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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: **FEB 17 2012** OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[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 law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based Immigrant Petition for Alien Worker (Form I-140) was initially approved by the Director, Texas Service Center. Upon determining that the petition had been approved in error, the director served the petitioner with a notice of Intent to Revoke (NOIR) the approval of the petition. In the Notice of Revocation (NOR), the director revoked the approval of the preference petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision to revoke the petition's approval will be affirmed.

The petitioner is a T-shirt wholesaling firm. It sought to employ the beneficiary permanently in the United States as an "exporter/T-shirts/ Portuguese language/ 185.157-018."¹ As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Labor Certification approved by the Department of Labor (DOL).

For the reasons explained below, the AAO concurs with the director's decision to revoke approval of the petition. The AAO concludes that the petitioner failed to credibly demonstrate that the beneficiary possessed the work experience required by the labor certification² and that the petitioner failed to establish its continuing ability to pay the proffered wage.³

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." 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).

¹DOL defines "185.157-018" occupational code on the Form ETA 750 as "wholesales II" occupational title.

²Section 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.

³ In this case, the proffered wage is \$7.50 per hour, which amounts to \$15,600 per year. 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.⁴

Section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F), provides that "[a]ny employer desiring and intending to employ within the United States an alien entitled to classification under section . . . 203(b)(1)(B) . . . of this title may file a petition with the Attorney General [now Secretary of Homeland Security] for such classification." (Emphasis added.)

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i) provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing qualified (or equally qualified in the case of an alien described in clause (ii) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The petitioner must establish that its job offer to the beneficiary is a realistic one and that the opportunity is a *bona fide* job offer. Because the filing of a 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 filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001, which establishes the priority date.⁵

⁴The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵The *bona fides* of the job offer, including such elements as the petitioner's ability to pay the proffered wage and the beneficiary's qualifications for the position are essential elements in evaluating whether a job offer is realistic. In reviewing a petitioner's ability to pay the proffered wage, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although in some cases, the overall 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.

The record indicates that the Form I-140 petition was initially filed on December 7, 2004. It was approved on April 28, 2005.

On January 18, 2011, the director concluded that the I-140 petition was approved in error and issued a notice of intent to revoke (NOIR).

The director found that the petition was deficient because the petitioner had not established that the beneficiary possessed two years of employment experience in the job offered as required by the labor certification and by 8 C.F.R. § 204.5(l)(3)(ii)(A).⁶ The director also noted that the petitioner had not demonstrated the continuing financial ability to pay the proffered wage of \$15,600 per year. Finally, the director questioned the *bona fides* of the job offer in the stated position when the beneficiary had previously been sponsored by the petitioner as an international executive or manager and had also claimed self-employment by Unicommerce Royalty Screen Printing Corp. The director requested in his NOIR that the petitioner provide additional evidence as follows:

- 1). Evidence that the beneficiary does in fact have the required two years of experience in the job offered, completed before the priority date.
- 2). Clarification as to why the beneficiary is both self-employed and employed by Unicommerce Royalty Screen Printing Corp.

1967). See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2).

⁶ The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

3). Federal tax returns, audited financial statements or annual reports for 2003 through and including 2009. Please also provide, if applicable, beneficiary's Forms W-2 for the years he may have worked for the petitioning company.

The petitioner was afforded thirty days to respond to the director's concerns raised in the NOIR.

On March 30, 2011, the director revoked the I-140 petition's approval pursuant to section 205 of the Act, 8 U.S.C. § 1155. The director concluded that the petitioner's response had not overcome the grounds for the grounds of revocation. Specifically, the director determined that the petitioner had not established that the beneficiary qualified as a skilled worker because he does not possess the required two years of experience in the job offered and also that the petitioner had not established its continuing financial ability to pay the proffered wage.

