REDACTED] Limited, in Pakistan had sent him the experience certificate verifying that he was employed as an assistant manager from February 1999 to December 1999. See [REDACTED] [REDACTED] 6 (Exhibit "C").

\* \* \*

By that time my prior employer, [REDACTED], in Pakistan had sent me the experience certificate verifying that I was employed as assistant manager from February 1999 to December 1999.

In response to the NDI, counsel claims:

After an extensive investigation in this case, it has been found that the experience letter signed by [REDACTED] is not genuine. Notwithstanding this untrue letter, [the beneficiary] nevertheless was actually employed from February to December 1999 with a service station named [REDACTED] Karachi, Pakistan. The letterhead and signatory of the experience was in fact a creation of one of the managers as more fully explained below. Immediately upon receipt of your NODI, [the petitioner] contacted [the beneficiary] and took information from him as to where he claimed to have gained experience before his employment with [the petitioner]. After obtaining the information, [the petitioner] wrote a confidential letter on December 29, 2008, to Mr. [REDACTED], the original of which is attached herewith as Exhibit "B." As you will see, [the petitioner] explained the purpose of his inquiry and his concerns of his handling very heavy cash and finding out if any possible misappropriation took place during [the beneficiary's] past employment. It is interesting to note that [the petitioner] did not compel [REDACTED] to answer his letter, but wrote him that if he chose not to answer, he should not disclose the contents of his letter to any one.

\* \* \*

Thus, it is quite clear that [REDACTED] the manager of [REDACTED] Station, is the one who made the experience letter alleged to be fraudulent and signed as [REDACTED]. Indeed, [the beneficiary] did make a request to document his employment with the Service Station. Unfortunately, the documentation although sent by [REDACTED], manager, was improper which [the beneficiary] took as genuine and used it. Other than that [the beneficiary] has absolutely nothing to do with the fraud or misrepresentation of another person.

\* \* \*

As stated hereinbefore supported by documentary evidence, the applicant was employed from February to December 1999. [The beneficiary's] only mistake is that he relied upon the document given to him by his employer's manager, which we believe is immaterial to the fact of his actual employment.

Counsel cites several precedent decisions in support of his contentions.

The AAO does not agree with counsel or the beneficiary. Although the petitioner's prior attorney pled guilty to several counts of filing fraudulent labor certification applications and employment petitions, the beneficiary's eligibility is decided by the documentation provided in the record of proceeding. Only on motion does the beneficiary submit additional evidence that he meets the two-year experience requirement at the priority date of the labor certification. He does not mention the additional employment on the signed copy of the Form ETA 750B (on September 9, 2002),<sup>2</sup> under penalty of perjury, which requests in question 15 that the beneficiary list "all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9."<sup>3</sup> In addition, the beneficiary does not list the employment with [REDACTED] on the Form G-325, Biographic Information, signed on October 16, 2002, under penalty of perjury, which requests that the beneficiary list his employment for the last five years. See footnote 2. Furthermore, although the beneficiary states that when he received the experience letter with the [REDACTED] letterhead and signature of [REDACTED] that he was surprised, he made no effort to correct the fraudulent letter, and, instead, he used the letter in an attempt to document his two years of experience as required by the labor certification before USCIS. *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.

The affidavit from [REDACTED] and the letter from [REDACTED] claim that the beneficiary worked at that service station from February 1999 to December 1999. In addition, the affidavit from [REDACTED] claims that the beneficiary had been referred to him by [REDACTED] for the position at [REDACTED]. The AAO does not understand why [REDACTED] would knowingly use a stolen letterhead from [REDACTED] (according to [REDACTED] with a forged signature to corroborate the beneficiary's work history with [REDACTED]

Furthermore, there is no evidence in the record of proceeding that confirms that [REDACTED] referred the beneficiary to Sunset Select and Service Station for employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of

<sup>2</sup> The beneficiary's experience at [REDACTED] would have occurred within the three-year time frame required by the labor certification.

