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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 19 2013 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

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 employment-based immigrant visa petition was denied by the Director, California Service Center. The petitioner appealed. The Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The director issued a new decision and denied the petition again and certified the decision to the AAO. The AAO affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reconsider. The AAO will affirm its prior decision of May 7, 2009. The petition remains denied.

The petitioner, is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it was the actual employer of the beneficiary or that it demonstrated its intent to directly employ the beneficiary on a full-time permanent basis. The director denied the petition, accordingly.[1]

The AAO remanded the petition to the director to obtain additional evidence, as to whether the petitioner or , described by the petitioner as its "alter ego," would be considered as the beneficiary's actual intended employer.[2] The AAO also remanded as to whether, in view of the multiple Form I-140(s), Immigrant Petition for Alien Worker(s) that had been filed by the petitioner, the petitioner had established its ability to pay the respective proffered wages to the instant beneficiary as well as the other sponsored beneficiaries. The beneficiary's wage as set forth on the ETA 750 is $1,712.50 per month, which amounts to $20,550 per year with

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[1] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[2] It is noted that only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). *See* 8 C.F.R. § 204.5(c).

The regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.
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> *Employment* means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

a priority date of March 26, 2001. The AAO noted that the record lacked information related to the payment of wages, employment status and priority dates of other sponsored beneficiaries.

In the AAO's second decision affirming the director's denial of the petition, the AAO set forth some of the essential provisions of the copy of the contract between the petitioner and as submitted by the petitioner and labeled as standard customer agreement,[3] and found that for the period spanning the contract between and the petitioner, the petitioner had not established that it was the actual intended U.S. employer of the beneficiary. The AAO also determined that the petitioner had not established its ability to pay the proffered wage to the beneficiary from the priority date onward. It is noted that despite the assertion on motion that the petitioner's continued employment of the beneficiary supports the petitioner as being the actual employer of the beneficiary, the record suggest that the petitioner abided by and honored the terms of the agreement at page 6 (F)(2), which gave the "required 30 days notice of termination" of its staffing contract with This May 1, 2006 letter from Ms , the petitioner's president, indicates that the petitioner would be terminating the contract with because of problems that the contract had caused between the petitioner and [USCIS] and that the petitioner wished to comply with [USCIS] regulations. It is additionally noted that Part E.1. of the agreement provides that it is the entire agreement between the parties and that any agreement or amendment would not be enforceable unless signed in writing by both parties.[4] Thus, a preponderance of the evidence indicates that the petitioner submitted this document because it represents a binding agreement between the petitioner and .

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[3] On page 1, section A.1, it indicates that will recruit, screen and hire employees for assignment at the customer's place of business in accordance with the job requirements and job description provided by the customer. A.5 of page 1 indicates that the petitioner has no right to set the level of compensation for employees at its site, only has this right. It is noted that information in the record suggests that the petitioner paid over $330,000 in workers compensation in 2003, but in 2004 paid over $700,000 in leased employees but none for workers compensation. B.1 of page 2 indicates that the petitioner may only offer temporary assignments to employees at its site. B.7 of page 3 gives the right to withdraw an employee from the petitioner's worksite if the petitioner fails to remedy certain forms of misconduct toward a employee, and C.4 of page 4 indicates that the petitioner may not request that its employees work outside the state without express written consent. The period in question when was determined to be the beneficiary's actual employer spanned the period of the contractual arrangement between the petitioner and from at least sometime in 2003 (at least November 2003) until May 2006 (based on the administrator of the petitioner, Ms. termination letter in the record).

[4] As stated in the AAO's prior decision , counsel's response dated February 26, 2007 to a request for evidence, included a copy of the petitioner's undated contract with , but there is a facsimile date of November 10, 2003, which appears on the signature page. It contains the signatures of the representatives of the petitioner and .

