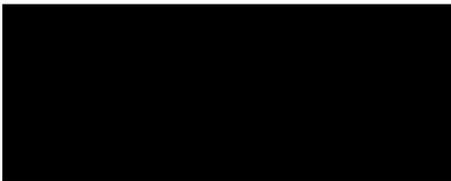




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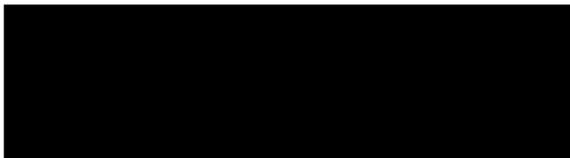
B6

FILE:  Office: VERMONT SERVICE CENTER Date: SEP 02 2010

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:

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, with a fee of \$585. 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential construction company. It seeks to employ the beneficiary permanently in the United States as a painter pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3)(A)(i). The petition is accompanied by a copy of Form ETA 750, Application for Alien Employment Certification (ETA 750), approved by the United States Department of Labor (DOL). The director found that the petition was submitted without the original or duplicate labor certification from the Secretary of Labor. Accordingly, the director denied the petition.¹

The record shows that the appeal is properly and timely filed, and makes 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). On appeal, counsel submits a brief and additional evidence to support his assertions. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

¹ The record contains another Form I-140 immigrant petition [REDACTED] filed by the petitioner on behalf of the beneficiary on November 23, 2009 while the instant appeal is pending with the Administrative Appeals Office (AAO). The new immigrant petition was filed based on a new ETA Form 9089 (ETA Case Number: [REDACTED]) certified to the beneficiary on September 30, 2009 and approved by the Texas Service Center on November 30, 2009.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The petitioner submitted a copy of labor certification from DOL for an original beneficiary and a request to substitute the beneficiary of the instant petition for the original beneficiary on the certification. The Form ETA 750 was accepted on April 12, 2002 and certified on February 26, 2004 initially on behalf of the original beneficiary. [REDACTED] The instant petition for the substituted beneficiary was filed on January 27, 2005.

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

U.S. Citizenship and Immigration Services (USCIS) may not approve a visa petition when the approved labor certification has already been used by another alien. *See Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412 (Comm. 1986).³ In this matter, counsel claimed that the underlying

³ While *Harry Bailen*, 19 I&N Dec. at 414, relies in part on language in 8 C.F.R. § 204.4(f) that no longer exists in the regulations, the decision also relies on DOL's regulations, which continue to hold that a labor certification is valid only for a specific job opportunity. 20 C.F.R. § 656.30(c)(2).

labor certification had not been used for the original beneficiary. This office consulted USCIS records which show that the petitioner never filed an I-140 petition on behalf of the original beneficiary or that the original beneficiary obtained lawful permanent resident status using the underlying labor certification with the priority date of April 12, 2002.

As set forth in the director's January 24, 2008 denial, the key issue in this case is whether or not the Form ETA 750 has been certified and whether the petitioner had valid labor certification to support the instant petition. Counsel submitted a copy of the certified labor certification [REDACTED] for the original beneficiary and claimed that the original labor certification was lost when the petitioner moved to a new location. The director could not obtain the duplicate labor certification despite two requests on October 14, 2005 and April 6, 2007 respectively. Accordingly, the director denied the petition based on filing without a valid labor certification.

During the adjudication of the appeal and pursuant to our consultation authority at section 204(6) of the Act, the AAO sent a request for a duplicate labor certification to the Employment and Training Administration, DOL. On August 17, 2010, this office received a response from DOL confirming that "the employer [REDACTED] Inc. was granted a labor certification on February 26, 2004 for a painter; the intended beneficiary v [REDACTED]. The labor certification carried a priority date of April 12, 2002." DOL provides an electronic record of this certification since the actual certified application is no longer available.

Therefore, the AAO finds that the petition was filed with a valid labor certification and thus, the director's January 24, 2008 decision is herewith withdrawn.

