

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



BE

Date: **OCT 13 2011**

Office: TEXAS SERVICE CENTER

FILE: 

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 \$630. 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,

*Kerai S. Pontes for*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was initially approved by the Director, Texas Service Center. In connection with the beneficiary's Form I-130, Petition for Alien Relative (Form I-130), the director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. 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 petitioner filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on October 25, 2006, which was approved on December 12, 2006.<sup>1</sup>

---

<sup>1</sup> As the petitioner has applied for the beneficiary under a blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I, no certified labor certification appears in the record. *See also* 20 C.F.R. § 656.15. Schedule A is the list of occupations set forth at 20 C.F.R. § 656.5 with respect to which the Department of Labor (DOL) has determined that there are not sufficient United States workers who are able, willing, qualified and available, and that the employment of aliens in such occupations will not adversely affect the wages and working conditions of United States workers similarly employed.

Based on 8 C.F.R. §§ 204.5(a)(2) and (1)(3)(i) an applicant for a Schedule A position would file Form I-140, "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program." The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [USCIS]." 8 C.F.R. § 204.5(d).

Pursuant to the regulations set forth in Title 20 of the Code of Federal Regulations, the filing must include evidence of prearranged employment for the alien beneficiary. The employment is evidenced by the employer's completion of the job offer description on the application form and evidence that the employer has provided appropriate notice of filing the Application for Alien Employment Certification to the bargaining representative or to the employer's employees as set forth in 20 C.F.R. § 656.10(d). According to 20 C.F.R. § 656.5(a)(2), aliens who will be permanently employed as professional

The petitioner is a hospital center. It seeks to employ the beneficiary permanently in the United States as a registered nurse.

The approval of this petition was revoked as a result of the beneficiary's other immigrant visa petition. A Form I-130 was filed on the beneficiary's behalf on January 25, 2001. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence as the immediate relative of a U.S. citizen. The file contains the completed forms signed by the beneficiary, photographs, a copy of a marriage certificate between the beneficiary and [REDACTED] death certificate for [REDACTED] former wife, and a document from [REDACTED]. In addition to the documents submitted with the Form I-130, tax returns from 1998 to 2000, lease agreements for 1998 to 2000, utility statements from 2001, bank statements from 2001, and the beneficiary's and [REDACTED] drivers licenses were submitted.

In connection with the Form I-130, a decision was issued by the district director of the USCIS office located in Baltimore, Maryland on February 3, 2006. The decision denied the Form I-130 because no evidence was submitted to demonstrate that the beneficiary's prior marriage had been terminated by the appropriate [REDACTED] and that the beneficiary and [REDACTED] did not live together in a bona fide marital relationship.

Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)<sup>2</sup> no petition shall be approved if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On June 21, 2007, the director sent a NOIR to the petitioner containing the language of 204(c) above

---

nurses must (1) have received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), (2) hold a permanent, full and unrestricted license to practice professional nursing in the state of intended employment, or (3) have passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN), administered by the National Council of State Boards of Nursing. The petitioner submitted a copy of the beneficiary's Bachelor of Science degree in Nursing from the University of Maryland and a State of Maryland Department of Health and Mental Hygiene registered nursing license.

<sup>2</sup> Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

and stating the following: “in the instant matter, the beneficiary was determined to have entered into a fraudulent or sham marriage based on the weight of the evidence of record and the interview with the District Adjudication Officer in Baltimore, Maryland” and allowing the beneficiary 30 days to respond to the NOIR. The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof.

In response to the NOIR, the beneficiary submitted an affidavit stating that she received a document from [REDACTED] who she identifies as her ex-husband, stating that he had filed for divorce and planned to re-marry. The affidavit further states that she then received a document that she thought was an “official original divorce decree” and she thus considered her first marriage terminated.

Section 205 of the Act, 8 U.S.C. § 1155, states: “the Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” On December 28, 2007, the director revoked the approval of the I-140 visa petition, finding that the beneficiary entered into a fraudulent or sham marriage.

