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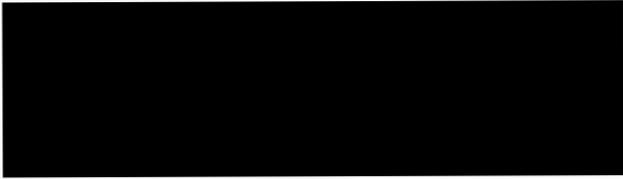
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: TEXAS SERVICE CENTER

Date:

SEP 03 2009

SRC 07 183 53094

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a beauty salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director also concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying work experience as of the visa priority date.

On appeal, the petitioner, through counsel provides additional evidence and maintains that the petitioner has established its continuing financial ability to pay the proffered wage.

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).

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 nature, for which qualified workers are not available in the United States.

It is noted that the petitioner, through counsel, clearly specified on Part 2 of the Form I-290B, that it is filing an appeal and that the brief and/or additional evidence is attached. Accordingly, the AAO will treat the filing as an appeal despite the characterization of the filing as a motion to reopen and reconsider as set forth on Part 3 of the Form I-290B.

The AAO concurs with the director's determination that the petitioner has not established the continuing financial ability to pay the proffered wage. Beyond the decision of the director, however, and for the reasons discussed below, the petition may not be approved based on the petitioner's failure to establish that the beneficiary satisfied the minimum requirements set forth on the approved labor certification. 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 at n. 9.

The regulation at 8 C.F.R. § 204.5(l)(3) 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.

(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 occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(2) further 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 establish that its ETA 750 job offer to the beneficiary is realistic. The petitioner must show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The filing date or priority date of the petition 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). In this case the priority date is September 18, 2001 as stated on Part A of the ETA 750. Therefore, the petitioner must establish that the job offer was realistic as of this priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on May 30, 2007, it is indicated that the petitioner was established on January 1, 2003 and employs more than six workers.

In this case, the beneficiary is submitted as a substitute for a beneficiary named [REDACTED], who himself had been approved as a substitute for another beneficiary identified as [REDACTED] on the ETA 750 submitted to the record. Mr. [REDACTED] I-140 was revoked when the petitioner submitted the [REDACTED] labor certification on behalf of the current beneficiary.¹

On Part 4, question 6 of the I-140, the petitioner is asked whether any immigrant visa petition has ever been filed by or on behalf of the beneficiary. The petitioner answered “no.” However, the petitioner had previously filed an I-140 on behalf of the beneficiary in this case on April 12, 2006, which was denied on March 22, 2007.² It was based on the same approved labor certification filed on behalf of [REDACTED]. One of the grounds of the director’s denial in that case was that the petitioner failed to show, as of the September 18, 2001 priority date, that the beneficiary had obtained a New York cosmetology license as required on Part 15 of the ETA 750 A. The exact language on Form ETA 750 is “must have NYS license.” The beneficiary’s New York cosmetology license was ultimately provided in this case, but as shown on the copy provided, it was not issued until March 21, 2007. In order to establish eligibility as a substitute beneficiary and benefit from the original priority date offered by the approved labor certification, the evidence must show that the new beneficiary met all requirements for the position at the time that the labor certification was initially filed. In this case, that was September 18, 2001. It is noted that the petitioner attempted to amend this requirement on Part B of the ETA 750, which is required to be signed by the new beneficiary, by stating on question 13 that the requirement is only to be eligible for a New York license. 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).

Another requirement set forth on Part A of the ETA 750 is that the beneficiary must possess two years of experience in the job offered of hair stylist. The director’s March 22, 2007 denial in the previous case also determined that the petitioner failed to establish that this qualification was established as of the September 18, 2001, priority date. It is noted that Part B of the ETA 750 in that case was signed by the beneficiary on February 6, 2006. The only previous employment experience given in Part 15 of the ETA 750 B is claimed as employment working as a hair stylist for Forma Coiff, 33 Rue Vivienne, Paris,

¹ DOL amended the administrative regulations at 20 C.F.R. part 656 through a final rulemaking published on May 17, 2007, which took effect on July 16, 2007(71 FR 27904). The regulation at 20 C.F.R. § 656.11 prohibits the alteration of any formation contained in the labor certification after the labor certification is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. For individual labor certifications filed with [DOL] prior to March 28, 2005, a new Form ETA 750 (sic), Part B signed by the substituted alien must be included with the preference petition. For individual labor certifications filed with the DOL on or after March 28, 2005, a new ETA Form 9089 signed by the substituted alien must be included with the petition. USCIS will continue to accept Form I-140 petitions that request labor certification substitution that were filed prior to July 16, 2007. As the instant I-140 was filed on May 30, 2007, its request to substitute its beneficiary was accepted.

² No appeal was taken.

France from January 2, 2002 until September 2005. Additionally, the beneficiary listed these dates of employment on Form G-325A submitted with his I-1485 application to adjust status. The employment verification letter submitted in that case was in English, from [REDACTED] manager of Forma Coiff who stated that the beneficiary "is employed by our company since 10/20/2003 as a Beautician." The letter is dated January 15, 2006. It is accompanied by a translator's certification. The original French version was not provided.