<sup>3</sup> See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.

proof in these proceedings. *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)). Moreover, the beneficiary does not claim that he was referred for employment to [REDACTED] by Mr. [REDACTED] nor does he acknowledge knowing [REDACTED] describe their relationship, or explain why [REDACTED] would refer him to the station for employment. Therefore, when considering the totality of the circumstances, the AAO finds that the beneficiary's claims and new evidence are undermined by his misrepresentation before USCIS. The AAO further finds that the beneficiary knew that the experience letter at issue was false, and thus its presentation was a willful misrepresentation. The beneficiary only admitted that the experience letter was fraudulent after it was uncovered by the American Consulate General in Karachi, Pakistan. By presenting the fraudulent experience letter to the USCIS, the beneficiary knowingly and willfully misled the USCIS concerning a material and relevant matter relating to an approval of an immigrant petition.

Section 212(a)(6)(C) of the Act provides:

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.

By filing the instant petition, by not listing information on Form ETA 750B that supports his prior employment, and by submitting previous work experience using a questionable letterhead that would lead to a positive determination that the beneficiary had the required experience, the beneficiary has sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Because the petitioner has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that the beneficiary misrepresented his prior experience, we affirm our finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue.

Beyond the decision of the director, the record in this case also lacks conclusive evidence the petitioner has established its ability to pay the proffered wage of \$30,160 as of the priority date of April 19, 2001. 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 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. 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 [USCIS].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour or \$30,160 annually.

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). Relevant evidence submitted on motion as a result of the NDI includes counsel's brief, copies of the petitioner's owner's 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns, copies of the petitioner's 2003, 2004, first three quarters of 2005 and 2006 through 2008 Forms 941, Employer's Quarterly Federal Tax Returns; and copies of the 2007 and 2008 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary. Other relevant evidence includes copies of the petitioner's 2000 through 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2000 through 2002 Forms 1120S reflect ordinary incomes or net incomes from Schedule K of \$21,577, \$9,392, and \$41,828, respectively. The petitioner's 2000 through 2002 Forms 1120S also reflect net current assets of \$48,181, \$37,987, and \$85,987, respectively.

The petitioner's Forms 941 do not include the names of the petitioner's employees with their social security numbers from 2001 to the present as requested by the NDI.<sup>4</sup>

The petitioner's owner's 2001 through 2006 Forms 1040 cannot be used when determining the petitioner's ability to pay the proffered wage as the petitioner is a corporation, a separate and distinct legal entity from its owners and shareholders, and as such, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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<sup>4</sup> It is noted that the petitioner states in response to the NDI that its accountants do not keep any forms older than three years.

Therefore, the AAO will not consider the petitioner's owner's Forms 1040 when determining the petitioner's ability to pay the proffered wage as of the priority date of April 19, 2001.

The 2007 and 2008 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary by the petitioner of \$10,400 in 2007 and \$13,800 in 2008.

In response to the NDI, counsel states:

With due respect and regard to the Administrative Appeals Office, we do not know of any immigration or other law that limits the number of petitions an Employer can submit to the USCIS. We will be enlightened to know of any such provision that will clear our ignorance. As is well known, the turnover of labor in service stations and restaurants is extremely high. In the absence of any law, an employer does not and should not subject himself to the accusation of slavery of employees.

The fact is that as soon as the aliens obtain their alien resident cards, the so called green cards, to the disappointment to the Employer they leave the job. There is nothing that an employer can do. The allegation that the petitioner has filed an additional 14 immigrant petitions (Form I-140), is silent as to the period within which the petitioner filed these petitions. As far as petitioner, [XXX], remembers that they did not file these petitions at one time. Assuming that these petitions were filed over a period of time e.g., from 2001, the employer submitted the require[d] copies of its corresponding Federal Tax Returns and the Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services) approved same.

However, as again required the Federal Income Tax Returns [sic] for the employer for the years 2001 to 2006 are attached herewith as Exhibit "F." Further, [the petitioner] contacted their accountants and they provided 941 Forms for the last three years as they do not keep those forms older than three years. Accordingly, 941 Forms for the last three years are placed at Exhibit "G." As to the ability of the employer to pay the proffered wages to [the beneficiary], his W2s for the years 2007 and 2008 are attached herewith as Exhibit "H."