On appeal, counsel argues that Section 291 of the Act was misapplied to the revocation of the I-140.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. See also *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972). *Tawfik*, 20 I&N Dec. at 167 also states the following in pertinent part:

Section 204(c) of the Act . . . prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien’s file and must be substantial and probative.

(citing *Matter of Kahy*, Interim Decision 3086 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)).

The evidence in the record indicates that no evidence was submitted about the marriage performed in [REDACTED] to demonstrate the appropriate jurisdiction to issue a divorce decree and that the document submitted from [REDACTED] "Dissolution of Marriage" does not conform to the standards set forth by the Department of State's Foreign Affairs Manual, which states that a "certificate of divorce" would be issued in appropriate cases. Evidence verifying the location of the [REDACTED] marriage and further evidence about any termination of that marriage was requested in the director's March 3, 2005 Notice of Intent to Deny. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). As insufficient evidence was submitted to demonstrate that the beneficiary's first marriage was legally terminated, she cannot have entered into the current marriage with Mr. Adekeye. See *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). In her affidavit dated July 19, 2003, the beneficiary acknowledges that the divorce decree she submitted was not legal.<sup>3</sup>

The evidence also does not demonstrate that the beneficiary lived with her husband, [REDACTED] in a bona fide relationship indicative of marriage. See *Matter of Phillis*, 15 I&N Dec. 385 (BIA 1975). Despite being married on February 25, 2000, the lease agreement signed by the beneficiary in December 2000 stated that only one person would be residing in the [REDACTED] [REDACTED]. The lease was amended on April 24, 2001 to include a second resident, [REDACTED]. The [REDACTED] submitted for [REDACTED] issued on October 2, 2000, indicates his address as [REDACTED] while the leases in the record indicate that the beneficiary lived on [REDACTED] November 30, 2001.<sup>4</sup> The change of address submitted from the [REDACTED] of [REDACTED]

<sup>3</sup> Section 204(c) of the Act provides that no petition shall be approved if the alien "has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws." Section 204(c) of the Act was amended by section 4(a) of the Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. No. 99-639, 100 Stat. 3537, 3543 (1986). Prior to [REDACTED], Congress held hearings on fraudulent marriage and fiancé arrangements and discussed the following fraudulent acts that aliens had committed in order to obtain immigration benefits: concealment of prior undissolved marriages, issuance of counterfeit [REDACTED] in support of petitions for petitions for permanent residence, and use of "stolen identification documents and stand-in grooms and brides to 'marry' U.S. citizens." See *Immigration Marriage Fraud: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 2 (1985) (statements of INS Commissioner Alan C. Nelson and Roger L. Conner, Executive Director Federation of American Immigration Reform). After the hearing, Congress enacted IMFA and added section 204(c)(2) of the Act, 1000 Stat. at 3543. "Paper" marriages are now covered by the "...attempted ... to enter into a marriage" language of the statute. Based on the scenarios discussed in the 1985 hearing and the subsequent amendment to the Act, Congress clearly intended that section 204(c) of the Act be applied to aliens who seek an immigration benefit through a fraudulent marriage, even in cases where there is no marriage in fact.

<sup>4</sup> Three leases were submitted for the beneficiary: the first stated a year-long lease for 6329

Transportation indicates that [REDACTED] changed his address to that of the beneficiary on June 11, 2001, i.e. nearly 16 months after the date of the marriage. The financial information submitted also does not show that the beneficiary and [REDACTED] resided together earlier than August 1, 2000.<sup>5</sup>

