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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**

B6

Date: **AUG 29 2012** Office: TEXAS SERVICE CENTER

IN RE:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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 May 8, 2012 the Director, Texas Service Center, revoked the approval of the petition, invalidated the labor certification, and certified the decision to the Administrative Appeals Office (AAO) for review pursuant to 8 C.F.R. § 103.4(a).<sup>1</sup> Upon review, the AAO will affirm the May 8, 2012 decision.

The petitioner is a lending company. It seeks to permanently employ the beneficiary in the United States as an account collector pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).<sup>2</sup> As required by statute, the petition is submitted along with an approved Application for Permanent Employment Certification (ETA Form 9089). The petition was initially approved by the Director, Nebraska Service Center, on October 25, 2010, but on January 9, 2012 the Director, Texas Service Center (the director), reopened the matter and sent a Notice of Intent to Revoke (NOIR) to the petitioner.

In the January 9, 2012 NOIR, the director noted, among other things, that the petitioner could not have conducted good faith recruitment efforts since the petitioner listed an address different than the petitioner on its advertisements (newspaper, in-house, and online through the Massachusetts job bank). The director indicated that the petitioner is located at [REDACTED] but the address listed on all of the job advertisements is [REDACTED].

In response to the director's January 9, 2012 NOIR the petitioner submitted statements from people familiar with the recruitment efforts at the time, who claim that the [REDACTED] address was typed erroneously, that the typographical error was never discovered before the NOIR was sent, and that the error was inadvertent, or an oversight, and not in any way intentional.

The director revoked the approval of the petition and invalidated the labor certification on May 8, 2012 finding that the petitioner failed to conduct the recruitment efforts in good faith and that there was fraud or willful misrepresentation involving the labor certification process. The director also found that the petitioner failed to establish 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 her lawful permanent residence.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

As set forth in the director's May 8, 2012 decision, the issues in this case are (a) whether or not there was fraud or willful misrepresentation involving labor certification, whether or not the petitioner conducted the recruitment efforts in good faith, and (b) whether or not the petitioner has the ability to pay as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

To show that the petitioner conducted recruitment in good faith, new counsel for the petitioner, [REDACTED] of [REDACTED] provided the following evidence:<sup>3</sup>

- A statement dated February 8, 2012 from one of the owners of the petitioner [REDACTED] [REDACTED]);
- A copy of a facsimile dated May 31, 2006 from [REDACTED] to the *Boston Herald Classified* Section;
- Copies of the newspaper tear sheets for the position offered, published in the *Boston Sunday Herald* on Sunday, June 4, 2006 and Sunday, June 11, 2006;
- A copy of the advertisement published online at the website of the Massachusetts Department of Workforce Development (Massachusetts job bank);
- A copy of the in-house posting notice;
- A copy of a facsimile dated May 31, 2006 from [REDACTED] to the petitioner advising the petitioner to post a job announcement at the petitioner's place of business for 14 consecutive days; and
- A copy of the letter dated February 14, 2001 from the *Boston Herald* addressed to [REDACTED] [REDACTED] stating that the job ads would also be posted online on jobfind.com for 30 days;

In his February 8, 2012 statement, [REDACTED] outlined the steps his company took to recruit U.S. workers. He stated that he and [REDACTED] reviewed the advertisement and other items prepared by [REDACTED] and gave [REDACTED] permission to place the advertisement with the *Boston Herald* and online with the Massachusetts job bank. He also stated that he posted the job

[REDACTED] will be referred to as counsel or by her name throughout this decision. The evidence above was submitted by counsel after the director issued the January 9, 2012 NOIR.

<sup>4</sup> The AAO notes that [REDACTED] was counsel of record for both the petitioner and the beneficiary originally. He helped the petitioner in the labor certification process. He also helped the petitioner file the Form I-140 petition in 2006. He was under U.S. Citizenship and Immigration Services (USCIS) investigation for allegedly submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions, when the director initially sent the January 9, 2012 NOIR. [REDACTED] has since been suspended from practice before the United States Department of Homeland Security for three years from March 1, 2012. [REDACTED] representations in this matter will be considered. He will be referred to throughout this decision by name.

announcement for the job offered on the bulletin board at [REDACTED] [REDACTED] for 14 consecutive days from June 1, 2006 to June 15, 2006. [REDACTED] indicated that nobody sent a resume, called, or inquired about the position despite all of the recruitment efforts.

