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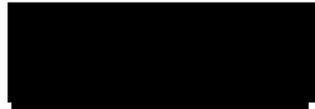
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

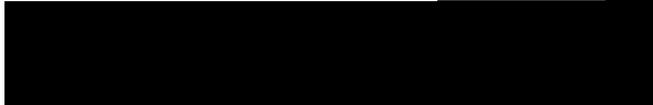


**U.S. Citizenship  
and Immigration  
Services**



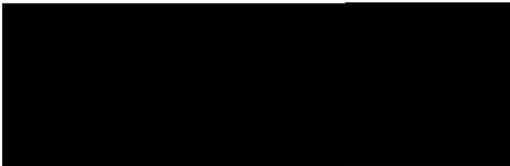
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Date: **AUG 21 2012** Office: **TEXAS SERVICE CENTER** FILE: 

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 BENEFICIARY:



**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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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:** On June 10, 2009 the Director of the Texas Service Center (the director) revoked the approval of the immigrant petition, and the petitioner subsequently appealed the director's decision. Upon review, the AAO withdrew the director's decision and remanded the matter to the director for issuance of a new detailed decision. On May 4, 2012 the director issued a new detailed decision and certified it to the AAO for review pursuant to 8 C.F.R. § 103.4(a).<sup>1</sup> Upon review, the AAO will affirm the director's decision in part and withdraw the director's decision in part.

The petitioner is a bakery company. It seeks to permanently employ the beneficiary in the United States as a baker 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).<sup>2</sup> As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750).<sup>3</sup> In the Notice of Certification (NOC), the director found that: (a) the petitioner did not conduct good faith recruitment in advertising for the proffered position; (b) the beneficiary did not have the requisite work experience in the job offered as of the priority date; and (c) the petitioner failed to establish the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. Accordingly, the director revoked the approval of the petition and invalidated the approved Form ETA 750 labor certification.

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.<sup>4</sup>

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<sup>1</sup> Under 8 C.F.R. § 103.4(a)(1) certifications by district directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact."

<sup>2</sup> 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.

<sup>3</sup> This petition involves the substitution of the labor certification beneficiary. The original beneficiary was [REDACTED]. Upon filing the Form I-140 petition, the petitioner requested that the original beneficiary be substituted with the beneficiary in the instant case. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>4</sup> 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).

As set forth in the director's decision dated May 4, 2012, the issues in this case are (a) whether the petitioner conducted the recruitment in accordance with Department of Labor (DOL) regulations, whether there was fraud or willful misrepresentation involving labor certification process and thus, justifying the invalidation of the labor certification; (b) whether the beneficiary had the requisite work experience in the job offered prior to the priority date; and (c) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

a) **Good Faith Recruitment and Invalidation of the Labor Certification**

U.S. Citizenship and Immigration Services (USCIS), pursuant to 20 C.F.R. § 656.31(d) (2004), may invalidate the labor certification based on fraud or willful misrepresentation. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, Form ETA 9089, replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. See 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefor shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

To demonstrate that the petitioner complied with DOL recruitment procedures, the petitioner's counsel at the time, [REDACTED]<sup>5</sup> initially offered the following evidence:

- Copies of the newspaper tear sheets for the position offered, published in the *Boston Globe* on the following days and dates: Sunday, November 5, 2000; Sunday, January 21, 2001; Sunday, October 28, 2001; Sunday, December 2, 2001; Monday December 3, 2001; Tuesday, December 4, 2001; Thursday, December 6, 2001; Friday, December 7, 2001; Saturday, December 8, 2001; and Sunday, December 9, 2001;<sup>6</sup> and

<sup>5</sup> [REDACTED] offered the evidence above in response to the director's Notice of Intent to Revoke dated April 3, 2009 (2009 NOIR). [REDACTED] at that time, was under USCIS investigation for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. He has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. He will be referred to throughout this decision as previous counsel or by name.

<sup>6</sup> The AAO notes that all of the ads state in bold letters, [REDACTED]

- A copy of the letter dated February 14, 2001 from the *Boston Herald* addressed to [REDACTED] stating that the job ads would also be posted online on jobfind.com for 30 days.

On January 5, 2012 the director issued a Notice of Intent to Revoke (2012 NOIR) advising the petitioner to explain the specific interactions between the petitioner and [REDACTED] prior to filing the petition including how many specific conversations the petitioner had with [REDACTED] prior to filing the labor certification application; [REDACTED] specific instructions with regard to recruitment; what procedures the petitioner followed in relation to the interviewing and consideration of applicants; what role [REDACTED] played in the recruitment process and in the interviewing and consideration of applicants; and to identify the advertisements placed by [REDACTED] in the *Boston Herald* for a cook related to the instant petition.

The director also asked the petitioner to submit evidence showing the petitioner's role in recruiting U.S. workers (i.e. how many candidate were interviewed for the job offered, how the interviews were conducted, and how it was determined that no other U.S. candidate was eligible for the position) and provide copies of the in-house posting notice and other independent objective evidence to show that the petitioner actively participated in the recruitment process.

