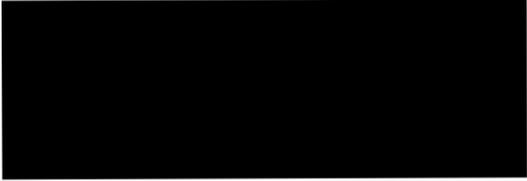




U.S. Citizenship
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Services

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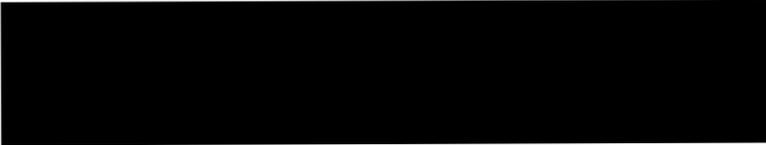
Office: NEBRASKA SERVICE CENTER

Date: NOV 02 2009

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that it offers a *bona fide* job opportunity and denied the petition accordingly.

On appeal, counsel asserts that the beneficiary is not related to or owns any part of the petitioner and that the petition merits approval.

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).

Part 2 of the Notice of Appeal or Motion (Form I-290B) states that counsel will submit a brief and/or additional evidence to the AAO within 30 days. As of this date, more than sixteen months later, nothing further has been received by this office. This decision will be rendered on the record as it currently stands. 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 petitioner must establish that its job offer to the beneficiary is *bona fide*. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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, as well as satisfy the educational and experiential requirements of the labor certification are essential elements 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).

It is noted that for the reasons explained below, the AAO concurs with the director's basis for denying the petition and additionally finds that the petition may be denied based on the petitioner's failure to establish that the beneficiary met the educational requirements of the certified position and that the petitioner failed to demonstrate its continuing financial ability to pay the proffered wage. 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 at 1002 n. 9. (noting that the AAO reviews appeals on a *de novo* basis).

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 other 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(l)(3) further provides:

(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.

With respect to the petitioner's ability to pay the proffered wage, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) states:

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 [United States Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage. It must also demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form

ETA 9089 was accepted for processing on September 8, 2006. The proffered wage as set forth on the ETA Form 9089 is \$7.55 per hour, which amounts to \$15,704 per year.

The director issued a notice of intent to deny on February 26, 2008 indicating that on Schedule C, Profit or Loss from Business of the beneficiary's individual 2006 federal income tax return (Form 1040), the beneficiary had listed the petitioning business as her own principal business, located at [REDACTED]. The same address was also listed on Part 6 of the Immigrant Petition for Alien Worker (Form I-140) as the address where the beneficiary would work. Electronic records also show that this is given as the current¹ corporate address of the petitioner. The director questioned the beneficiary's relationship with the petitioning business and the reliability of the information indicated on Part C, Item 9 of the ETA Form 9089 that questions whether the alien has an ownership interest or familial relationship with the petitioner's owners, stockholders, partners, officers or incorporators. The petitioner had checked no to this question.

The director also noted that the record contained other contradictory evidence which included: 1) a claim on Part 5 of the Immigrant Petition for Alien Worker (Form I-140) that the petitioner employed two workers while counsel's description implied that the petitioner employed more than two workers including a registered nurse, direct support professionals and other licensed or experienced support personnel; 2) the prevailing wage request issued by the California Employment Development Department reflected the beneficiary's jobsite address to be the same as that given for [REDACTED] at [REDACTED], rather than [REDACTED] as indicated on the I-140. The address appears on the copies of the petitioner's 2007 payroll checks and bank statements submitted to the record, as well as being given as the beneficiary's residential address on her 2006 Form 1040 and on the Form 1099 issued by the petitioner for 2006. It is noted that the beneficiary's residential address given on the I-140 which was filed on November 3, 2006 is [REDACTED]; 3) the petitioner's address stated on the copy of its Form 1120, U.S. Corporation Income Tax Return for 2006 provided to the record is [REDACTED]. It is noted that while this address matches the address given as the street address of the principal executive and principal business office of the petitioner, it was not used on the Form 1099 issued to the beneficiary in 2006, not used on the I-140 filed in 2006 and not used on the ETA Form 9089. The I-140 and ETA Form 9089 give the petitioner's address as [REDACTED] while as stated above, the petitioner's address used on the 2006 Form 1099 was [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

¹See <http://kepler.sos.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C2109769>. (Accessed 10/26/09).

The petitioner provided a copy of the petitioner's 1998 articles of incorporation showing [REDACTED] as the director of the petitioner, as well as a copy its application for a federal employer identification number that has been listed on its 2006 tax return and on its 2006 Form 1099 issued to the beneficiary. According to counsel's explanation [REDACTED] is now [REDACTED] but runs the petitioning business, which owns and operates four residential care homes. Counsel indicates that the facility employs two full-time employees and a contractual registered nurse. Counsel also submits a copy of the beneficiary's amended Form 1040 for 2006 indicating that previous listing on Schedule C as the beneficiary's business was a tax preparer's error. Counsel further states that the beneficiary's use of the [REDACTED] address as her residential address was part of the employer's employment incentive program whereby a worker can stay and occupy the room dedicated to the employees (if the employee chooses to). Counsel further states that on August 16, 2007, the petitioner's corporate address was changed to [REDACTED], and that this is the reason why the 2006 Form 1120 tax return filed by the petitioner still used the [REDACTED] address. She also claims this is why the beneficiary's Form 1099 still used the [REDACTED] address. Counsel denies that the beneficiary is related to, or is a partner, or has an ownership interest in the petitioning business.

