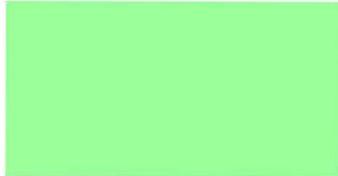


(b)(6)

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

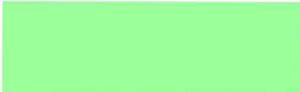
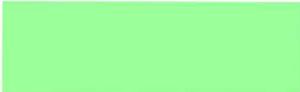


U.S. Citizenship  
and Immigration  
Services



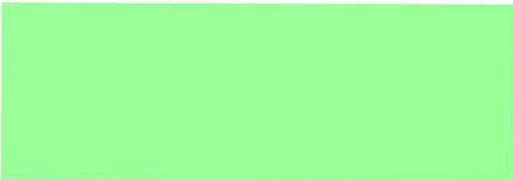
DATE: **MAY 24 2013**

OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF 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, Nebraska Service Center. The petitioner filed a motion to reconsider, which was dismissed by the Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a professional or skilled worker. The director determined that the petitioner failed to reconcile inconsistencies in the record of proceeding and did not demonstrate that the petition and labor certification were supported by a bona fide job offer. The director also found that the petitioner failed to demonstrate that it possessed the continued ability to pay the proffered wage from the priority date onward.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).<sup>1</sup>

Under the Department of Labor's (DOL) regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). Even when a petitioner has actually tested the labor market, a petition may be denied and a labor certification invalidated if a relationship exists which precludes a *bona fide*, such as where the beneficiary is related to the petitioner by "blood" or a close relationship created by financial arrangement, marriage, or friendship. *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

The DOL applies a totality of circumstances test to ascertain a *bona fide* job offer with respect to the alien's inappropriate control over a job offer. The DOL considers multiple factors including whether the alien: (a) is in a position to control or influence hiring decisions regarding the job for which labor certification is sought; (b) is related to corporate directors, officers, or employees; (c) was an incorporator or founder of the company; (d) has an ownership interest in the company; (e) is involved in the management of the company; (f) is on the board of directors; (g) is one of a small number of employees; (h) has qualifications for the job that are identical to specialized or unusual job duties and requirements stated in the application; and (i) is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would

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<sup>1</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations as in effect prior to the PERM amendments.

be unlikely to continue in operation without the alien. *See Modular Container Systems, Inc.*, 89-INA-228 (BALCA July 16, 1991)(*en banc*).

Invalidating relationships have been found even when there were no qualified United States applicants. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9<sup>th</sup> Cir. 1992) (labor certification application denied for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

The petitioner is a convenience and grocery store. It seeks to hire the beneficiary as a manager. During the adjudication of the petition, the director noted several inconsistencies in the beneficiary's claimed employment history and issued a request for evidence (RFE). The RFE asked the petitioner to explain why on the Form G-325A, Biographical Information, submitted with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary claimed to have been employed by the petitioner from October 2000 until the day the document was signed in 2007, yet on the application for labor certification signed on April 28, 2001 the beneficiary claimed to have been employed by [REDACTED] from October 2000 to "present." The director also noticed that the business address for [REDACTED] the home address for the beneficiary, and the home address for [REDACTED] owner were the same.

In response, the petitioner explained that it had essentially sublet its business to [REDACTED] for \$10,000 per month, and that the beneficiary was employed by [REDACTED]. This sublet was the result of an oral agreement, and was never reduced to writing. According to the petitioner, this arrangement made the beneficiary an indirect employee of the petitioner. The record does not establish that the petitioner had any direct employees.<sup>2</sup> The petitioner explained that [REDACTED] was owned by the beneficiary's brother, and its only employees were the two brothers (the principal and the beneficiary) and the beneficiary's sister-in-law. The petitioner stated that the sublet arrangement had been on-going since 1989, but that the petitioner felt it was now time to take direct control of the business and end the de facto sublease arrangement. The petitioner did not explain why this change was contemplated.

It is important to note that the petitioner and the owner of [REDACTED] had a long standing business relationship which functioned on mutual trust. Each month, the petitioner received \$10,000 from [REDACTED] on nothing more than a promise. The petitioner's business which is run by [REDACTED] requires three employs to function. The petitioner states that it plans to take over operations directly, and seeks to hire the beneficiary to achieve that goal. However, the petitioner does not state that he has plans to hire additional employees to run the business.