Regarding the address listed on the in-house job announcement and the newspaper advertisements, the petitioner stated that the address shown on the in-house job announcement and the newspaper advertisements is incorrect due to a typographical error, that the error was not discovered until the director sent the NOIR on January 9, 2012, and that the error was not intentional.

The director revoked the approval of the petition and invalidated the labor certification, because the petitioner advertised for the position offered using an address that is not associated with the petitioner. The director specifically stated that by providing wrong address to potential job seekers the petitioner did not provide U.S. workers an opportunity to respond to the job announcement.

We agree.

The newspaper, the in-house, and the online job announcements all asked potential job applicants to apply by mail and to forward their resumes to [REDACTED] [REDACTED] an address which does not belong to the petitioner. [REDACTED] claimed that even though the address was wrong, he would still have received resumes from people who were interested in the position if they mailed their application to his business. "It would be clear to any United States postal worker delivering the mail when he or she was walking down [REDACTED] [REDACTED] that our business [Signature Finance] was located at [REDACTED] [REDACTED] stated.

[REDACTED] assertion that the U.S. postal worker would have delivered the mail to his address even though the mail was addressed to a different location is not persuasive. The record contains no evidence showing that the U.S. postal worker would have actually delivered mail addressed to [REDACTED] [REDACTED] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

We agree with the director that it would be almost impossible for interested job applicants to apply for the position offered in this case since they could only respond to the job announcement by mail. The interested applicant's resume or other relevant documentation would not reach the petitioner through the mail because the wrong address was provided.

The petitioner claimed that the wrong address on all of the job announcements was provided inadvertently.

The AAO notes that the petitioner also listed the [REDACTED] address on Part 6, item 4 of the Form I-140 and on Part H, item 1 of the ETA Form 9089.

Part 6, item 4 of the Form I-140 petition reads, "Address where the person will work if different from address in **Part I.**" The petitioner answered, "[REDACTED]"

Part H, item 1 of the ETA Form 9089 states, "Job Opportunity Information (Where work will be performed)." The petitioner answered, "[REDACTED]"

Based on the evidence submitted and the facts stated above, we determine that there was fraud or willful misrepresentation involving the labor certification application.

USCIS, pursuant to 20 C.F.R. § 656.30(d), may invalidate the labor certification based on fraud or willful misrepresentation. The regulation at 20 C.F.R. § 656.30(d) states:

*Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described in § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS [Department of Homeland Security] or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application.

As immigration officers, USCIS Appeals Officers and Center Adjudications Officers possess the full scope of authority accorded to officers by the relevant statutes, regulations, and the Secretary of Homeland Security's delegation of authority. See sections 101(a)(18), 103(a), and 287(b) of the Act; 8 C.F.R. §§ 103.1(b), 287.5(a); DHS Delegation Number 0150.1 (effective March 1, 2003).

With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(1).

As an issue of fact that is material to an alien's eligibility for the requested immigration benefit or that alien's subsequent admissibility to the United States, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Outside of the basic adjudication of visa eligibility, there are many critical functions of the DHS that hinge on a finding of fraud or material misrepresentation. For example, the Act provides that an alien is inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or by willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182. Additionally, the regulations state that the willful failure to provide full and truthful information requested by USCIS constitutes a failure to maintain nonimmigrant status. 8 C.F.R. § 214.1(f). For these provisions to be effective, USCIS is required to enter a factual finding of fraud or material misrepresentation into the administrative record.<sup>5</sup>

If USCIS were to be barred from entering a finding of fraud after a petitioner withdraws the visa petition or appeal, or after the petition is automatically revoked, the agency would be unable to subsequently enforce the law and find an alien inadmissible for having “sought to procure” an immigrant visa by fraud or willful misrepresentation of a material fact. *See* section 212(a)(6)(C) of the Act.