In response to the director's 2012 NOIR, [REDACTED] of the petitioner, submitted a letter dated February 1, 2012 stating that the company no longer retains any documentation concerning recruitment of U.S. workers before 2007. [REDACTED] further indicated that he has no recollection of any conversations with [REDACTED] regarding the case at hand or concerning recruiting instructions and additionally states, "Resumes, if any were submitted, would have been reviewed by [REDACTED] our office manager at the time; [REDACTED] employment with this company ended in 2006." [REDACTED] claims that he has reviewed all of the copies of the *Boston Herald* advertisements and found no records indicating any qualified U.S. candidates applied for the job offered.

The AAO acknowledges that before 2005, employers filing a Form ETA 750 were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

Here, the petitioner has stated that it retained no documentation regarding the recruitment of U.S. workers prior to 2007 and that it has no records indicating any qualified U.S. candidates applied for the position offered. The petitioner also stated that the manager responsible for reviewing job applications and resumes is no longer employed (her employment ended in 2006). Since there was no requirement to keep recruitment records once the labor certification was approved before

2005, USCIS may not make an adverse finding against the petitioner, if, the petitioner as in this case, claims it no longer has the documentation.

The AAO also notes that the DOL at the time the petition was filed in 2001 accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2001). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who 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) (2001). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: 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) (2001).

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).

Based on the evidence submitted, the petitioner advertised the position in the *Boston Herald* twice before it submitted the Form ETA 750 for processing to the DOL (on November 5, 2000 and January 21, 2001) and eight times after the DOL approved the Form ETA 750 (once in October 2001 and seven times in December 2001). There is no explanation for this inconsistency. Nonetheless, the AAO finds that evidence of record does not support the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. Therefore, the director's decision to invalidate the certified Form ETA 750 will be withdrawn.

**b) The Beneficiary's Qualifications**

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, 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.

Here as indicated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on March 23, 2001. The name of the job title or the position for which the petitioner seeks to hire is [REDACTED]. The job description under section 13 of the Form ETA 750A is as follows:

Mix & bakes ingredients to produce all types of bread, rolls, etc. Measures ingredients, prepare batters and dough. Rolls, cuts, and shapes dough to form products.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

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).

On the Form ETA 750, part B, signed by the beneficiary on September 27, 2001, he represented he worked 35 hours per week as a baker for a bakery called "██████████" from April 1995 to November 1998. In the 2012 NOIR the director indicated that the beneficiary was only 15 years of age when he claimed that he worked ██████████ in April 1995, that none of the letters of employment submitted (one dated July 12, 2001 and the other dated April 13, 2009 from ██████████) complied with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), and that the beneficiary failed to include his employment abroad on the Form G-325 Biographic Information. The director requested that the petitioner submit independent objective evidence such as copies of the beneficiary's pay stubs, payroll records, tax documents, and/or copies of his booklet of employment and social security to demonstrate the credibility of the beneficiary's claimed employment as a baker in Brazil from April 1995 to November 1998.

Responding to the 2012 NOIR the beneficiary submitted a letter dated February 1, 2012 from ██████████ stating that the beneficiary worked as a baker from April 1, 1995 to November 30, 1998 and that his responsibilities were "to measure ingredients, mix dough, cut and shape dough for products, and coordinate the manufacture and quality of the same." ██████████ also states that the beneficiary was paid cash during his employment and thus, no record of his employment was made with the government and no taxes were paid on his wages.

The AAO acknowledges that the February 1, 2012 letter of employment include a more detailed job description; however, it did not address the director's concerns that the beneficiary was only 15 years old, when he claims to have worked full time as a baker at ██████████ and why he failed to include his occupation abroad on the Form G-325. Given the inconsistencies, the director requested independent objective evidence to verify the veracity of the beneficiary's claim that he worked as a baker in Brazil from April 1995 to November 1998. None was submitted.

For the reasons stated above, the AAO finds that the beneficiary did not have the requisite work experience in the job offered or in the related occupation as an assistant cook before the priority date and that the beneficiary does not qualify to perform the duties of the position.

c) **The Petitioner's Ability to Pay**

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).

Here, as stated above, the ETA Form 750 was accepted for processing by the DOL on March 23, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.61 per hour or \$22,950.20 per year based on a 35 hour work week.<sup>7</sup>

To show that the petitioner has the continuing ability to pay \$12.61 per hour or \$22,950.20 per year from March 23, 2001, the petitioner submitted the following evidence:

- A letter dated September 8, 2000 from [REDACTED], stating, among other things, that the petitioner employs approximately 100 people and has an annual payroll of approximately \$2,000,000 and a gross annual profit of \$3,535,479, and net income of \$1,418,132.

Responding to the director's 2012 NOIR the beneficiary through his counsel further submitted the following evidence:

- Copies of the beneficiary's Wage and Tax Statements (Forms W-2) for the years 2002 through 2007 and 2011;

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<sup>7</sup> 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 Memo indicates 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).

