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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

PUBLIC COPY

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[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 22 2010

IN RE: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 landscaping and plumbing business. It seeks to employ the beneficiary permanently in the United States as a landscaping foreman. As required by statute, the petition is accompanied by a Form ETA 750 Application for Permanent Employment Certification certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had indicated the wrong visa classification for the beneficiary on the petition and that the petitioner had failed to demonstrate its ability to pay. The director denied the petition accordingly.

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

As set forth in the director's denial dated September 18, 2008, the primary issue in this case involves the visa classification sought. On Part 2 of the Form I-140 petition, the petitioner checked box "e," indicating that it seeks to classify the beneficiary pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) as skilled worker. The director determined that the petitioner incorrectly indicated that the position requires work from an alien capable of performing skilled labor.

The AAO will affirm the director's denial and dismiss the appeal. Upon review, the director's decision was proper under the law and regulations. As will be discussed in detail, a petitioner may not make material changes to a petition after adjudication in order to establish eligibility. Additionally, the Act prohibits U.S. Citizenship and Immigration Services (USCIS) from providing a petitioner with multiple adjudications for a single petition with a single fee. The petitioner claims that it erroneously requested classification of a cook as an alien who is an unskilled worker.

Section 203(b)(3)(A)(i) of 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.

The specific requirements for supporting documents to establish that an alien has gained sufficient experience are set forth in the regulation at 8 C.F.R. § 204.5(l)(3):

> *Initial evidence—*
>
> (i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A

> designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is a shortage occupation with the Labor Market Pilot Program, a fully executed uncertified Form ETA–750 in duplicate must accompany the petition. The job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.
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> (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.

On September 18, 2008, the director denied the petition finding that the petitioner incorrectly indicated that the position requires work from an alien capable of performing skilled labor.

On appeal, the petitioner submitted a brief, but did not address the fact that it had indicated the wrong classification on the petition. The AAO notes that the labor certification does not call for any experience in the proffered position. Thus, the labor certification does not call for at least the required 24 months of experience in the required position as required by skilled worker positions. As discussed, the Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as a skilled worker. The petitioner signed the Form I-140 petition under penalty of perjury, attesting that the information on the form was correct. As the petition was unaccompanied by instructions from the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(3)(A)(i) of the Act. Since the director's decision was not in error, the petitioner is precluded from requesting a change of classification on appeal. A request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. 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. 1998).

The initial filing fee for the Form I-140 petition covered the cost of the director's adjudication of the Form I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.[1] If the petitioner now seeks to classify the beneficiary as an

[1] *See* http://www.whitehouse.gov/omb/circulars/a025/a025.html (last visited July 26, 2010).

unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Act, then it must file a separate Form I-140 petition requesting the new classification. On appeal, the petitioner has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

In this matter, the petitioner's appellate submission did not address the beneficiary's eligibility pursuant to section 203(b)(3)(A)(i) of the Act. With regard to regulatory requirements at 8 C.F.R. § 204.5(l), the petitioner has not specifically challenged the reasons stated for denial and has not provided any additional evidence to overcome the director's decision.

Review of the record does not establish that the beneficiary is capable of performing skilled labor. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(3)(A)(i) of the Act, and the petition may not be approved.

As set forth in the director's denial dated September 18, 2008, the other issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 750 was accepted on April 11, 2001 and certified on May 3, 2002. The proffered wage as stated on the ETA Form 750 is $15.34 per hour ($31,907.20 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1994 and to employ 10 workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a

calendar year. The petitioner did not list its net annual income and gross annual on the petition. On the ETA Form 750, signed by the beneficiary on February 27, 2001, the beneficiary claimed to have worked for the petitioner since May 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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). 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

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

Counsel submitted documentation demonstrating that the petitioner used payroll services to pay wages to the beneficiary from 2001 to 2006. Counsel submitted IRS Form W-2 Wage and Tax statements from Epix I, Inc. on behalf of the petitioner to the beneficiary for years 2001 to 2003 in the amounts of $22,908.63, $22,709.50, and $19,484.01. Counsel submitted IRS Form W-2 Wage and Tax statements from IEG PEOV, LLC on behalf of the petitioner to the beneficiary for years 2003 and 2004 in the amounts of $4,136.96 and $26,248.94. Counsel submitted IRS Form W-2 Wage and Tax statements from GI PEO, Inc. on behalf of the petitioner to the beneficiary for years 2005 and 2006 in the amounts of $33,354.50 and $33,485.00. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. The petitioner has demonstrated its ability to pay for 2005 and 2006. Since the proffered wage is $31,907.20 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is $8,998.57, $9,197.70, $8,286.23, and $5,658.26 from 2001 to 2004.

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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010. 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. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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.
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> 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 118. "[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).

The petitioner's tax returns demonstrate its net income for 2001 to 2004, as shown in the table below.

- In 2001, the IRS Form 1120S stated net income of -$86,072.00.[2]
- In 2002, the IRS Form 1120S stated net income of $24,923.00.
- In 2003, the IRS Form 1120S stated net income of $8,103.00.
- In 2004, the IRS Form 1120S stated net income of -$83,845.00.

The petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for 2001, 2003, and 2004. The demonstrated its ability to pay in 2002 since the petitioner's net income is greater than the difference between wages paid and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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.

Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form

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[2] The AAO notes that 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* IRS, Instructions for Form 1120S, 2001, at http://www.irs.gov/pub/irs-prior/f1120s--2001.pdf, Instructions for Form 1120S, 2002, at http://www.irs.gov/pub/irs-prior/f1120s--2002.pdf, Instructions for Form 1120S, 2003, at http://www.irs.gov/pub/irs-prior/f1120s--2003.pdf, Instructions for Form 1120S, 2004, at http://www.irs.gov/pub/irs-prior/f1120s--2004.pdf (last visited November 1, 2010). The petitioner had income from sources other than from a trade or business in 2002 to 2004, so USCIS takes the net income figure from Schedule K for those years. However, in 2001, the petitioner's income is exclusively from trade or business, so USCIS takes the net income figure from line 21 on the first page.

[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.

1120S and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were $26,132.00.
- The petitioner's net current assets during 2003 were $2,765.00.
- The petitioner's net current assets during 2004 were -$1,218.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for 2003 or 2004 even if the petitioner's net current assets are combined with wages paid to the beneficiary. The petitioner has demonstrated its ability to pay for 2001 based upon its net current assets.

Accordingly, from the priority date of April 11, 2001, the petitioner has not established the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets.

On appeal, counsel asserts that the wages that the payroll companies paid to the beneficiary on the petitioner's behalf demonstrate its ability to pay. Counsel's assertions on appeal do not outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the ETA Form 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa,* USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that

USCIS deems relevant to the petitioner's ability to pay the proffered wage. The petitioner has maintained between approximately $900,000.00 and $438,000.00 in gross sales since the priority date, has been in business since 1994, and has employed 10 workers, but it has failed to demonstrate that it has even close to enough net income or net current assets to pay the difference between wages actually paid and the proffered wage for 2003 and 2004. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.