Further, certain discrepancies exist in the statements made by the beneficiary and [REDACTED] in their statements to the [REDACTED] office.<sup>6</sup> Specifically, the beneficiary and [REDACTED] listed different witnesses to their marriage: [REDACTED] stated that [REDACTED] attended while the beneficiary stated that [REDACTED] attended. After the wedding, [REDACTED] stated that he and his new bride did nothing, while the beneficiary stated that the couple went "back home" with friends and ate. Another discrepancy in the statements was the number of faucets in the kitchen sink, with [REDACTED] stating that the sink had one faucet while the beneficiary stated that it has two faucets. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Additionally, although the beneficiary submitted obstetrics records concerning a child born in 2001, the beneficiary omitted this child on the Form I-140 or Form I-485, both filed on October 27, 2006. In an affidavit of poverty dated August 27, 2010, the beneficiary states that she has three children born on December 12, 2001, March 9, 2004, and January 13, 2006, respectively. All of these children bear the same last name of [REDACTED]. We note that this last name is different from both the beneficiary's last name and [REDACTED] last name. The first child was born during the marriage between the beneficiary and [REDACTED] the other two children were born after the divorce of the beneficiary and [REDACTED]. The obstetric records also show that "husband" is circled instead of "father of baby" on the form where it lists [REDACTED]. The forms do not indicate that [REDACTED] is the father of the baby born during the marriage between the beneficiary and [REDACTED] and no birth certificate has been provided for that child. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or

---

[REDACTED] April 1, 1998; the second stated a year-long lease for [REDACTED] beginning October 1, 1999; and the third stated a year-long lease for [REDACTED] beginning December 1, 2000. All three leases were for units located in [REDACTED]

<sup>5</sup> Five checks with the beneficiary's and [REDACTED] name and the [REDACTED] address were submitted, the earliest being dated August 1, 2000 and signed by the beneficiary and the latest dated June 2, 2001 and signed by [REDACTED]. The cable bill in the record was dated November 16, 2000; the telephone bill in the record was dated May 13, 2001; and the bank statements were dated February 10, 2001 to March 14, 2001 and April 13, 2001 through June 13, 2001.

<sup>6</sup> *Stokes v. INS*, 393 F.Supp. 24 (S.D.N.Y. 1975), set forth procedures for governmental investigations of fraud. In marriage-based immigrant petitions, this involves separating the spouses and asking the same questions to each spouse separately.

admission to the United States or other benefit provided under the Act is inadmissible.” See section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).<sup>7</sup>

The term “willfully” in the statute has been interpreted to mean “knowingly and intentionally,” as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) (“knowledge of the falsity of the representation” is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting “willfully” to mean “deliberate and voluntary”). Materiality is determined based on the substantive law under which the purported misrepresentation is made. See *Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); see also *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979).

A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant’s eligibility and which might well have resulted in a proper determination that the application be denied. See *Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961). Under this test, the beneficiary made a material misrepresentation in omitting her children on the Form I-140 and I-485 filed on October 27, 2006, and by failing to disclose to USCIS that she had three children with an undisclosed father including one child born while the beneficiary was married to the sponsor of her I-130 petition. Information pertaining to the beneficiary’s children, including the fact that the beneficiary potentially had a child with a man other than her U.S. citizen husband while she was married to that husband, is material to the bona fides of a marriage-based immigrant petition and the

---

<sup>7</sup> In *Matter of Estime*, the BIA made two conclusions: (a) “[a] determination of statutory ineligibility is not valid unless based on evidence contained in the record of proceedings” (*Matter of Estime*, 19 I&N 450, 451-452 (BIA 1987)); and (b) the review on appeal is limited to the record of proceedings before the director. *Id.* See also 8 C.F.R. § 103.8(d):

The term *record of proceeding* is the official history of any hearing, examination, or proceeding before [USCIS], and in addition to the application, petition or other initiating document, includes the transcript of hearing or interview, exhibits, and any other evidence relied upon in the adjudication; papers filed in connection with the proceedings, including motions and briefs; the [USCIS] officer’s determination; notice of appeal or certification; the Board or other appellate determination; motions to reconsider or reopen; and documents submitted in support of appeals, certifications, or motions.

