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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**

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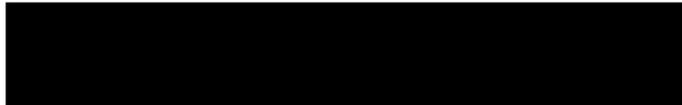
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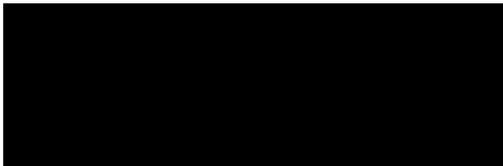
Petitioner:

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On December 27, 2004, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an immigrant petition for alien worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on February 10, 2005. The director of the Texas Service Center (TSC), however, revoked the approval of the immigrant petition on May 13, 2009, and the petitioner subsequently appealed the director's decision to revoke approval of the visa petition. On May 5, 2010, the Administrative Appeals Office (AAO) issued a notice of derogatory information and request for evidence (NDI/RFE) to the petitioner. The petitioner timely responded to the NDI/RFE. The appeal will be dismissed.

The petitioner is a restaurant/store. It seeks to employ the beneficiary permanently in the United States as a food service supervisor 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).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As noted above, the petition was initially approved in February 2005 but was later revoked in May 2009. The director found that the petitioner did not follow the Department of Labor (DOL) recruitment requirements and had obtained the approval of the Form ETA 750 by fraud or by willfully misrepresenting material facts. The director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1.

On appeal, counsel for the petitioner argued that the director's notice of intent to revoke (NOIR) did not contain specific adverse information relating to the petition or the petitioner in the instant proceeding nor did it request the petitioner to present specific evidence. Thus, counsel contended that the director's decision to revoke the approval of the petition was erroneous and not based on good and sufficient cause, as required by section 205 of the Act, 8 U.S.C. § 1155, and further counsel urged that the AAO reverse the director's decision and reinstate the approval of the petition.

The issue here is whether the director, based on the evidence of record, properly concluded that the petitioner did not comply with the DOL recruitment procedures, and thus obtained the labor certification by fraud or material misrepresentation.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 205 of the Act, 8 U.S.C. § 1155, states:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him

¹ 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.

under section 204. Such revocation shall be effective as of the date of approval of any such petition.

Further, the regulation at 8 C.F.R. § 205.2 states:

(a) *General.* Any Service [U.S. Citizenship and Immigration Services (USCIS)] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on **any ground** other than those specified in § 205.1 **when the necessity for the revocation comes to the attention of this Service [USCIS].** (emphasis added).

However, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Further, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the director wrote in the notice of intent to revoke (NOIR):

The Service is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's former attorney of record, ██████████].

In the notice of revocation (NOR), the director stated:

Interviews conducted by Special Agents with the U.S. Department of Labor, Office of Inspector General, Office of Labor Racketeering and Fraud

Investigations (OLRFI), found fraud. The interviews of petitioners resulted in evidence that did not demonstrate credibly that the petitioner complied with the DOL requirements to recruit U.S. workers regarding the ETA 750 filed by the petitioners. It was further noted that petitioners stated that several of the documents submitted in support of the ETA 750 did not bare a signature that he/she executed. The petitioner's misrepresentations of the compliance with DOL requirements is a fundamental impediment to accordance of the benefit sought. They were determined to be willful because the petitioner presented a host of documents, via petitioner's counsel, [REDACTED] of which the petitioner had no knowledge but which were, nonetheless, presented to the Department of Labor as representing compliance with ETA 750 recruitment requirements. Interviews of the beneficiaries established that many of the beneficiaries were instructed by [REDACTED] and his associates to obtain fraudulent employment letters. Several interviews confirmed the law office obtained the fraudulent letters for the beneficiaries.