In sum, from some unspecified date after was established in 2003 until 30 days subsequent to the petitioner's May 1, 2006, notice of termination letter, apparently had the authority to hire and terminate employees at the petitioner's place of business. The standard customer agreement clearly states that the workers at the petitioner's worksite are employees. The record indicates that for a certain time during the relevant period these workers were under control in other significant ways. For example, had the authority to remove the employees from the petitioner's place of business should the petitioner fail to remedy issues of misconduct at its worksite which were of concern to and presumable had the authority then to place such employees at worksites away from the petitioning business. Additionally, the petitioner was not permitted offer permanent assignments to any employee working at the petitioner's place of business. It could only place the employee in temporary assignments. This, the AAO continues to find that would have been the beneficiary's actual employer for some portion of the relevant period of analysis from the priority date onwards in that would have directly paid the beneficiary's salary and would have had the authority to place the beneficiary at a worksite other than the petitioner's place of business. The petitioner failed to establish that during the entirety of the period of time from the March 26, 2001, priority date onwards that it could be considered the beneficiary's actual employer in control of the proffered position had the beneficiary accepted the position. Consequently, the job offer from the petitioner lapsed and the petitioner cannot be considered to be eligible to file a visa preference petition on behalf of the beneficiary.[5]

Regarding the petitioner's continuing ability to pay the proffered wage of $20, 550 per year from the priority date of March 26, 2001 onward, it is noted that if the petition were the only petition filed by the petitioner, it would only be required to produce evidence of its continuing ability to pay the offered wage for a single beneficiary. However, where, as in this case, a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously or approved during the relevant period of analysis, the petitioner must produce evidence that its job offers to each beneficiary are realistic. Therefore, it must show that it has the continuing ability to the proffered wages to each of the beneficiaries of its pending (or pending until denied), or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[5] *See Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

> *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.[6]

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[6]In reviewing a petitioner's ability to pay a proffered wage, USCIS examines wages paid to the beneficiary as well as a petitioner's net income or net current assets. If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure or net current assets reflected on the petitioner's federal income tax return or audited financial statements without consideration of depreciation or other expenses as suggested by counsel in this case. *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 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.

With respect to depreciation as claimed by counsel, 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

United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).[7]

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). As stated above, in this case, the priority date is March 26, 2001.

In this case, USCIS electronic records show that the petitioner has filed at least 230 petitions, including 10 Form I-129 non-immigrant petitions, with the remaining being Form I-140 petitions, approximately 170 of which have been filed since 2007. In its previous decision, the AAO noted that the director had issued a Notice of Intent to Deny on December 21, 2005, in which he had requested evidence that the petitioner had the ability to cover the proffered wages for all petitions. The petitioner did not submit the requested evidence. The 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).

On remand, the director again requested evidence from the petitioner that it could pay the proffered wages to all sponsored beneficiaries, including federal tax returns for 2004 and 2005; copies of the beneficiary's Wage and Tax Statements (W-2s) for 2004 and 2005 as well as her copies of individual federal tax returns for 2001 through 2005, and copies of the state quarterly wage reports for all employees for the last four quarters.

> 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.
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> 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 116. "[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).

[7] 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 is clear.

In response to the director's request, the petitioner provided copies of its state quarterly wage reports for the last three quarters of 2006, but not the last four quarters as requested. Also provided were copies of its 2004 and 2005 federal tax returns, but the petitioner failed to provide any further evidence that it could pay the proffered wages of all sponsored beneficiaries from their respective priority dates until the present. As noted in the AAO's previous decision of May 7, 2009:

> ....[I]t is noted that documentation provided by the petitioner on certification indicates that the petitioner has employed and paid the beneficiary at least an amount equal to the proffered wage in 2007 and 2008, however this ability must be existent as of the priority date in 2001. The insufficiency of the evidence related to the petitioner's continuing ability to pay all beneficiaries' their combined respective proffered wages precludes a favorable finding with regard to its ability to pay the instant beneficiary, as of her March 26, 2001 priority date. The AAO notes that the petitioner did not specifically respond to the director's request that it demonstrate its continuing ability to pay the respective proffered wages to all sponsored beneficiaries. Further, the petitioner omitted the first quarter's 2006 wage reports from its response. The 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 instant motion for reconsideration, counsel indicates that he is including a list of the sponsored beneficiaries. The list accompanying the motion lists names of 110 workers with their proffered wages and priority dates, but provides no information as to whether the petitioner has employed such workers, dates of employment, payment of compensation, or reconciled the other omitted 60 petitions for which the USCIS electronic records show have been filed. The total proffered wages identified in this list amount to 2.84 million dollars.

Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its Form ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In this case, despite its relatively large net income and net current assets, the petitioner's ability to pay this beneficiary has not been established, because insufficient information has been provided relevant to the proffered wages of all sponsored beneficiaries of the multiple petitions that it has filed during the relevant period, beginning as of the beneficiaries' respective priority dates.

The insufficiency of the evidence related to the petitioner's continuing ability to pay all beneficiaries' their combined respective proffered wages precludes a favorable finding with regard to its ability to pay the instant beneficiary, as of the March 26, 2001, priority date.

In some circumstances, the principles set forth in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) are applicable. That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In the present matter, as set forth above, the petitioner has not established that the petition merits approval under *Sonegawa.* As noted above, the petitioner must demonstrate that it can pay the proffered wage of all sponsored workers, as well as the instant beneficiary's proffered salary. Information relevant to its other sponsored beneficiaries' wages that has been provided is inadequate. Further, no unusual business circumstances or reputational factors have been shown to exist in this case that parallel those in *Sonegawa,* nor has it been established that the filing year was an uncharacteristically unprofitable year for the petitioner within a framework of profitable years. Additionally, certain other negative reputational factors may affect this petitioner. The petitioner received a two star rating, meaning "below average" from the federal Medicare nursing home profiling online site.[8] Further, the petitioner received an "AA" citation, the most severe penalty under state law, and a $80,000 fine from the state of California after an investigation concluded that inadequate care led to the death of a resident in April 2009.[9] Although these findings do not form the basis of the AAO's decision, the reputation factors would preclude a positive reputational factor for consideration in any *Sonegawa* analysis. The petitioner's ability to pay the proffered wage has not been established.

Beyond the decision of the director and as a separate and additional ground for the denial of the petition, it is noted that the employment verification documents contained in the record do not comply with the provisions of 8 C.F.R. § 204.5(l)(3) and do not establish that the beneficiary acquired one year of experience in the job offered as a nursing assistant as required by the terms of the labor certification. The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA 750 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. §

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[8] *See* (accessed March 24, 2013).

[9] *See* .. (accessed March 24, 2013).

204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). As noted above, the priority date of this matter is March 26, 2001.

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

(ii) *Other documentation*—

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

The record contains an employment verification letter from as "employer" located in Pasadena, California. The letter is dated June 21, 2004 and states that the beneficiary was employed with Ms. as a caregiver from August 2, 2003 until the present, which is the date of the letter. The beneficiary's duties are described by Ms. This experience cannot be considered qualifying work experience in the job offered because it occurred prior to the priority date of March 26, 2001. The record also contains two additional letters, but both are written by the beneficiary and do not comply with the regulation at 8 C.F.R. § 204.5(l)(3) as they are not from trainers or employers. Moreover, both letters assert the beneficiary's employment in the Los Angeles area during the March 2000 to the June 2003 period of time. However, according to the copies of the beneficiary's individual income tax returns for 2001, 2002 and 2003 subsequently submitted to the record, the beneficiary resided and worked in San Jose, California, which is approximately 340 miles from Los Angeles. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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)). Therefore, the evidence in the record is not sufficient to establish that the beneficiary possessed the one year of experience in the offered position by the priority date as required by the terms of the labor certification.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

Based on the underlying record, the petitioner has failed to establish that it was the actual employer eligible to sponsor the beneficiary on a visa preference petition during the entire period from the priority date onward or that it has had the *continuing* ability to pay the beneficiary the required wage from the priority date until the time of adjustment. Further, the petitioner failed to establish that the beneficiary possessed the required one year of employment experience as of the priority date.

The motion to reconsider is granted. The prior decision of the AAO, dated May 7, 2009 is affirmed. The petition remains denied. The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider is granted. The prior decision of the AAO, dated May 7, 2009, is affirmed. The petition remains denied.