In the current case, it is further noted that the same copy of Part B signed by the beneficiary on February 6, 2006 has also been provided. Except that the beneficiary's employment at Forma Coiff has been amended. On this version of Part B of the ETA 750, the start date was treated with "whiteout" to reflect June 1998 as the beginning date of the employment, ending in September 2005. Handwritten notations suggest that from June 1998 to October 2003, the beneficiary was a hairstylist and from November 2003 to September 2005 he was a "trainer hairstylist-manager." There is no initialed date as to when these changes were made. The employment verification letter provided to support these new qualifying dates of employment is in English. It is dated July 30, 2006 and is represented to also be from [REDACTED] as Executive Director. She now states that the beneficiary was employed from June 1, 1998 to October 19, 2003 as a professional hairstylist when he was promoted as a trainer and manager of the company. The letter is in English and there is no indication that there was an original French version or translator's certification and no plausible explanation as to why the dates of employment had been so inaccurate on the letter provided to the earlier case. In view of these inconsistencies and dubious representations, the reliability of the evidence in this matter must be questioned. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO finds that the petitioner failed to demonstrate that the beneficiary's relevant work experience was sufficiently documented to have been obtained as of the priority date of September 18, 2001. 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. *Id.* at 591-592. Based on the foregoing, it may not be concluded that the beneficiary possessed the education, training, and experience specified on the labor certification beginning as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. The ETA 750A establishes the proffered wage as \$756.80 per week, which amounts to \$39,353.60.

The petitioner, Salon a Deux Inc. (formerly La Tete de Paris, Inc.) did not provide evidence of its ability to pay the proffered wage. By a request for evidence issued on December 14, 2007, the director requested such evidence for 2001 through 2007. The director also requested the petitioner to explain its relationship with La Tete de Paris, Inc., which was the named employer on the original labor certification submitted with the petition.

In response, addressing the relationship of La Tete de Paris, Inc. to the current petitioner, the petitioner provided a copy of a letter from [REDACTED] who formed the petitioner's

corporation in 2003. She states that it was the successor-in-interest to La Tete de Paris, Inc. and that both were 100% owned by [REDACTED] and operated at the same location in New York, New York and that the petitioner assumed all the rights, duties, assets and liabilities of La Tete de Paris, Inc.³ The petitioner's accountant, [REDACTED] also affirmed this information.

As to the continuing ability to pay the proffered wage, the petitioner provided a copy of its 2005 Form 1120, U.S. Corporation Income Tax Return.⁴ It provided the following information:

	2005
Net Income	-\$ 77,369
Current Assets	\$ 26,000
Current Liabilities	\$296,155
Net Current Assets	-\$270,155
Total tax (line 31)	-0-

As shown in the table above, 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.⁵ It

³ A labor certification is valid only for the employer to which it is issued, unless a merger, reorganization, transfer, or acquisition occurs that creates an employer that may be considered a successor-in-interest to the original employer. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁴ The petitioner is a C corporation. 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.

⁵ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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.

No other tax returns, audited financial statements or annual reports were submitted. Mr. [REDACTED] states in his letter, that an Internal Revenue Service (IRS) extension to file the 2006 tax returns had been filed so they were not available and similarly financial documentation for 2007 was not available. He adds that nothing indicated a substantial change from previous years. Instead, the petitioner, through counsel, submitted copies of various Wage and Tax Statements (W-2s) issued to or [REDACTED] by the petitioner and its predecessor for the following amounts:

Name	Year	Amount
[REDACTED]	2001	\$46,861
[REDACTED]	2002	\$53,054
[REDACTED]	2003	\$13,600
[REDACTED]	2004	\$16,399.50
[REDACTED]	2005	\$16,783
[REDACTED]	2006	\$16,860

Counsel asserts that these wages should be considered as funds available to pay the beneficiary because the beneficiary had been submitted as a substituted beneficiary based on the [REDACTED] approved labor certification, which in turn had also been used for [REDACTED] when he had been offered as a substitute beneficiary. Counsel asserts that for 2001 and 2002, the wages paid to Mr. [REDACTED] could be applied to the beneficiary and reflected the ability to pay the proffered wage because the petitioner paid [REDACTED] more than the proffered salary. Referring to the petitioner's tax returns of 2003 and 2004, which were not submitted in this proceeding, counsel asserts that in addition to [REDACTED] wages, funds could be deducted from the outside labor costs expended by the petitioner to be applied to the proffered wage. Counsel adds that the petitioner's bank balance of \$35,000 shown on a December 31-January 24, 2003 bank statement submitted with the petitioner's response to the request for evidence should also be considered for that year's calculation. Counsel asserts similar rationale of offsetting outside labor costs for 2005, 2006 and 2007.

