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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

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date:
SRC 08 052 52429

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

MAR 23 2010

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:

SELF-REPRESENTED

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, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a drapery rigging and maintenance firm. It seeks to employ the beneficiary permanently in the United States as a high rigger. As required by statute, a Form ETA 750 (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 requirements set forth on the approved labor certification were consistent with the visa classification sought. The director denied the petition on September 13, 2009.

On appeal, the petitioner submits an amended page one of the preference petition and asserts that that it was human error responsible for requesting the original classification.

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.

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) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on November 29, 2007, indicates that the petitioner was established in 1934, currently employs six workers, reported a gross annual income of \$1,000,000 and a net annual income of \$50,000. The petitioner sought visa classification

(Part 2, paragraph e of I-140) of the beneficiary as a skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act. The ETA 750 submitted in support of this visa classification required no training or experience in the job offered as a high rigger.

As noted above, the director observed that the certified position described on the ETA 750 required no training, education or experience. As the visa classification sought on the I-140 petition designated the skilled worker category (paragraph e), the I-140 petition was not approvable because it was not supported by the appropriate labor certification. In order to be classified as a skilled worker, the ETA 750 must require at least two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required at least two years of training or experience.

On appeal, the petitioner submits an amended page one of the I-140 that designates paragraph g (unskilled worker) as the selected visa classification. The petitioner asserts that human error may have caused the original designation and that it could be remedied by accepting the amended I-140. The AAO does not concur. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

Beyond the decision of the director, it is noted that the petitioner's continuing financial ability to pay the proffered wage of \$32,552 has not been established. 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 establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the ETA 750 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 ETA 750 was accepted for processing on April 26, 2001. The proffered wage as set forth on the ETA 750 is \$626 per week, which amounts to \$32,552 per year.

In support of its ability to pay the proffered wage, the petitioner provided copies of the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2001 and 2006. The petitioner did not submit returns for 2002, 2003, 2004, or 2005. The returns that were provided indicate that the petitioner's fiscal year is a standard calendar year. The returns contain the following information:

	2001	2006
Net Income ¹	\$ 100,671	\$ 18,790
Current Assets	\$ 141,253	\$ 125,129

¹Where 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. 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 (2001) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 23 of Schedule K in 2001 and on line 18 of Schedule K in 2006.

Current Liabilities	\$ 45,077	\$ 116,249
Net Current Assets	\$ 96,176	-\$ 8,880

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.² It 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. 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.³

The petitioner also provided a letter from its principal shareholder and president, who stated that the petitioner had employed the beneficiary intermittently during the period between 2000 and 2006. The petitioner submitted copies of Form 1099, Miscellaneous Income for 2002, 2003, 2005, and 2006. Except for 2005, which was issued by a different corporate entity and is not therefore relevant to the instant case,⁴ the Form(s) 1099 indicate that the following compensation was paid to the beneficiary by the corporate petitioner:

Year	Compensation Paid	Difference from Proffered Wage of \$32,552
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² 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.

³ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

⁴ Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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."

2002	\$19,800	-\$12,752
2003	\$29,500	-\$ 3,052
2006	\$ 8,075	-\$24,477

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 paid compensation to the beneficiary for the years and amounts stated, however no evidence of compensation was submitted for 2001, 2004 or 2005.

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).

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, although the record indicates that the petitioning business is a long-established operation, based on the submission of two corporate tax returns, in which the petitioner’s net income declined over \$80,000 and its net current assets decreased over \$100,000 from 2001 to 2006, it may not be concluded that this represents the kind of framework of profitability such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonogawa*.

It may be concluded that although in 2001, the petitioner established its ability to pay the certified wage of \$32,552 because it had sufficient net income or net current assets to cover this

amount, in 2002, 2003, 2004, 2005, and 2006, the petitioner failed to establish its financial ability to pay the proffered salary.

In 2002, the petitioner failed to provide a federal tax return, audited financial statement or annual report pursuant to the regulatory requirements set forth in 8 C.F.R. 204.5(g)(2), which would indicate whether the petitioner's net income or net current assets could cover any difference between actual compensation paid to the beneficiary and the full certified salary. As set forth above, although the petitioner paid compensation of \$19,800 to the beneficiary, this was \$12,752 less than the proffered wage. The petitioner failed to demonstrate its ability to pay in this year.

In 2003, the petitioner also failed to provide a federal tax return, audited financial statement or annual report pursuant to 8 C.F.R. 204.5(g)(2), which would indicate whether the petitioner's net income or net current assets could cover any difference between actual compensation paid to the beneficiary and the full certified salary. As set forth above, although the petitioner paid compensation of \$29,500 to the beneficiary, this was \$3,052 less than the proffered wage. The petitioner failed to demonstrate its ability to pay in this year.

In 2004, the petitioner additionally failed to provide a federal tax return, audited financial statement or annual report pursuant to 8 C.F.R. 204.5(g)(2), which would indicate whether the petitioner's net income or net current assets could cover the proffered wage. No evidence of compensation paid to the beneficiary was submitted. The petitioner failed to demonstrate its ability to pay in this year.

Similarly, in 2005, the petitioner failed to provide a federal tax return, audited financial statement or annual report or evidence of compensation paid to the beneficiary. The petitioner failed to demonstrate its ability to pay in this year. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, in 2006, as set forth above, neither the petitioner's net income of \$18,790, nor its net current assets of -\$8,880 could cover the \$24,477 difference between the beneficiary's actual compensation paid of \$8,075 and the proffered wage of \$32,552. The petitioner has not demonstrated the ability to pay the full proffered wage in this year.

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 April 26, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In this matter, the petitioner has not established its continuing financial ability to pay the proffered wage.

Upon review of the evidence contained in the record and submitted on appeal, the petitioner failed to establish that the requirements set forth on the approved labor certification were consistent with the visa classification sought. Further, the AAO concludes that the petitioner has failed to demonstrate that it has had the 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, 1002 at n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated 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.

ORDER: The appeal is dismissed.