With regard to the current proceeding, section 204(b) of the Act states, in pertinent part, that:

After an investigation of the facts in each case . . . the [Secretary of Homeland Security] shall, if [she] determines that the facts stated in the petition are true and that the alien . . . in behalf of whom the petition is made is an immediate relative specified in section 201(b) or is eligible for preference under subsection (a) or (b) of section 203, approve the petition . . . .

Pursuant to section 204(b) of the Act, USCIS has the authority to issue a determination regarding whether the facts stated in a petition filed pursuant to section 203(b) of the Act are true. A material issue in this case is whether there was fraud or willful misrepresentation involving the labor certification application. Submitting false documents amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. The Attorney General has held that a misrepresentation made in connection with an application for a visa or other document, or with entry into the United States, is material if either:

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<sup>5</sup> It is important to note that, while it may present the opportunity to enter an administrative finding of fraud, the immigrant visa petition is not the appropriate forum for finding an alien inadmissible. *See Matter of O*, 8 I&N Dec. 295 (BIA 1959). Instead, the alien may be found inadmissible at a later date when he or she subsequently applies for admission into the United States or applies for adjustment of status to permanent resident status. *See* sections 212(a) and 245(a) of the Act, 8 U.S.C. §§ 1182(a) and 1255(a). Nevertheless, the AAO has the authority to enter a fraud finding, if during the course of adjudication, it discloses fraud or a material misrepresentation. In this case, the beneficiary has been given notice of the proposed findings and has been presented with an opportunity to respond to the same.

- (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.

*Matter of S & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961). Accordingly, the materiality test has three parts. First, if the record shows that the alien is inadmissible on the true facts, then the misrepresentation is material. *Id.* at 448. If the foreign national would not be inadmissible on the true facts, then the second and third questions must be addressed. The second question is whether the misrepresentation shut off a line of inquiry relevant to the alien's admissibility. *Id.* Third, if the relevant line of inquiry has been cut off, then it must be determined whether the inquiry might have resulted in a proper determination that the foreign national should have been excluded. *Id.* at 449.

Here, the director in the January 9, 2012 NOIR identified the inconsistencies in the record pertaining to the address listed on the job announcements. The petitioner stated in response to the January 9, 2012 NOIR that the address listed on the job announcements was simply the result of a typographical error or an oversight, and that it was not made intentionally.

We find, however, that the address listed on the job announcements was also listed on the Form I-140 petition and the ETA Form 9089, which raises significant doubt that the petitioner inadvertently listed a wrong address on the job announcements. Based on the noted problems in the labor certification application, the AAO finds that the petitioner has willfully misrepresented facts about the labor certification application.<sup>6</sup> Although the petitioner in this case presented an approved labor certification, the labor certification appears to have been approved erroneously.

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<sup>6</sup> The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.21(b)(5) (1998), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility and which might well have resulted in a proper determination that the application be denied. *See*

If USCIS Nebraska Service Center had initially known the true facts, it would have denied the employer's petition, as the ETA Form 9089 was falsified. In other words, the concealed facts, if known, would have resulted in the outright denial of the petition. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 403 (Comm'r 1986). USCIS Nebraska Service Center was unable to make a proper investigation of the facts when determining eligibility for the benefit sought, because the petitioner shut off a line of relevant inquiry by submitting fraudulent or falsified information (that the address on the job announcements was the result of a simply typographical error). Accordingly, the misrepresentation was material under the second and third inquiries of *Matter of S & B-C-*.

By submitting fraudulent information to USCIS, the petitioner sought to procure a benefit provided under the Act through willful misrepresentation of a material fact. *See also Matter of Ho*, 19 I&N Dec. at 591-592. As noted above, it is proper for USCIS to make a finding of fraud pursuant to section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182.

For these reasons, the director's decision to invalidate the certified Form ETA 750 is affirmed as evidence of record supports the director's conclusion that there was fraud or willful misrepresentation involving the labor certification. *See* 20 C.F.R. § 656.30(d).

