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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 10 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a marble company. It seeks to employ the beneficiary permanently in the United States as an installer. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the I-140 petition was submitted without all of the required initial evidence, specifically evidence of the beneficiary's experience and evidence of the petitioner's ability to pay the proffered wage. The director denied the petition accordingly.

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.

As set forth in the director's February 25, 2009 denial, the petitioner failed to submit initial evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. The director denied the petitioner accordingly.

The AAO conducts appellate review on a *de novo* basis. *See 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.[1]

The petitioner claims on appeal that that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition.

The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

> *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage as of August 19, 2002, the priority date, as well as evidence that the beneficiary met the requirements of Form ETA 750, and therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility.

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[1] 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).

On appeal, the petitioner submitted the following evidence:

- Copies of the beneficiary's Form W-2 for 2002, 2003, 2004, 2005, 2006, 2007, and 2008;
- Partial copies of the petitioner's 2002, 2003, 2006, and 2007 Income Tax Returns (Forms 1120);
- A copy of the petitioner's 2005 Income Tax Return (Form 1120); and
- A letter dated March 12, 2009, from the petitioner.

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. 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.

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

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the present case, the petitioner must establish its ability to pay the proffered wage of $20.23 per hour, which is $42,078.40 per year (based on forty hours per week), starting on August 19, 2002, the priority date, and continuing to the present.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[2] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On appeal, the petitioner submitted copies of Forms W-2 it issued to the beneficiary for years 2002, 2003, 2004, 2005, 2006, 2007, and 2008. These Forms W-2 show that the petitioner paid the beneficiary:

- $30,212.00 in 2002;
- $29,421.00 in 2003;
- $30,821.00 in 2004;
- $48,631.00 in 2005;
- $49,503.25 in 2006;
- $51,197.40 in 2007; and
- $36,219.15 in 2008.

The AAO will not accept this evidence as proof of the petitioner's ability to pay the proffered wage. Research conducted in all available databases revealed that the social security number listed on the beneficiary's 2002 and 2003 Forms W-2 has been used by other individuals. The research also revealed that the beneficiary has used a different social security number than the one listed on his 2002 and 2003 Forms W-2 of record.

In addition, the number shown on the beneficiary's 2004, 2005, 2006, 2007, and 2008 Forms W-2 appears to be an individual taxpayer identification number (ITIN) temporarily issued by the IRS to the beneficiary. An ITIN is a tax-processing number issued by the IRS to those individuals who do not have a SSN for filing tax returns and other tax-related documents.[3]

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[2] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

[3] The instructions to IRS Form W-2 state that an employer should not accept an ITIN for employment purposes. When an employer prepares a Form W-2, it should show the correct SSN for the employee. *See* http://www.irs.gov/instructions/iw2w3/ch01.html (accessed February 16, 2012).

Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

On appeal, the petitioner also submitted partial copies of it tax returns for years 2002, 2003, 2006, and 2007.[4] For the year 2005, however, the copy submitted includes Schedule L. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. Even though the petitioner's 2005 tax return of record shows a net income of $120,826.00 and net current assets of $165,222.00, the petitioner's failure to provide complete copies of its federal tax returns for all years since the priority date (August 19, 2002) precludes USCIS from analyzing the petitioner's net

[4] The tax returns submitted, except for year 2005, are not accompanied by all supporting schedules, including Schedule L, exhibits and attachments thereto. The petitioner could have secured official copies of its complete tax returns from the Internal Revenue Service (IRS) by using IRS Form 4506, Request for Copy of Tax Return.

current assets for all relevant years. Therefore, the AAO is unable to analyze the petitioner's ability to pay based on net current assets.

In addition, USCIS records indicate that the petitioner has filed six other immigrant petitions since 1999. The petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date in 2002 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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner failed to provide regulatory prescribed evidence of its ability to pay the proffered wage. The evidence of record falls short in allowing the AAO to conduct a totality of the circumstances analysis based on *Sonegawa.* The petitioner submitted no evidence that it enjoys a reputation like that in *Sonegawa.* Thus, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage beginning on the priority date to present.

The petitioner has also not demonstrated by credible evidence that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r

1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). *See also, Madany* v. *Smith,* 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).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation—*
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience.

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as an installer. On the labor certification, the beneficiary claimed to qualify for the offered position based on experience gained with the petitioner as an installer. However, it is noted that the beneficiary failed to disclose the date he started to work for the petitioner on this form. No other employment is listed on that form.

On appeal, the petitioner submitted a letter dated March 12, 2009, signed by [redacted] in the capacity of President. [redacted] stated that in May 2000 the petitioner hired the beneficiary as a full-time installer after "he worked for two years with another marble company." The record does not contain any documentary evidence of the beneficiary's employment with another marble company. The letter of record does not comply with the requirements set forth by 8 C.F.R. § 204.5(l)(3) as it does not provide a full description of the beneficiary's duties. Furthermore, [redacted] letter does not provide any details about the position the beneficiary held with another marble company, nor does it mention the name of the other marble company. The beneficiary failed to represent this previous employment on the labor certification. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact

certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The statement in the March 12, 2009 letter is vague, does not provide a description of the duties, and is not supported by any documentary evidence. The AAO considers this evidence to be deficient. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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). In all cases, the burden of proof is on the petitioner, to establish the beneficiary's eligibility by a preponderance of the evidence. [See Section 291 INA; *Matter of Sun*, 12 I. & N. Dec. 800, Interim Decision (BIA) 1885 (1968)]. A "preponderance of the evidence" is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not". [Black's Law Dictionary 1064 (5th ed. 1979)] See I.D. 3112 (BIA 1989).

The petitioner failed to demonstrate by credible and preponderant evidence that the beneficiary had the required two of experience as an installer as of the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.