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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

DATE:

OFFICE: NEBRASKA SERVICE CENTER

FILE:

**JUN 27 2014**

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant petition for Alien Worker as a Skilled Worker or a 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a vehicle service center. It seeks to permanently employ the beneficiary in the United States as a diesel mechanic<sup>1</sup> and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). Section 203(b)(3)(A)(i) of the Act 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 petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, which was filed with the U.S. Department of Labor (DOL) on February 1, 2010, and certified by the DOL on July 2, 2010 (labor certification). The Form I-140, Immigrant Petition for Alien Worker, was filed on September 13, 2010.

On October 18, 2013, the Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date of the petition (February 1, 2010 – the date the underlying labor certification application was filed with the DOL) up to the present. The petitioner filed a timely appeal and supporting documentation. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personal records, may be submitted by the petitioner or requested by the Service.

Thus, the petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date, which is the date the labor certification application was accepted for processing by any

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<sup>1</sup> A letter from counsel accompanying the petition, dated August 29, 2010, identifies the proffered position offered as “Baker, Polish style” without further explanation and without reference to any diesel mechanic position.

office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application, ETA Form 9089, was received by the DOL on February 1, 2010. Section G of the ETA Form 9089 states that the offered wage for diesel mechanic is \$24.49 per hour. Based on a work year of 2,080 hours, the annualized proffered wage amounts to \$50,939.20.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. 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 this case, there is no evidence that the petitioner has ever employed the beneficiary. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its actual compensation to the beneficiary over the years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See 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 (6<sup>th</sup> 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. *See 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).

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 [sic] 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). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

The only federal income tax return in the record that postdates the priority date is the petitioner's Form 1120 for the year 2010.<sup>2</sup> As recorded in that form, the petitioner's net income (line 28 of the Form 1120) is \$7,783.00 in 2010. This figure is below the proffered wage of \$50,939.20. Accordingly, the petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present based on its net income.

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax returns. Net

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<sup>2</sup> In a Request for Evidence (RFE) issued on June 13, 2013, the Director requested the submission of the petitioner's latest federal tax return, annual report, or audited financial statements, but no such documentation was submitted with the petitioner's response to the RFE filed on September 3, 2013. Accordingly, there is no tax return in the record for any year after 2010 (nor an annual report or audited financial statement for any year).

current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the Form 1120. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total of a corporation's end-of-year net current assets is 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.

As recorded on in its Form 1120 for the year 2010, the petitioner's current assets totaled \$38,865 and its current liabilities totaled \$35,442, resulting in net current assets of \$3,423. This figure is below the proffered wage of \$50,939.20. Accordingly, the petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present based on its net current assets.

The petitioner has submitted its federal income tax returns for 2008 and 2009 as well. They recorded net income of \$9,783 in 2008 and \$7,158 in 2009, and net current assets of \$80,255 in 2008 and \$60,903 in 2009. Thus, the petitioner's net current assets would have been sufficient to pay the proffered wage of \$50,939.20 in both 2008 and 2009. Those years preceded the priority date of the instant petition, however, and the petitioner has not supplemented the record with any of its federal income tax returns after 2010, despite the Director's request for the petitioner's "latest U.S. tax return" in the RFE issued on June 13, 2013.

In summation, the foregoing analysis shows that the petitioner cannot establish its continuing ability to pay the proffered wage of the job offered by any of the three methods discussed above – (a) compensation actually paid to the beneficiary, (b) the petitioner's net income, or (c) the petitioner's net current assets.

On appeal the petitioner's co-owner [REDACTED] submitted a letter to USCIS, dated November 19, 2013, stating that he could have contributed his salary of \$47,700 in 2010 to pay the full proffered wage of the diesel mechanic position. Mr. [REDACTED] stated that the diesel mechanic position already exists in the business and is filled by himself, but that he wanted to retire and would be replaced by the beneficiary who would draw the salary previously paid to Mr. [REDACTED]. The petitioner's 2010 Form 1120 (Schedule E) confirms that Mr. [REDACTED] received \$47,700 in "officer compensation" that year.

While Mr. [REDACTED] asserts that the beneficiary would be replacing him as a diesel mechanic, it seems likely that Mr. [REDACTED] has additional duties as a co-owner of the business that the beneficiary would not be performing. In his letter of November 19, 2013, Mr. [REDACTED] stated that he "would like to focus solely on overseeing the company's day-to-day activities and developing effective marketing

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

strategies.” As a co-owner Mr. [REDACTED] may already be performing these duties, in addition to working as a diesel mechanic. Mr. [REDACTED] has not provided a detailed list of his current duties with the business. Thus, the evidence of record does not establish that the job offered to the beneficiary, as described in part H, box 11 of the ETA Form 9089, has the same duties as the position currently filled by Mr. [REDACTED]. If the duties of the job offered do not encompass all of the duties currently performed by Mr. [REDACTED], and Mr. [REDACTED] continues to perform duties associated with his co-ownership of the business, then Mr. [REDACTED] would not be replaced by the beneficiary and Mr. [REDACTED] salary cannot be attributed to the diesel mechanic position.