The petitioner appealed the director's decision. Petitioner's counsel asserts that the director erred in revoking the approved petition based on the lapse of time and the reconstructed nature of the file. Counsel also asserts that the director erred in revoking the petition based on the beneficiary's lack of work experience and the petitioner's failure to establish its ability to pay the proffered wage. On the notice of appeal (Form I-290B), counsel states that additional evidence or a brief will be submitted to the AAO within 30 days. As of this date, more than eight months later, this office has received nothing further. Therefore, this decision will be rendered on the record as it stands.

As a preliminary matter, the AAO notes that once USCIS has produced some evidence to show cause for revoking the visa petition, the petitioner still bears the ultimate burden of proving eligibility in a revocation proceeding.⁷ We do not find that the director erred in initiating this

⁷ It is further noted that the traditional position is that courts have generally opposed claims based on a theory of equitable estoppel against the federal government particularly where a public right or interest is implicated. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, (1917) (The Court disregarded the government's acquiescence because "laches or neglect of duty ... is no defense to a suit [the government] to enforce a public right or protect a public interest."); also *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, (1947) (The Court upheld the Federal Crop Insurance Corporation (FCIC) decision to refuse to pay for a crop loss even though it had erroneously approved an application under a regulation that prohibited insuring reseeded crops. The Court rejected the farmer's theory of recovery based on an analogy to a private insurance company reneging on a contract, concluding that the government was not akin to a private litigant and that the farmer had the obligation not to submit an application for benefits for which he did not qualify); *INS v. Miranda*, 459 U.S. 14, 19, (1982), [Eighteen month delay involving spousal immigrant visa; court did not apply estoppel]. Gross negligence and incompetence are not sufficient to support a finding of affirmative misconduct as required for estoppel against the government. Such affirmative misconduct requires that the government either intentionally or recklessly misled the claimant. *U.S. v. Wang*, 2005 WL 2671383 (N.D. Cal., 2005), [revocation of naturalization]. The issue as to what circumstances would justify the

revocation based on the eligibility of the beneficiary for a skilled worker visa and the petitioner's ability to pay the proffered wage. The court in *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984), additionally stated that "[I]t is important to note that a *visa petition* is not the same thing as a *visa*. An approved visa petition is merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain the United States." (Citations omitted) (Original emphasis).

Beneficiary's Employment Experience

Item 13 of the Form ETA 750 describes the job duties of an "exporter/T-shirts/ Portuguese language/ 185.157-018" as follows:

Export t-shirts to Brazil. Discuss prices, sales, and purchases in Portuguese. Obtain freight regulations and payment conditions.

Item 14 specifies that the beneficiary must have two years' work experience in the job offered. No other experience requirements are stated, however Item 15, "Other Special Requirements," states that "oral and written fluency in the Portuguese language" is also a requirement.

As evidence of the beneficiary's work experience, the petitioner has submitted a letter of recommendation, dated July 18, 1997, from a Brazilian company identified as [REDACTED], which has an illegible signature according to the English translation. The letter states that the beneficiary worked at that company from April 16, 1984 to December 6, 1988 as a "technical electrician." Counsel asserts that the beneficiary qualifies as a skilled worker in the job of "exporter t-shirts and Portuguese language" because he completed at least two years of college in Brazil and worked for Poligran Plastic Products Ltd. for four years. The AAO does not concur. In order to comply with 8 C.F.R. § 204.5(1)(3) and qualify the beneficiary in the visa classification sought as a skilled worker, employment verification letters must confirm that the beneficiary acquired the necessary work experience as of the priority date and be supported by

application of an estoppel claim against the government has been left open. In *Heckler v. Community Health Services of Crawford*, 467 U.S. 51, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984), Justice Stevens noted that:

[I]t is well-settled that the Government may not be estopped on the same terms as any other litigant. . . . We have left the issue open in the past, and do so again today. Though the arguments that the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are *no* cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government. (Original emphasis).

letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The letter from [REDACTED] does not identify the author and does not describe the beneficiary's job duties. The English translation indicates only that the letter was from the "Personnel Sector" and that the signature was "illegible." Most importantly, the letter only confirmed that the beneficiary worked as a technical electrician. A June 17, 1987 Ministry of Labor (Brazil) document certifies that the beneficiary worked as a technical electrician for Poligran Plastic Products, but provides no details. Additional English translations of two unknown documents translated on October 2, 1997 list numerous salary increases awarded to the beneficiary during his job as a technical electrician for [REDACTED] and also summarize the beneficiary's vacations during the 1987 to 1997 period. This does not satisfy the requirements of the Form ETA 750, which requires two years of work experience in the job offered of "exporter/T-shirts/ Portuguese language." Ministry of Education documents also indicate that the beneficiary "participated in a 60 hour course in industrial electricity from October 4, 1986 to January 24, 1987. Academic records indicating the beneficiary's attendance at the University of Veiga de Almeida in Brazil for an indeterminate period of time between 1984 and 1987 do not constitute employment experience in the job offered and do not establish the beneficiary's qualifications as a skilled worker.

Further, as observed by the director and as indicated by the record, the beneficiary, who signed Part B of the ETA 750 on April 24, 2001, lists no previous employment. The instructions require "all previous jobs held during the past three years" to be listed as well as "any other jobs related to the occupation for which the alien is seeking certification." It is notable that the beneficiary's job at [REDACTED] was not listed as a job held during the past three years or one considered to be related to the job offered. Therefore, the labor certification, signed under penalty of perjury by the beneficiary, does not support a claim that he possessed the required two years of work experience in the job offered as of the priority date. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) 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 at 591-592.

Based on the evidence contained in the record, the petitioner failed to establish that the beneficiary had the experience required for the position offered. The petitioner failed to establish that the beneficiary had the required two years of employment experience in the job offered, and, the beneficiary thus failed to qualify as a skilled worker.

Petitioner's Ability to Pay the Proffered Wage

As noted above, the petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, April 30, 2001. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).⁸ The proffered wage is stated as \$7.50 per hour, which amounts to \$15,600 per year. Also, as noted above, Part B of the Form ETA 750, signed by the beneficiary on April 24, 2001, does not indicate that the petitioner employed the beneficiary.

In response to the NOIR, however, counsel indicates that the petitioner employed the beneficiary in 2005 and 2006 as an employee and in other years employed him as an independent contractor, which income the beneficiary included in his own tax returns as self-employment. Counsel asserts that despite self-employment, the beneficiary's intent is to become the petitioner's employee following approval of his Form I-485, Application to Register Permanent Residence or Adjust Status.⁹ It is noted that the record does not contain any Wage and Tax Statements (W-2s) from the petitioner for 2005, however W-2s for 2006 and 2007 indicate that the petitioner paid the beneficiary \$1,800 in 2006 and \$4,500 in 2007, respectively. No Form 1099s were submitted, which would indicate payments to the beneficiary as an independent contractor. The petitioner submitted no evidence of pay to the beneficiary for the years 2001, 2002, 2003, or 2004.

On Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), it is claimed that the petitioner was established on July 31, 1992 employs fifteen workers and reports gross annual income \$1,104,000 and net annual income of \$1,045,300.

In support of the petitioner's ability to pay, the petitioner has provided copies of its U.S. Corporation Income Tax Returns for 2000, 2001, 2002, 2003, 2004, 2006. The petitioner has not submitted a copy of its 2005 federal tax return or submitted copies of its federal tax returns, audited financial statements or annual reports for 2006 through 2009 as requested by the director in the NOIR. The tax returns provided indicate that the petitioner's fiscal year runs from August 1st to July 31st of the following year.

⁸ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

⁹The record contains documentation that the beneficiary is self-employed and derives income from two other corporations; 1). Abarbanel Foundation, Inc. and 2). Power of Light Corp.