In both the NOIR and the NOR, the director warned the petitioner that the matter in the instant case might involve fraud since the petition was filed by [REDACTED]. In the NOR, the director specifically stated that the DOL had uncovered fraud in numerous other immigrant visa petitions that the petitioner's former attorney of record, [REDACTED], filed. Because of these other petitions and since [REDACTED] filed the petition in this case, the director on February 6, 2009 issued a notice of intent to revoke, advising the petitioner to submit additional evidence to demonstrate that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and that the petitioner complied with all of the DOL recruiting requirements.

Based on these stated facts, the AAO finds that the director appropriately reopened the proceeding to issue the NOIR. However, we find that the director's conclusion that the petitioner failed to follow the DOL recruitment requirements, and thus obtained the labor certification by fraud or misrepresentation is erroneous and is not supported by the evidence of record. The director's decision will be withdrawn.

Before 2005, the DOL accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2004). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), which then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2004). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2004).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

In this case, the petitioner filed and the DOL accepted the Form ETA 750 for processing on July 23, 2003. The Form ETA 750 was approved on September 8, 2004. To demonstrate that the petitioner fully complied with the DOL recruitment requirements, the petitioner submitted the following relevant evidence:

- A copy of the advertisement for the position offered published in the *Boston Sunday Herald* on June 15 and June 22, 2003 and in the *Boston Herald* from June 16 to June 20, 2003; and
- A signed statement dated February 28, 2009 from the [REDACTED] petitioning corporation, stating that the beneficiary has been employed as a food preparer since February 5, 2004 earning \$26,000 a year.

Based on the evidence submitted, the petitioner conducted the recruitment process before it submitted the Form ETA 750, consistent with the reduction in recruitment process which was allowed at the time.

Further, the director in his NOIR did not specifically state that the petitioner needed to submit copies of the internal postings to show that the petitioner complied with the DOL recruitment procedures. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Moreover, neither the NOIR nor the NOR contained specific derogatory information pertaining to the petition or the petitioner in the instant visa petition.

Based on the facts stated and evidence available in the record, the AAO, therefore, finds that the director's conclusion that the petitioner did not follow the DOL recruitment requirements is defective and will be withdrawn. The AAO will also withdraw the finding of fraud or misrepresentation against the petitioner.

Nonetheless, the petition, as it currently stands, remains unapprovable, as the record does not reflect that the petitioner has the continuing ability to pay the proffered wage from the priority date and that the beneficiary is qualified for the position. As noted earlier, the AAO has *de novo* authority to review matters that are properly before it on appeal. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In adjudicating the appeal, the AAO, among other things, found several inconsistencies in the record pertaining to the beneficiary's past work experience as a cook in India and in the United States. On May 5, 2010, the AAO sent the petitioner an NDI/RFE in accordance with 8 C.F.R. §§ 103.2(b)(8)(iv) and 103.2(b)(16)(i). In the NDI/RFE, the AAO noted that on the Form ETA 750, part B, the beneficiary claimed he worked as a bakery supervisor for [REDACTED] from February 2001 to present (the date he signed the Form ETA 750B,

which was on June 11, 2003); that he worked as a bakery supervisor for [REDACTED] from August 1999 to January 2001; and that he worked as a bakery supervisor for [REDACTED] from February 1999 to August 1999. No evidence from [REDACTED] however, was submitted to verify the veracity of the beneficiary's claims. Instead, a letter from [REDACTED] indicating that the beneficiary worked as a cook from June 1994 to August 1997 was submitted to demonstrate that the beneficiary had the requisite work experience before the priority date. The AAO noted that the letter from [REDACTED] did not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), in that it did not identify the name of the author and did not verify the beneficiary's full-time employment. For these inconsistencies in the record and problems as noted above, the AAO requested that the petitioner submit independent objective evidence, such as copies of pay stubs, tax documents, financial statements, or other evidence of payments made to the beneficiary by [REDACTED]

In response to the AAO's NDI/RFE dated June 3, 2010, counsel requests that the beneficiary be given 90 additional days from the date the NDI/RFE was issued to submit documentation pertaining to his employment with [REDACTED]. No additional documentation relating to the beneficiary's prior employment with [REDACTED] has been submitted thus far, however, over one year later.

