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

[redacted]

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DATE: DEC 2 6 2012 OFFICE: TEXAS 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)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(i)

ON BEHALF OF PETITIONER:

[redacted]

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a specialty baker. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that "they will pay the beneficiary the amount of wages that is required for the position" as the petitioner stated that it was not employing the beneficiary forty hours a week.

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.

In a decision dated September 18, 2008, the director denied the petition because the petitioner failed to establish that it would pay the beneficiary the proffered wage as stated on the Form ETA 750 ($11.95 per hour, plus eight hours of overtime per week at the rate of $17.92 per hour, which yields an annual wage of $32,310.72). Specifically the director noted that the petitioner indicated in Part 6 of the Form I-140 that the beneficiary would be paid only $376.00 per week, which is less than the above stated certified wage. When asked in a Request For Evidence (RFE) to explain the discrepancy in wages to be paid to the beneficiary and the wage certified by the Department of Labor, the petitioner responded that the beneficiary was making less than the certified wage because he was working less than 40 hours per week. The director noted that the petitioner did not state that it would pay the full certified wage.[1]

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[1] On appeal, the petitioner states that it would pay the full certified wage. The petitioner indicates that it was represented by an individual who held themselves out to be "registered" as a paralegal with the California Bar Association and with USCIS as a paralegal, and that the representative advised the petitioner that the Form I-140 was filled out correctly. The petitioner further states that the representative formulated the response to the RFE with regard to the wage to be paid to the beneficiary. The petitioner states that it was defrauded by the representative which resulted in supplying inaccurate information to USCIS and led to the denial of the petition. Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), *affd,* 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia,* file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel. It is further noted, however, as set forth above, the petition is not being denied on appeal based upon the reasons for denial reached by the director based on the discrepancy in wage, but instead based on grounds set forth in the AAO's RFE. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The 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, 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 Form 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).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as noted above and stated on the Form ETA 750 is $11.95 per hour, plus eight hours of overtime per week at the rate of $17.92 per hour, which yields an annual wage of $32,310.72. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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.[2]

2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It should be noted, however, that as the director states, based on the petitioner's letter, the owner has stated, "The workers hours are variable depending on the business's job." The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). The petitioner has not adequately addressed this issue, that it will employ the beneficiary full-time.

[2] 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

The record indicates the petitioner is a domestic general partnership and filed its tax return on IRS Form 1065. On the petition, the petitioner claimed to have been established in 1988 and to currently employ 10 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 16, 2001, the beneficiary claimed to have worked for the petitioner since 1992.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until 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 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. If the petitioner paid some wages to the beneficiary, but less than the full proffered wage, the petitioner would need to establish the difference between the wages paid to the beneficiary and the full proffered wage. In the instant case, petitioner submitted W-2 Forms showing wages paid as follows:

- 2001 - $14,885.59
- 2002 - $17,774.36
- 2003 - $15,483.05
- 2004 - $12,883.79
- 2005 - $14,799.40
- 2006 - $15,382.74
- 2007 - $16,145.63
- 2008 - $21,902.59
- 2009 - $20,635.58
- 2010 - $20,165.38
- 2011 - $20,910.00

In Part 3 of the Form I-140, the beneficiary's social security number is requested. In the block provided for that response, the answer "NONE" is stated. On the W-2 Forms submitted by the

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newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner and referenced above, the beneficiary's social security number is listed as The beneficiary's personal tax returns were submitted to show tax filings for the above listed wages. Those tax returns, however, listed the beneficiary's social security number as Based upon the discrepancy in the social security number and the taxpayer identification number listed, the listed wages purportedly paid to the beneficiary will not be considered in the analysis of the petitioner's ability to pay the proffered wage of the beneficiary without resolution of the discrepancy. The discrepancy in the social security number is not explained in the record and that issue must be addressed by the petitioner in any future filings. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

On July 24, 2012, the AAO received the petitioner's submissions in response to the AAO's request for evidence. In the request for evidence, the AAO asked the petitioner to submit copies of its tax returns for 2007 through 2011 (copies of 2001 through 2006 tax returns were already in the record). The petitioner provided copies of its 2007 through 2010 tax returns, and a copy of a request for an extension of time in which to file its 2011 tax returns. The tax returns submitted reflect the following net income[3] for the petitioner:

- 2001 - $102,082
- 2002 - $112,260
- 2003 - $104,220
- 2004 - $102,220
- 2005 - $100,332
- 2006 - $98,630
- 2007 - $104,860
- 2008 - $85,120

[3]Where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (accessed November 19, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedules K for 2001 through 2010 do not state relevant entries for additional income, credits, deductions, and/or other adjustments and, therefore, its net income is found on line 22 of page one of the petitioner's Form 1065.

- 2009 - $61,998
- 2010 - $56,220

While the petitioner's tax returns would show sufficient net income to pay the full proffered wage of the present beneficiary in all listed years, USCIS records indicate that the petitioner has filed other Form I-140 petitions since the petitioner's stated establishment in 1988. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence in order to establish its ability to pay for the present beneficiary. *See* 8 C.F.R. § 204.5(g)(2). The AAO specifically asked the petitioner, in its May 14, 2012 RFE, to provide the following information with regard to petitions filed for other workers:

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The actual wage paid to each beneficiary from the priority date of the instant petition to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.

The AAO specifically explained the need for this information. In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together wages for each beneficiary for each year starting from the priority date of the instant petition, and analyze the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider the petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

The RFE informed the petitioner that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). In the petitioner's response to the AAO's RFE, the petitioner failed to provide the receipt number and priority date of each petition, the exact dates of employment of each worker, the proffered wage listed on the labor certification submitted with each petition, the actual wages paid to each beneficiary with Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present. As such, it is not possible to determine the amount of net income necessary

to pay all sponsored workers during each year from the priority date to the present. Without the requested information, the AAO cannot determine the petitioner's total wage burden in each year. While counsel identified the names of workers that obtained green cards, only two A-numbers were identified, but without the priority date and receipt numbers, and when permanent residence was obtained, the AAO cannot determine the impact of these petitions on the petitioner's ability to pay the proffered wage for the years in question. Additionally, counsel identified eight other petitions that were denied or withdrawn, but did not list the priority dates or the dates that such petitions were denied or withdrawn. Without such information, the petitioner's total wage obligation cannot be calculated and the AAO is precluded from being able to determine the petitioner's ability to pay as information regarding other sponsored workers is material to this determination. For this reason, the petition must be denied.

It is noted that if the net income the petitioner demonstrates it had available during all applicable periods, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS would review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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. None of the petitioner's tax returns stated any sums on its Schedules L. The absence of any figures for the petitioner for any year on Schedule L for a company the petitioner's size seems highly unusual and must be addressed in any further filings. Net current assets, therefore, could not be determined. It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. "Attempts to explain or reconcile the conflicting accounts, 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*, at 591. The absence of any information on Schedule L for all the years in question casts doubt on the veracity of the entire tax return and must be addressed, and resolved by independent objective evidence.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage of all sponsored workers as of their respective priority dates through an examination of wages paid to those workers, or its net income or net current assets.

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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, although specifically requested by the AAO, material information about the petitioner's wage obligations to sponsored workers. The AAO, therefore, could not determine the petitioner's ability to pay the proffered wages of all the petitioner's sponsored workers from their respective priority dates. Without such information the petitioner cannot establish its ability to pay the instant beneficiary. The petitioner's tax returns show steadily declining net income from 2008 through 2010. The net income stated on the petitioner's 2010 tax return is only $23,909.28 more than the proffered wage of the present beneficiary without considering wages that would be owed to any other sponsored worker(s). The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 appeal is dismissed.