However, the AAO has identified an additional ground of ineligibility beyond the director's decision and counsel's assertions on appeal, and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

The regulation 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

Moreover, the reasoning in *Harry Bailen*, 19 I&N Dec. at 414 has been adopted in recent cases. *See Matter of Francisco Javier Villarreal-Zuniga*, 23 I&N Dec. 886, 889-90 (BIA 2006).

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 that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the original Form ETA 750 was initially accepted on April 12, 2002. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750.⁴ The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000 per year).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner 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. The petitioner did not claim to employ the beneficiary and did not submit any documentary evidence showing that it hired and paid the beneficiary during the relevant years from the priority date. The petitioner failed to establish its continuing ability to pay the proffered wage through the examination of wages actually paid to the beneficiary. Therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the proffered wage from the year of the priority date to the present.

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).

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:

⁴ Memo. from [REDACTED] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28_-96a.pdf (March 7, 1996).

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 an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁵ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax return in the record, the petitioner’s fiscal year is based on calendar year. The record contains the petitioner’s federal income tax returns for 2002 and 2003. The petitioner’s tax returns demonstrate its net income and net current assets for 2002 and 2003 as follows:

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.

- In 2002, the petitioner had net income⁶ of \$28,136 and net current assets of \$144,530.
- In 2003, the petitioner had net income of \$47,667 and net current assets of \$168,808.

For the years 2002 and 2003, the petitioner had sufficient net income or net current assets to pay the instant beneficiary the full proffered wage of \$26,000 and therefore, it has established its ability to pay the instant beneficiary the proffered wage for these two years.

The record does not contain the petitioner's annual reports, tax returns or audited financial statements for 2004 and thereafter. Without such regulatory-prescribed evidence, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the proffered wage from 2004 to the present. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner failed to establish its ability to pay the instant beneficiary the proffered wage for 2004 onwards because it failed to submit regulatory-prescribed evidence for these years.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed 43 I-140 immigrant petitions with service centers, for which the petitioner was responsible to pay 19 proffered wages in 2002, 17 in 2003, 17 in 2004, 15 in 2005, eight in 2006, six in 2007 and six in 2008. The record does not contain any documentary evidence showing that the petitioner paid these beneficiaries any compensation during the relevant years. Nor did the petitioner provide any information about the proffered wages for those approved beneficiaries. Assuming the beneficiaries of the approved petitions were offered the same proffered wage as the instant beneficiary, the petitioner would need \$494,000 in 2002 to pay the 19 proffered wages, and \$442,000 in 2003 to pay the 17 proffered wages. However, as previously discussed, the petitioner had net income of \$28,136 and net current assets of \$144,530 in 2002, and net income of \$47,667 and net current assets of \$168,808 in 2003. Neither the petitioner's net income nor net current assets were not sufficient to pay the 19 and 17 proffered wages in 2002 and 2003 respectively. For years 2004 through 2007, the record does not contain any documentary evidence showing that the petitioner had sufficient net income or net current assets to pay all proffered wages in these relevant years. Therefore, the petitioner failed to establish that it had continuing ability to pay all proffered wages it was obligated to from the priority date to the time the beneficiary obtained permanent resident status or the present.

⁶ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

In the instant case, the petitioner failed to submit regulatory-prescribed evidence to establish its ability to pay the proffered wages for 2004 through the present and failed to establish its ability to pay all proffered wages in 2002 and 2003. The petitioner did not provide its current number of employees on the petition. The petitioner's tax returns show that the petitioner paid salary and wage of \$32,297 in 2002 and \$59,288 in 2003. However, the petitioner filed numerous immigrant petitions which increased its obligations to pay the proffered wages substantially. Given the record as a whole, the petitioner's history of filing petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 wages.

For the above stated reasons, the director's January 24, 2008 decision will be withdrawn, however, the petition will remain denied because the petitioner failed to establish its continuing ability to pay all proffered wages for all relevant years in this case. 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 director's January 24, 2008 decision is withdrawn, however, the appeal is dismissed and the petition remains denied.