**b) 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 Form ETA 9089 was accepted for processing by DOL on August 6, 2006. The prevailing wage and the offered wage specified on the Form ETA 750 is \$13.90 per hour or \$28,912 per year.

To show that the petitioner has the ability to pay \$13.90 per hour or \$28,912 per year from August 2, 2006 and continuing until the beneficiary receives lawful permanent residence the petitioner submitted the following evidence:

- Copies of Forms 1120S U.S. Income Tax Return for an S Corporation for the years 2005 through 2009;<sup>7</sup>
- Copies of the beneficiary's Forms W-2 Wage and Tax Statement for the years 2008 and 2009; and
- A copy of the petitioner's Revised Financial Statement and Supplementary Info for year ended December 31, 2010.

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 1993 and to currently employ three people.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 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 compensation from the petitioner in 2008 and 2009:

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<sup>7</sup> The AAO notes that the petitioner submitted copies of its 2005 tax returns. However, it is noted that the petitioner's 2005 tax return is for the year prior to the priority date of the visa petition; and, therefore, it has little probative value when determining the petitioner's continuing ability to pay the proffered wage from the priority date of August 2, 2006. Therefore, the AAO will not consider the petitioner's 2005 tax return when determining the petitioner's ability to pay except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

<b>Tax Year</b>	<b>Actual wage (AW) (Box 1, W-2)</b>	<b>Yearly Proffered Wage (PW)</b>	<b>AW minus PW</b>
2008	\$45,038.66	\$28,912.00	Exceed the PW
2009	\$41,021.69	\$28,912.00	Exceed the PW

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 show that it has the ability to pay the full proffered wage of \$28,912 in 2006, 2007, and 2010. The petitioner can pay these amounts through either its net income or net current assets.

If the petitioner chooses to pay these amounts 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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).

The record before the director closed on February 10, 2012 upon receipt by the director of the petitioner’s submission in response to the director’s NOIR. As of that date, the petitioner’s 2011 federal income tax return was not yet available. Therefore, the petitioner’s income tax return for 2010 is the most recent return available. The petitioner’s tax returns demonstrate its net income (loss) for the years 2006 and 2007 as shown below:

<b>Tax Year</b>	<b>Net Income (Loss)<sup>8</sup> – in \$</b>	<b>The PW – in \$</b>
2006	188,649	28,912
2007	157,033	28,912

Therefore, the petitioner establishes the ability to pay through its net income in 2006 and 2007, but not in 2010.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>9</sup> A corporation’s year-end current assets are

<sup>8</sup> For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S if the S corporation’s income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income in 2007 is found in schedule K.

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

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 2010. The petitioner did not submit the copy of its federal tax return for 2010.

The AAO observes that the Revised Financial Statement and Supplementary Info for Year Ended December 31, 2010 is not audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements *must* be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. An unaudited financial statement consists of the unsupported assertions of management. In this case, the financial statement in the record is unaudited, and is therefore unreliable. Therefore, the AAO declines to accept the Revised Financial Statement and Supplementary Info for Year Ended December 31, 2010 as evidence of the petitioner's ability to pay.

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 petitioner's reputation within its industry, whether the beneficiary is replacing a former employee

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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.

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 submit the copy of its federal tax return, annual report, or audited financial statement for 2010 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, particularly in 2010.

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

The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

For the reasons stated above, the AAO finds that the director has good and sufficient cause to revoke the approval of the petition as required by section 205 of the Act, 8 U.S.C. § 1155.

The revocation of the approval of the petition is affirmed for the reasons stated above, 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 approval of the petition is affirmed.

**FURTHER ORDER:** The AAO finds that the petitioner knowingly misrepresented a material fact by providing fraudulent / materially misleading

information in an effort to procure a benefit under the Act and the implementing regulations.

**FURTHER ORDER:**

The alien employment certification, Form ETA 750, ETA case number A-06150-22379, filed by the petitioner is invalidated.