The tax returns also contain the following information:

Year	2000	2001	2002
Net Income ¹⁰	\$78,632	-\$ 15,088	\$ 58,707
Current Assets	\$ 75,560	\$ 98,794	\$ 72,504
Current Liabilities	\$ 61,836	\$ 196,631	\$175,088
Net Current Assets	\$ 13,724	-\$ 97,837	-\$102,584

Year	2003	2004	2005 (not submitted)	2006
Net Income	\$ 26,743	\$ 21,780		\$26,018
Current Assets	\$ 76,914	\$ 52,640		\$32,602
Current Liabilities	\$110,731	\$ 113,929		\$53,723
Net Current Assets	-\$ 33,817	-\$ 61,289		-\$27,705

As shown above, the 2005 tax return is not contained in the record. As also indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹¹ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the

¹⁰The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

¹¹ 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.

proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.¹²

The petitioner also submitted copies of various unaudited financial statements in support of its ability to pay the proffered wage. It is noted that 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. The unaudited financial statement submitted with the petition is not persuasive evidence. It represents the unsupported claims of management and is not considered probative of the petitioner's ability to pay the proffered wage during a given period.

In revoking the petition, the director noted that the petitioner had not submitted a copy of its 2005 federal tax return. Instead, it had submitted a copy of a Form 7004, Application for an Automatic Extension of Time to File Corporation Income Tax Return for the year 2005. This does not relieve it of its burden to demonstrate an ability to pay in this year pursuant to 8 204.5(g)(2), such as the submission of an audited financial statement. The director also noted that the petitioner had failed to provide copies of its tax returns (or other financial documentation) for 2007, 2008, and 2009 as requested in the NOIR.¹³ Therefore, the director determined that the petitioner had failed to establish its ability to pay the proffered wage in 2005, 2007, 2008 and 2009.

As noted above, on appeal, counsel merely states that the director erred, and failed to review the petitioner's "totality of the circumstances" relevant to its ability to pay the proffered wage. However, counsel does not elaborate on this contention through the submission of a brief or additional evidence and we do not find it persuasive. The undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

If a 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference

¹² A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

¹³ The petitioner did not submit these returns on appeal either.

between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given period, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As stated above, the petitioner paid the beneficiary \$1,800 in 2006 and \$4,500 in 2007, respectively, which are insufficient to establish the petitioner's ability to pay in these years. No other record of wages paid to the beneficiary has been provided.

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 or net current assets as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could 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 this case, although the petitioner's net income could cover the proffered wage of \$15,600 in the fiscal years of 2000, 2002, 2003, 2004, and 2006, neither the petitioner's net income nor net current assets of -\$15,088 and -\$97,837, respectively, could cover the proffered wage in fiscal year 2001. Further, the petitioner failed to submit documentation pursuant to 8 C.F.R. § 204.5(g)(2) such as a federal tax return or audited financial statement that would support its ability to pay the proffered wage in fiscal year 2005. Additionally, the petitioner failed to submit any documentation as requested in the director's NOIR for 2007, 2008 or 2009. The petitioner did not submit any of these tax returns that the director noted were missing on appeal either. The 2007 W-2 issued to the beneficiary for \$4,500 is \$11,100 less than the proffered wage. The petitioner failed to establish its *continuing* ability to pay the beneficiary the proffered wage from the priority date onward.

In some cases, 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 (Reg. Comm. 1967). 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, or the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry.

It is noted that counsel has cited none of these factors on appeal. It is additionally noted as stated above, that the record lacks financial documentation for several years, which the petitioner failed to submit in response to the director's NOIR or on appeal. Further, the petitioner's net income has declined during the 2000 to 2006 period and its net current assets have consistently reflected losses. It is not concluded that the record shows such unusual and unique circumstances such as those that prevailed in *Matter of Sonogawa* to support an approval in this case.

In view of the foregoing, the AAO concludes that the director properly revoked the approval of the petition. The revocation is based on the failure of the petitioner to establish that the beneficiary had the experience required for the position offered or eligibility as a skilled worker requiring two years of work experience in the job offered and based on the petitioner's failure to establish its continuing ability to pay the proffered wage.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582 at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). In this case, the evidence contained in the record, which raised numerous inconsistencies in the evidence as set forth above at the time the decision was rendered, warranted such denial.

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.