Looking at the totality of the circumstances, the petitioner has not established that a bona fide job offer exists. When the owner of [REDACTED] brother is the beneficiary of an employment based immigrant visa petition, the depth of the relationship between [REDACTED] principal and the petitioner raises the specter of an invalidating relationship. The director informed the petitioner that the

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<sup>2</sup> In fact, as noted by the director, the petitioner's tax returns indicate it paid no wages or cost of wages.

bona fides of the job offer were in doubt, highlighting the petitioner's burden. In response, the petitioner did not provide any details to explain why it was abandoning the long standing relationship with [REDACTED] principal. The termination of a long standing cooperative agreement would likely be complex and have been thought out in advance. If the termination were not amicable, it would certainly create strained relationships between the petitioner and [REDACTED] principle. This missing information is especially relevant when the record indicates the beneficiary (who stood to financially gain at [REDACTED] and his brother were working together and sharing the same home address. In cases such as this, when the petitioner is put on notice that the bona fides of the job offer are in doubt, the petitioner must show why the job offer is in fact bona fide. The petitioner did not establish why it intended to make this significant change in operations, which could also enable a long term business partner's brother to gain permanent resident status. In short, the petitioner did not meet this burden.

We also note that when filing the application for labor certification on ETA Form 750A, Block 21, the petitioner stated that it unsuccessfully recruited United States workers by placing a notice of the job opening in the company, listed the job with the Department of Labor, and offered a referral fee to employees. We note that the record does not contain evidence that the petitioner had any employees. To the extent that the petitioner is referring to the employees of [REDACTED] who operated the sublet business, these efforts do not seem calculated to reach United States workers. We note that it is unlikely that the beneficiary, his brother or sister-in-law would seek to find outside workers for the position for which the beneficiary had been selected. If the relationship between the petitioner and [REDACTED] principal had degenerated, it is doubtful that they would have sought qualified workers to further the business interests of the petitioner. Furthermore, listing the job with the Department of Labor is not a regulatory prescribed manner of recruiting United States workers. According to the regulations in effect at the time, the petitioner was required to: "place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication, whichever is appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers." See 20 C.F.R. § 656.21(g) (2001).

No evidence in the record demonstrates that the petitioner met the regulatory requirement of advertising in a newspaper or other permissible publication. Therefore, it appears that the petitioner did not conduct a valid labor market test.

As set forth in the director's denial, another issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.51 per hour (\$33,720.96 per year based upon a 48 hour work week as required on the application for labor certification).

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. According to the Form ETA 750B, signed by the beneficiary on April 28, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United

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<sup>3</sup> 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 newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent

either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record contains the petitioner’s federal income tax returns for 2001 through 2007. The petitioner’s tax returns demonstrate its net income for that period, as shown in the table below.

- In 2001, the Form 1120S stated net income of \$12,307;
- In 2002, the Form 1120S stated net income of \$13,630;
- In 2003, the Form 1120S stated net income of \$16,949;
- In 2004, the Form 1120S stated net income of \$18,772;
- In 2005, the Form 1120S stated net income of \$34,850;
- In 2006, the Form 1120S stated net income of \$27,533;
- In 2007, the Form 1120S stated net income of \$17,117;

Therefore, for the years 2001 through 2004, 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities. According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The record shows that from 2001 through 2007, the petitioner claimed \$42,580 each year in inventory. The petitioner explained that when the relationship with [REDACTED] began, [REDACTED]

paid \$42,580 for the petitioner's inventory. It has carried that figure forward on each subsequent years' tax return. However, this practice does not comport with the definition noted above of a "current asset." This "asset" has been unchanged for seven years.<sup>4</sup> Taking this into account and excluding its inventory, the petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$18,101;
- In 2002, the Form 1120S stated net current assets of \$11,084;
- In 2003, the Form 1120S stated net current assets of \$1,959;
- In 2004, the Form 1120S stated net current assets of -\$956;
- In 2005, the Form 1120S stated net current assets of \$10,217;
- In 2006, the Form 1120S stated net current assets of \$13,134;
- In 2007, the Form 1120S stated net current assets of \$3,064.

Therefore, for the years 2001 through 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, 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 as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, counsel asserts that when the beneficiary is hired, the petitioner's income will increase because it will be able to retain "amounts received from the [redacted] as income." Counsel has not provided evidence to support this assertion. The 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).

Counsel also states that non-cash deductions such as depreciation and amortization should be considered when determining the petitioner's ability to pay the proffered wage. However, as noted earlier, this argument has been rejected. *River Street Donuts, LLC v. Napolitano*, at 111.

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'l Comm'r 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

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<sup>4</sup> Even if the petitioner were correct in calling this fixed sum of money a current asset, the amount would have been depleted each year by the difference of the proffered wage, exhausting this resource in early 2003.

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 has been subletting his business and receiving compensation for more than a decade. The petitioner now states that it wants to alter its business model and take direct control of the business and end the sublet arrangement. The petitioner cannot establish a long standing track record or reputation in the industry for its new mode of operations. Nor can it accurately forecast its success in this new endeavor. 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.

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.

**ORDER:** The appeal is dismissed.