- Copies of the beneficiary's Forms 1040 (U.S. Individual Income Tax Return) for the years 2008 through 2010;
- Copies of the beneficiary's Forms 2008 and 2009 Schedule INC (Massachusetts Resident Income Tax Return);<sup>8</sup> and
- A copy of the petitioner's Form 8879-S (IRS e-file Signature Authorization for Form 1120S).

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. Comm. 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 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 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.

Based on the evidence submitted, the beneficiary received the following wages from the petitioner between 2001 and 2011:

<i>Tax Year</i>	<i>Actual wage (AW) (Box 1, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2001	N/A <sup>9</sup>	\$22,950.20	\$22,950.20
2002	\$10,400.92	\$22,950.20	\$12,549.28

<sup>8</sup> The 2008 and 2009 Schedule INC are Forms W-2 (Wage and Tax Statements) for the State of Massachusetts. The State Wages reported on the Schedule INC are the same amounts reported on the beneficiary's Forms 1040 for 2008 and 2009; therefore, we will accept the Schedule INC for 2008 and 2009 as evidence of the petitioner's ability to pay. The beneficiary's 2010 individual tax return is not accompanied with Schedule INC; therefore, we will not accept the beneficiary's 2010 individual tax return as evidence of the petitioner's ability to pay in that year.

<sup>9</sup> No 2001 W-2 or 2001 Schedule INC is submitted.

2003	\$23,194.07	\$22,950.20	Exceeds the PW
2004	\$11,245.50	\$22,950.20	\$11,704.70
2005	\$31,682.10	\$22,950.20	Exceeds the PW
2006	\$32,108.50	\$22,950.20	Exceeds the PW
2007	\$31,912.62	\$22,950.20	Exceeds the PW
2008	\$34,137.00	\$22,950.20	Exceeds the PW
2009	44,579.00	\$22,950.20	Exceeds the PW
2010	N/A <sup>10</sup>	\$22,950.20	\$22,950.20
2011	\$46,409.44	\$22,950.20	Exceeds the PW

Therefore, the petitioner has established the ability to pay in 2003, from 2005 to 2009, and in 2011. In order to meet the burden of proving by preponderance of the evidence that the petitioner has the ability to pay the proffered wage from the priority date, the petitioner must demonstrate that it could pay the following amounts:

- \$22,950.20 in 2001 and 2010;
- \$12,549.28 in 2002; and
- \$11,704.70 in 2004.

The petitioner can demonstrate the ability to pay those amounts through either its net income or net current assets. If the petitioner chooses to demonstrate the ability to pay 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 (1<sup>st</sup> 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 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 v. Napolitano*, 696 F. Supp. 2d at

<sup>10</sup> Only Form 1040 for 2010 is submitted; no 2001 W-2 or 2001 Schedule INC is submitted. We cannot cross check the wages reported on the beneficiary’s Form 1040 with the W-2 or Schedule INC.

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* 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 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>11</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record, however, contains no evidence showing the petitioner’s net income or net current assets in 2001, 2002, 2004, and 2010. No evidence such as copies of the business’ federal tax

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<sup>11</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, 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.

returns, annual reports, or audited financial statements for those years (2001, 2002, 2004, and 2010) has been submitted.

Additionally, we will not accept [REDACTED] assertion that the petitioner employs approximately 100 people as evidence of the petitioner's ability to pay. The regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. The AAO notes that [REDACTED] is not the company's financial officer; he is the company's President. In addition, the record contains no copies of the acceptable evidence to demonstrate the ability to pay, i.e. annual reports, federal tax returns, or audited financial statements for the years 2001, 2002, 2004, and 2010 to corroborate [REDACTED] statement.

For the reasons stated above, the AAO affirms the director's conclusion that the petitioner has not established that it has the continuing ability to pay the proffered wages of the beneficiary in this case and of the other beneficiaries<sup>12</sup> from the priority date.

Finally, 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

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<sup>12</sup> As noted by the director in the 2012 NOIR, the petitioner has filed several other employment-based immigrant visa petitions for alien beneficiaries other than the beneficiary in this case. Consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wages not only for the current beneficiary but for the other immigrant visa beneficiary until either one or more of these circumstances apply: (a) each beneficiary receives his or her legal permanent residence (LPR), (b) unless and until we revoke the petition, or (c) unless and until the petitioner withdraws the petition. No additional evidence as requested has been received.

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.

Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner during the qualifying period had uncharacteristically substantial expenditures.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. Given that the petition's approval has been revoked and the fact that the petitioner failed to respond to any of the director's Notices of Intent to Revoke, the AAO is not persuaded that the petitioner has that ability. We conclude that the petitioner has not met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date.

The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

**ORDER:** The director's decision to revoke the previously approved petition is affirmed.

**FURTHER ORDER:** The decision to invalidate the alien employment certification, Form ETA 750, ETA case number [REDACTED] is withdrawn.