USCIS administrative procedure requires the creation of a permanent A-file to house the appellate record of any denied *immigrant* visa petition. USCIS Adj. Field Manual 22.2(1)(2) (“If the grounds of denial have not been overcome, an A-file is created to house the record of proceeding and the case must be forwarded to the AAO in accordance with 8 CFR 103.3.”). If an A-file already exists for that alien, the denied petition is consolidated into the existing A-file. The system is designed to consolidate the denials common to an alien into his or her permanent A-file so that they can be reviewed with subsequent visa petitions to prevent petitioners for permanent resident status from concealing an element of ineligibility or materially changing their claims.

applicability of section 204(c) to employment-based immigrant petitions. Concealment of that fact shows a willful intention to shut off a line of inquiry relevant to the applicant's eligibility.

By omitting her children on the Forms I-140 and I-485 filed on October 27, 2006, the beneficiary sought to procure a benefit provided under the Act through a willful misrepresentation of a material fact.

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The record of proceeding contains evidence that a family-based immigrant petition was filed to obtain an immigration benefit for the beneficiary.

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

Beyond the decision of the director, the petitioner has not established that it had the continuing ability to pay the beneficiary 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the date that the I-140 was filed, which in this case was October 27, 2006. The proffered wage stated on

The AAO conducts appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>8</sup>

The evidence in the record of proceeding contains no evidence concerning the petitioner's structure. On the petition, the petitioner claimed to have been established in 1986 and to currently employ 302 workers. Although the petitioner claimed to have more than 100 workers, it did not submit a statement from a financial officer of the organization attesting to its ability to pay the proffered wage as allowed by 8 C.F.R. § 204.5(g)(2).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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 submitted no evidence that it ever employed the beneficiary or paid her any wages.

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*, 696 F. Supp. 2d. 873, 881 (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*

---

<sup>8</sup> 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).

*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 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. See *Taco Especial*, 696 F. Supp. at 881 (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.

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*, 558 F.3d 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*, 719 F.Supp. 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.<sup>9</sup> A corporation's year-end current assets are shown

---

<sup>9</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

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 petitioner submitted no regulatory prescribed evidence including tax returns, audited financial statements, or annual reports to demonstrate its ability to pay the proffered wage from the date that the I-140 was accepted onward.

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 (Reg'l Comm'r 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 [REDACTED]. Her clients included [REDACTED]. The petitioner's clients had been included in the lists of the best-dressed [REDACTED]. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at [REDACTED]. [REDACTED] 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 submitted no regulatory-prescribed evidence of its ability to pay the proffered wage from the date the I-140 was accepted onward. Similarly, the petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. The petitioner also failed to submit evidence of its historical growth since its incorporation in 2001. 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.

---

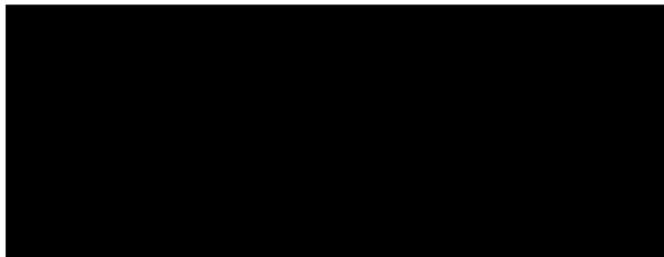
inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Further, beyond the decision of the director, the posting notice submitted by the petitioner does not meet certain regulatory requirements. The regulation at 20 C.F.R. § 656.10(d)(3) requires the following:

The notice of the filing of an Application for Permanent Employment Certification must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

The posting failed to meet the requirements of 20 C.F.R. § 656.10(d)(3)(iii), as it does not provide the address of the appropriate Certifying Officer. For employment in Washington, DC, the proper address of the appropriate Certifying Officer is:



See [http://www.foreignlaborcert.doleta.gov/pdf/perm\\_faqs\\_3-3-05.pdf](http://www.foreignlaborcert.doleta.gov/pdf/perm_faqs_3-3-05.pdf) (Accessed September 16, 2011). The petitioner's posting notice listed addresses in [REDACTED]

In addition, the petitioner failed to provide an attestation that it posted the position in any in-house media, as required by 20 CFR § 656.10(d)(1)(ii). The regulation at 20 C.F.R. § 656.10(d)(1) provides:

- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR 1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance

with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

20 C.F.R. § 656.10(d) does not define "in-house media" or what sources in-house media would comprise. The initial PERM regulation published at 69 Fed. Reg. 77326 provides only that the posting must be "published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions." 69 Fed. Reg. at 77338.