The director denied the petition on February 13, 2008. He found that although the petitioner had established its ability to pay the proffered wage through the application of wages paid to former employees who the beneficiary is intended to replace for 2001 and 2002, the petitioner failed to establish its ability to pay the certified wage for the years of 2003 to 2006.

⁶ Although the petitioner asserts that [REDACTED] replaced [REDACTED], and the beneficiary will replace [REDACTED], it is unclear why the petitioner paid a substantially lesser wage in 2003 for what they assert is the same position.

On appeal, counsel submits copies of the petitioner's 2006 and 2007 handwritten federal tax returns (both appeared to have been prepared on March 9, 2008) and adopts the arguments made in her transmittal letter submitted with the response to the request for evidence. She asserts that the director failed to adjudicate the petition in accordance with the USCIS interoffice memo, *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2), HQOPRD 90/16.45 (May 4, 2004), (hereinafter "Yates Memo"). Counsel argues that the petitioner's totality of the circumstances should have been examined, and that the categories of review described in the Yates Memo including net income, net current assets and employment of the beneficiary were not properly employed by the director in reviewing the petitioner's ability to pay the proffered wage.

With regard to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.⁷ It does not supersede the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The director did not adjudicate the petitioner's ability to pay the proffered wage contrary to its guidelines. Moreover, it is difficult to see how the director could have "combined" the categories as characterized by counsel, as the petitioner submitted only the 2005 tax return to the underlying record in this proceeding. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). It failed to submit either a federal tax return, audited financial statement or annual report for 2006 or 2007 to the director as requested and as supported by the regulation at 8 C.F.R. § 204.5(g)(2) because they were not available or were not required by the I.R.S., and therefore were relieved of any liability to supply any additional documentation beyond the 2006 W-2 issued to [REDACTED]

As noted above, the petitioner denied having filed a previous petition on behalf of this beneficiary. Nevertheless, it is worth noting that in the previously filed 2003 tax return in Lin xx xxx [REDACTED] the petitioner's net income was declared to be -\$185,959 with net current assets of -\$86,808 and its 2004 return reflected net income of -\$206,539 with net current assets of -\$137,219.

As to the compensation paid to [REDACTED] and [REDACTED] in the years listed above, it may be more rational to impute [REDACTED] wages to the funds available to pay the beneficiary's proffered wage if he had been replaced because [REDACTED] compensation was closer to the proffered wage and appeared to represent full-time employment. It is observed that the I-140 filed on March 7, 2005 on behalf of [REDACTED] was approved on May 17, 2005. It was revoked on September 18, 2006. Yet his W-2s for 2005 and 2006 reflect that the petitioner paid him substantially less than the proffered wage. His wages for 2004, 2005 and 2006 were additionally similar at approximately \$16,000. His wages for 2003 were \$13,600. This raises a question as to how he was employed and whether the proffered position was intended as a full-time job. Until those questions are answered by the petitioner, his wages will not be imputed to the beneficiary. If an employee performed other kinds of work, then the beneficiary could not have replaced him or her.

⁷See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

Similarly, counsel's assertions that certain funds from the cost of outside labor taken as deductions on the petitioner's respective tax returns should be automatically applied to the payment of the proffered wage is not specifically supported by the record. Undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In such a case, the hypothesis that outside labor costs will be reduced must be supported with specificity. The identity of such individuals providing the labor, nature of services, compensation, contractual obligations, and other pertinent evidence must persuasively show that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.⁸

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 alien 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. Here, the record does not indicate that the petitioner has employed the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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

⁸ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS 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).

In this case, it may be concluded that the petitioner's ability to pay the proffered wage in 2001 and 2002 may be imputed from the wages paid to the original beneficiary of the labor certification.

In 2003, neither the petitioner's net income of -\$185,959, nor its net current assets of -\$86,808 was sufficient to establish its ability to pay the proffered wage of \$39,353.60.

In 2004 the tax return reflected net income of -\$206,539 with net current assets of -\$137,219. Neither amount was sufficient to cover the certified salary.

In 2005, both the petitioner's net income of -\$77,369 and its net current assets of -\$270,155 were insufficient to pay the proffered salary and establish the petitioner's ability to pay.

As shown on the 2006 tax return submitted on appeal, the petitioner's reported net income of \$106,752 was sufficient to cover the proffered salary and establish its ability to pay in this year.

Similarly, in 2007, the petitioner's reported net income of \$52,396 was enough to pay the proffered wage of \$39,353.60 and demonstrate its ability to pay the proposed wage offer in this year.

Similarly, we do not find that an approval based on *Matter of Sonogawa*, 12 I&N Dec. 612, (Reg. Comm. 1967) is appropriate in this case. In *Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related 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 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, while the petitioner's 2006 and 2007 tax returns reflected a positive net income, the other available returns for 2003, 2004 and 2005 consistently reflect losses as net income and net current assets in each year and do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonogawa* have been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Based on the foregoing, the petitioner has not demonstrated that it has had the continued financial ability to pay the proffered wage or that the beneficiary possessed the experience and qualifications required on the labor certification as of the priority date. The petition will be denied for these reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.