Furthermore, to cover the beneficiary’s proffered wage in 2010 Mr. [REDACTED] would have had to contribute \$43,156 out of his salary – approximately 90% of the total – to cover the difference between the petitioner’s net income (\$7,783) and the full proffered wage of \$50,939.20. Such an outlay raises the question of what additional financial resources Mr. [REDACTED] had to cover his own living expenses in 2010. The petitioner has not submitted Mr. [REDACTED] personal income tax return for 2010, or any other documentation showing what, if any, financial resources Mr. [REDACTED] had in 2010 beyond his salary. Nor has any such documentation been submitted for subsequent years. The record does not indicate what amount of officer compensation Mr. [REDACTED] drew, if any, in 2011 and 2012 (or 2013) because no federal income tax returns have been submitted by the petitioner for any of those years. We conclude, therefore, that the record fails to establish that the petitioner could have covered the full proffered wage in 2010, or in any subsequent year, by contributions from Mr. [REDACTED] salary.

On appeal the petitioner also asserts that it had sufficient cash on hand to pay the proffered wage of \$50,939.20, citing bank statements from [REDACTED] for the months of July and August 2013. Counsel’s reliance on the balances in the petitioner’s bank accounts is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified in 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. The petitioner has not shown that its bank account balances represent additional funds that were not included in its list of current assets on Schedule L of its federal income tax return, Form 1120. As we have already considered the petitioner’s net current assets for 2010 earlier in this decision, it would be duplicative to consider bank account balances from that year separately. The same rationale would apply to the petitioner’s bank account statements from 2013 if the petitioner had submitted its federal income tax return for 2013.

The petitioner cites a decision issued by the AAU (a predecessor component of the AAO) in 1992 which “approved” a petition wherein, according to the beneficiary, the employer established its ability to compensate the beneficiary “by combining its net income and wages previously paid out” (presumably to a replaced employee). As the record in this case does not establish that the beneficiary would be replacing any current employee of the petitioner, the 1992 decision cited in the instant appeal is not persuasive. Moreover, the AAO is not bound in the instant proceeding by its decision in another case back in 1992. While the regulation at 8 C.F.R. § 103.3(c) provides that

precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions (like the one cited by the petitioner) are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. See 8 C.F.R. § 103.9(a).<sup>4</sup> Thus, the 1992 decision cited above is not a precedent, is not binding on the AAO, and is not persuasive evidence of the instant petitioner's ability to pay the proffered wage.

Finally, the petitioner argued before the Director that it could meet its obligation to pay the proffered wage in 2010 by adding back depreciation and amortization in the amount of \$24,404, combining that amount with its taxable income in the amount of \$7,783, then adding its total cash to its total current assets. As noted above, depreciation and amortization are real expenses and represent an actual cost of doing business. Thus, these amounts may not be added back into net income. Net income and net current assets are not cumulative. We view net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, net current assets are a prospective "snapshot" of the net total of the petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, we do not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

In addition to the foregoing criteria for determining the petitioner's ability to pay the proffered wage, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612.<sup>5</sup> USCIS may, at its discretion, consider

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<sup>4</sup> The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

<sup>5</sup> 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

evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner stated that it began operations in 1996 and had three employees at the time the instant petition was filed in 2010. Subsequent WR-30 quarterly reports and Forms W-2 in the record indicate that the petitioner had five or six employees in 2012 and 2013. The petitioner's federal income tax returns for the years 2008-2010 recorded gross receipts of \$3,613,686 (2008), \$3,092,955 (2009), and \$3,244,902 (2010). Thus, the petitioner's business volume remained fairly constant in the years 2008-2010. However, with no post-2010 tax returns in the record, or alternative documentation such as audited financial statements or annual reports after 2010, we cannot determine the scale of the petitioner's business and its overall growth, if any, from 2011 onward.

For all of the reasons discussed in this decision, we conclude that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage of the job offered from the priority date up to the present. Accordingly, the petition cannot be approved, and the appeal will be dismissed.

Beyond the decision of the Director, the record also fails to establish that the beneficiary has the requisite experience as a diesel mechanic to qualify for classification as a skilled worker. The beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date to be eligible for approval under section 203(b)(3) of the Act. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The labor certification in this case states that the beneficiary had approximately four years of experience as a diesel mechanic with PKP – Polish Railroad Company at Plac Wiezniow Oswiecimia in Jaroslaw, Podkarpacki, Poland, from June 1, 1995 to May 1, 1999. Two letters have been submitted in support of the instant petition – an undated letter from senior mechanic [REDACTED] and a letter from human resources specialist

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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.

[REDACTED] dated June 17, 2013 – which state that the beneficiary worked for the railroad as a diesel engines mechanic from June or July 1995 to May 1999.

In an earlier Form I-140 petition filed on behalf of the beneficiary in 2008 by another company, also for a diesel mechanic position, a different letter was submitted as evidence of the beneficiary's experience. In that letter dated January 22, 2007, co-signed by a member and a director of [REDACTED] Building and Water Resources Services, in [REDACTED] Poland, the authors stated that the beneficiary worked as a diesel engine mechanic from June 21, 1996 to July 17, 1999. This letter is inconsistent with those submitted in support of the instant petition insofar as it appears to identify the beneficiary's former employer in Poland as a water supply company, not a railroad, and indicates a different and shorter time frame of employment.

Furthermore, while the instant petition and labor certification both identify the proffered position as a diesel mechanic, the original letter submitted by counsel for the petitioner, dated August 29, 2010, identified the position offered as "Baker, Polish style."

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

In view of the inconsistencies in the letters discussed above with regard to the nature of the proffered position and the beneficiary's qualifying experience, the identity of the beneficiary's employer in Poland during the 1990s, and the time frame of that employment, we conclude that the petitioner has failed to establish that the beneficiary has the requisite two years of experience as a diesel mechanic to qualify for classification as a skilled worker under section 203(b)(3)(i) of the Act. For this reason as well, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

For the reasons discussed in this decision, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.