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, 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).

When determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided evidence that it employed the beneficiary in 2007 at a salary of \$10,400, and in 2008 at a salary of \$13,800. No evidence was submitted that establishes that the beneficiary was employed by the petitioner in 2001 through 2006.

The petitioner is obligated to show that it had sufficient income to pay the difference between the proffered wage of \$30,160 and the actual wages paid to the beneficiary in 2001 and 2002. The difference between the proffered wage of \$30,160 and the actual wages paid to the beneficiary of \$10,400 in 2007 is \$19,760. The difference between the proffered wage of \$30,160 and the actual wages paid to the beneficiary of \$13,800 in 2008 is \$16,360. Since the petitioner has not submitted any evidence that it employed the beneficiary in 2001 through 2006, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of \$30,160 in those years. In addition, a review of USCIS records reveals that the petitioner has filed additional Forms I-140 with the same priority date year and subsequent priority date years. Therefore, the petitioner is obligated to establish that it had sufficient funds to pay the proffered wages to all the beneficiaries with a priority date of 2001 and subsequent.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by federal case law. *See 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

In 2000 through 2002, the petitioner was organized as an S corporation.<sup>5</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) of Schedule K, or line 18 (2006). See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional 2001 and 2002 income and deductions shown on its Schedule K, the petitioner's net income is found on line 23 for 2001 and 2002.

In the instant case, the petitioner's net incomes for 2001 and 2002 were \$9,392 and \$41,828, respectively. The petitioner could not have paid the proffered wage of \$30,160 from its net income in 2001. In 2002, while it appears that the petitioner had sufficient funds to pay the proffered wage of \$30,160 from its net income, the petitioner has filed additional immigrant petitions with the same or similar priority date as the current beneficiary, and, therefore, it must establish its ability to pay the proffered wages to all the beneficiaries with a priority date of 2001 and subsequent. The petitioner has not done so.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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 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.

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<sup>5</sup> The petitioner's tax returns for 2003 through the present were not submitted. In addition, the petitioner's 2000 tax return was for the year preceding the priority date of April 19, 2001, and, therefore, has little probative value when determining the petitioner's ability to pay the proffered wage of \$30,160 from the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). Therefore, the AAO will not consider the petitioner's 2000 tax return except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's 2001 and 2002 net current assets were \$37,367 and \$85,987, respectively. While it appears that the petitioner had sufficient funds to pay the proffered wage of \$30,160 in 2001 and 2002 from its net current assets, the petitioner has filed additional immigrant petitions with the same or similar priority date as the current beneficiary, and, therefore, it must establish its ability to pay the proffered wages to all the beneficiaries with a priority date of 2001 and subsequent. The petitioner has not done so.

On motion and in response to the NDI, counsel claims that there is no immigration law that limits the number of petitions an employer can submit to USCIS. Counsel also points to the high turnover rate of labor in service stations and restaurants and claims "an employer does not and should not subject himself to the accusations of slavery of employees." Counsel further contends that the petitioner did not submit all of the petitions at one time and that it submitted the required copies of its federal tax returns that USCIS approved.

From the outset, it should be noted that the AAO takes issue with counsel's statement that "an employer does not and should not subject himself to the accusations of slavery of employees." At no time has the AAO or USCIS made such an accusation. The AAO has merely pointed out that the petitioner has filed additional Forms I-140 with the same priority date year as the current beneficiary and subsequent priority dates. As noted previously, 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, 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). If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore,

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In addition, counsel noted that USCIS approved other petitions that had been previously filed on behalf of other employees. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 1993. The petitioner has provided tax returns for the years 2000 through 2002. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of \$30,160 and the additional wages of the multiple beneficiaries petitioned for. In addition, the petitioner's tax returns are not enough 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 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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

**ORDER:** The motion to reopen is granted. The AAO's decision of May 20, 2005 is affirmed. The petition remains denied.

**FURTHER ORDER:** The AAO finds that the alien beneficiary fraudulently and willfully misrepresented a material fact.