The director notes in his denial that the petitioner failed to submit any evidence of current corporate stock ownership or corporate officers. He further states that the copy of the beneficiary's amended 2006 Form 1040 which disclaims any ownership relationship to the petitioner on Schedule C was undated and not certified as filed with the Internal Revenue Service. We note that simply asserting that the reported tax return was a tax preparer's error does not qualify as independent and objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. The petitioner did not submit any such evidence on appeal.

The director additionally notes that other than counsel's statements relating to the number of workers at the facility, no further evidence was provided to substantiate the corporate petitioner's staff members even though four residential care homes are owned and operated by the petitioner. **It is additionally noted that counsel's explanation relating to the petitioner's use of the [REDACTED] address on the 2006 Form 1099 makes no sense if it is claimed that its address did not change from [REDACTED] to the [REDACTED] address until August 16, 2007.** Moreover, it is unclear why the petitioner used an address at [REDACTED] as its corporate address on the I-140 and on the ETA Form 9089, which were both filed in September and November 2006, respectively, and are not consistent with either address given on petitioner's 2006 federal income tax return ([REDACTED]) or on 2006

Form 1099 () issued to the beneficiary. Counsel's unsupported assertions relating to the foregoing do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Based on the above, the AAO finds that the director's denial on grounds enumerated in his denial was not reversible error. In this regard, the petitioner failed to demonstrate that the certified position represented a *bona fide* job opportunity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158 at 165.

As stated above, the AAO does not find that the petitioner's ability to pay the proffered wage of \$15,704 has been established even if the director's grounds for denial of the petition had been overcome by the petitioner. It is noted that the petitioner's 2006 Form 1120 income tax return reflects that it reported \$55,980 in net income,² \$77,359 in current assets and \$9,423 in current liabilities, yielding \$67,936 in net current assets.³

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure

² For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28. (taxable income before net operating loss deduction and special deductions) USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

As indicated above, a copy of a Form 1099 for 2006 is contained in the record. It indicates compensation of \$13,300 paid to the beneficiary by the petitioner. Copies of payroll checks issued to the beneficiary during the period from April 20, 2007 to December 20, 2007 were also provided. The 2007 checks reflect that the petitioner paid \$10,161.33 to the beneficiary in 2007.

The petitioner additionally submitted copies of its bank statements covering the period from April 13, 2007 to November 14, 2007 and a copy of its statement covering the period from December 14, 2007 to January 14, 2008. It is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay. While this regulation allows additional material "in appropriate cases," it has not been demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on a corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. It is noted that in this respect, the director instructed the petitioner in his request for additional evidence issued on November 20, 2007, that evidence of its ability to pay the offered wage as of September 8, 2006 must include the petitioner's federal tax return for the applicable years or audited financial statements for the years/quarters since 2006. The petitioner elected not to provide any audited financial statements.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner established its ability to pay the proffered wage in 2006 because either its net income of \$55,980 or \$67,936 in net current assets was sufficient to cover the \$2,404 difference between the compensation of \$13,300 paid to the beneficiary and the proffered wage of \$15,704.

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).

As indicated above, the compensation of \$10,161.33 shown to be paid to the beneficiary in 2007 was \$5,542.67 less than the annual proffered wage of \$15,704. The petitioner failed to provide any audited financial statement demonstrating that either its net income or net current assets could cover this difference. The petitioner has not demonstrated its continuing ability to pay the beneficiary’s proposed wage offer through employment and payment of wages to the beneficiary in 2007 or through its net income or net current assets.

It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in Time and Look. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, it may not be concluded that petitioner’s business operations have presented the kind of framework of profitability such as that discussed in *Sonogawa*. As noted above, one tax return provided to the record does not demonstrate that such unusual and unique business circumstances exist in this case, which is analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonogawa*.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is September 8, 2006. Demonstrating that the petitioner’s ability to pay in one year is insufficient as the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Therefore, based on the foregoing, the petitioner has failed to establish its continuing ability to pay the certified wage.

Relevant to the beneficiary’s required education for the certified job, it is noted that Part H, item 4 of the ETA Form 9089 requires that an applicant for the position of caregiver must have a high school education. Counsel’s transmittal letter, initially submitted with the I-140, suggests that a copy of the beneficiary’s high school diploma was provided, however the document submitted is not in English and is not accompanied by a certified English translation in compliance 8 C.F.R. §

103.2(b)(3), which provides:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Based on a review of the record, it may not be concluded that the petitioner demonstrated that *bona fide* job opportunity was offered. Additionally, there was insufficient evidence to establish that the petitioner has the continuing ability to pay the proffered wage or that the beneficiary had requisite high school education as set required on the labor certification. Therefore, the appeal will be dismissed on these bases.

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.