DOL's FAQ response "Round 10" provides that "the regulations require that the employer publish the notice internally using in-house media – whether electronic or print – in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question." See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed September 16, 2011). The FAQ response further provides that:

The language should give sufficient notice to interested persons of the employer's having filed an application for permanent alien labor certification . . . it is not required to mirror, word for word, the physical posting... . In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer.

An employer must publish the notice in any and all in-house media in accordance with its normal recruitment procedures. 20 C.F.R. § 656.10(d)(1)(ii). Documentation of this requirement is satisfied by providing copies of all the in-house media, whether electronic or print, that were used to distribute the notice. *Id.* If it is not in accordance with the employer's normal recruitment procedures to publish openings for similar positions in its in-house media, then there is no requirement to publish the notice in any in-house media. There is no requirement in the regulations that the employer state on the notice itself whether or not the employer published the notice in any in-house media. A signed statement by the petitioner that the company does not have any in-house media, or that it is not in accordance with its normal recruitment procedures to publish openings for similar positions in its in-house media, may be sufficient.

The petitioner must establish that it has fulfilled its obligations relating to the notice set forth at 20 C.F.R. § 656.10(d)(1)(ii). In the instant case, the record contains no documentary evidence or employer attestation concerning the publication of the notice in any in-house media. If there is no evidence in the record relating to whether or not the notice was published in the petitioner's in-house media, USCIS cannot conclude from the absence of any evidence that the petitioner complied with

the regulatory requirements set forth at 20 C.F.R. § 656.10(d)(1)(ii). Therefore, the petitioner has not established that it satisfied the requirements relating to the publication of the notice in any in-house media set forth at 20 C.F.R. § 656.10(d)(1)(ii).

Finally, the petitioner has not established that the notice was posted in a conspicuous place where the employer's U.S. workers can readily read it on their way to or from their place of employment, as required by 20 C.F.R. § 656.10(d)(1)(ii). Appropriate physical locations for posting the notice include the immediate vicinity of the wage and hour notices or occupational safety and health notices. *Id.*

Documentation of the posting of the notice "may be satisfied by providing a copy of the posted notice and stating where it was posted." *Id.* There is no requirement that the employer state the address or physical location of the posting of the notice on the notice itself. An attestation executed by the employer that identifies the address and physical location where the notice was posted may be sufficient to establish the employer's compliance with 20 C.F.R. § 656.10(d)(1)(ii).

The petitioner must establish that it satisfied the notice requirements set forth at 20 C.F.R. § 656.10(d)(1)(ii). The notice does not state the actual physical location of the posting. As there is no evidence in the record of the physical location at the proposed worksite where the notice was posted, the petitioner has failed to establish that it satisfied the requirements relating to the posting of the notice.<sup>10</sup>

For the reasons set forth above, the petitioner failed to submit a posting notice that would permit an approval of the instant petition and accompanying Schedule A application.

The petition will be denied for the above-stated reasons, with each considered as an independent and alternate basis for denial.<sup>11</sup> We also find that the beneficiary willfully misled USCIS on elements material to her eligibility for a benefit sought under the immigration laws of the United States.

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.

---

<sup>10</sup> It is also noted that the posting notice lists an incorrect wage of \$45,000 for the proffered position, as the proffered wage listed on the labor certification is \$45,989.00. In addition, the notice does not indicate that an associate's degree is required for the position as required by the labor certification application, but instead states that a R.N. license is the only requirement for the job.

<sup>11</sup> When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

**ORDER:**

The appeal is dismissed. The approval of the employment-based immigrant visa petition remains revoked.

**FURTHER ORDER:**

The AAO finds that the beneficiary willfully misled USCIS on elements material to her eligibility for a benefit sought under the immigration laws of the United States.