To demonstrate that the beneficiary had the requisite work experience before the priority date, counsel submits copies of the beneficiary's Forms W-2 and pay stubs issued by the following companies: [REDACTED] for 1999, 2000, and 2001; [REDACTED] for 2000; [REDACTED] for February 2003; and [REDACTED]

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. .

Thus, to determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Further, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

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.

Here, as noted earlier, the Form ETA 750 was filed and accepted for processing by the DOL on July 23, 2003. The name of the job title or the position for which the petitioner sought to hire is "food service supervisor." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

Assist with the supervision of preparation of food or sale in deli, assist in determining daily specials, train workers, schedule workers after conferring with manager.

The Form ETA 750 further specifically required the applicant to have a minimum of two years experience in the job offered or in the related occupation as a kitchen worker. The DOL labeled this job description as "First-Line Supervisors/Managers of Food Preparation and Serving Workers," in accordance with SOC (Standard Occupational Code) 35-1012.²

While the beneficiary, based on the evidence in the record, appears to have worked at [REDACTED] from 1999 to 2001; at [REDACTED] in 2000; at [REDACTED] in 2003; and at [REDACTED] in Lumbarton, New Jersey, in 2004; none of the evidence described above shows that the beneficiary worked as a food service supervisor or as a kitchen worker before the priority date of July 23, 2003. Further, the credibility of the letter from [REDACTED] is questionable since the beneficiary fails to corroborate the veracity of that letter with additional evidence (i.e. pay stubs, tax records, etc.). The letter also does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) in that it does not include the name of the author and does not describe the experience or the training received by the beneficiary while he worked there.

For these reasons, the AAO determines that the evidence of record does not support the assertions that the beneficiary had the experience or training necessary to be qualified for the position offered as of the priority date.

The AAO in the NDI/RFE also noted that the job offer might not be *bona fide* since the last name of the beneficiary [REDACTED] is the same as the last name of the current director and officer of the petitioning corporation [REDACTED]. The AAO also requested that the petitioner provide an affidavit certifying its consent to file the Form ETA 750 and the petition.

In response to these issues, the petitioner submits affidavits from [REDACTED] [REDACTED]. In his affidavit, [REDACTED] states that he was the director and officer of the petitioning corporation who signed the labor certification application and the Form I-140 petition and that he was authorized to act on behalf of the

² The SOC job code can be accessed at this web address: <http://www.onetcodeconnector.org/>

corporation. [REDACTED] in his affidavit repeat [REDACTED] statements. The AAO accepts [REDACTED]'s affidavits as credible.

[REDACTED] further claims that he is not related to the beneficiary. He explains that the corporation, besides himself, has two (2) other shareholders, with whom he equally shares ownership of the corporation. He also states that, if related at all, the beneficiary is related to Mr. [REDACTED] states in his affidavit that he is a minority (33%) shareholder of the petitioning corporation and that the beneficiary is his cousin's daughter's husband. The federal tax returns in the record show that [REDACTED] each equally own the petitioning corporation, corroborating [REDACTED] affidavits. Based on the evidence submitted, the AAO determines that the beneficiary more likely than not did not have undue influence over the job offer.

Further, the immigrant visa petition may not be approved since issues relating to the petitioner's ability to pay have not been established. The appeal will be dismissed for this additional reason.

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 Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

As noted above, the petitioner filed the labor certification application (Form ETA 750) for the beneficiary with the DOL on July 23, 2003. The rate of pay or the proffered wage set forth by the DOL is \$9.85 per hour or \$17,927 per year (based on a 35-hour work per week).³ If the instant petition were the only petition filed by the petitioner, the petitioner would only be required to produce evidence of its ability to pay \$9.85 per hour or \$17,927 per year. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and that the petitioner has the ability to pay the proffered wages to each of the

³ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

beneficiaries of its pending petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. A review of USCIS electronic databases reveals that the petitioner has previously filed one (1) other immigrant petition since the priority date.

██████████ in his affidavit states that the other beneficiary being sponsored is ██████████. In response to the AAO's NDI/RFE, counsel indicates that the priority date and the proffered wage for ██████████ are the same as the beneficiary in the instant proceeding.

The record contains copies of the following relevant evidence:

- Copies of Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2003 through 2009; and
- Copies of the beneficiary's Forms W-2 for 2005-2009.

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 2001.⁴

Since this matter involves multiple filings, the petitioner must establish that its job offer to each beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until each beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay each beneficiary's proffered wage, 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will examine whether the petitioner employed and paid all of the beneficiaries 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.

Based on the Forms W-2 submitted, the petitioner paid the beneficiary the following wages between 2005 and 2009:

- \$23,500 in 2005 (exceeds the proffered wage);
- \$22,000 in 2006(exceeds the proffered wage);
- \$26,000 in 2007 (exceeds the proffered wage);

⁴ A search of the Massachusetts Secretary of Commonwealth's website shows that the petitioning corporation was established on October 31, 2001.

- \$26,000 in 2008 (exceeds the proffered wage);
- \$8,500 in 2009 (\$9,427 less than the proffered wage).

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay \$35,854 in 2003 and 2004;⁵ and \$27,354 in 2009.⁶ The petitioner can pay these wages through its net income or net current assets.

If the petitioner chooses to pay these wages through its net income, USCIS will 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 (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*, 696 F. Supp. 2d 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

⁵ \$17,927 per year multiplied by two beneficiaries – [REDACTED] and the beneficiary in the instant proceeding.

⁶ \$9,427 for the beneficiary in the instant proceeding plus \$17,927 for [REDACTED]

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 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).

As noted above, to show the continuing ability to pay from the priority date, the petitioner must be able to demonstrate that it can pay \$35,854 in 2003 and 2004; and \$27,354 in 2009. The petitioner can pay these wages through its net income or net current assets. The petitioner’s tax returns demonstrate its net income (loss) for 2003, 2004, and 2009, as shown below:

- In 2003 the Form 1120 stated net income (loss)⁷ of \$14,907.
- In 2004 the Form 1120 stated net income (loss) of \$51,627.
- In 2009 the Form 1120 stated net income (loss) of \$39,356.

Therefore the petitioner has the ability to pay in 2004 and 2009, but not in 2003.

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.⁸ 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

⁷ For an S corporation, USCIS considers net income (loss) to be the figure shown on line 21 of the Form 1120S so long as the S corporation has no other income, credits, deductions or other adjustments from sources other than a trade or business. Otherwise, the net income (loss) is found on line 23 (2002-2003), line 17e (2004-2005), or line 18 (2006-2009) of schedule K. See Instructions for Form 1120S, 2009, at <http://www.irs.gov/pub/irs-prior/i1120s--2009.pdf> (accessed on June 8, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In this case, the net income is found in schedule K.

⁸ 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.

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 tax returns demonstrate its end-of-year net current assets (liabilities) for the year 2003, as shown below:

- In 2003, the Form 1120S stated net current assets (liabilities) of \$34,643.

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wages in 2003, as shown above. Based on the net income and net current asset analysis above, the AAO concludes that the petitioner has failed to establish that it had the continuing ability to pay the combined proffered wages from the priority date.

Finally, although not raised by either the petitioner or counsel on appeal, 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. 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.

The AAO acknowledges that the petitioner is an ongoing business; however, the record is devoid of evidence regarding the petitioner's reputation. Unlike *Sonogawa*, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage, specifically in 2003.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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).

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. The petition is unapprovable, and the director's decision to revoke the approval of the petition remains undisturbed.