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**U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**

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FILE:

[REDACTED]  
LIN 07 017 54127

Office: NEBRASKA SERVICE CENTER

Date: **SEP 4 - 2009**

IN RE:

Petitioner:  
Beneficiary:  
[REDACTED]

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

**ON BEHALF OF PETITIONER:**

[REDACTED]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom  
Acting Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original February 5, 2008 denial, the single 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 or seasonal 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in

the instant petition is April 14, 2003. The proffered wage as stated on the Form ETA 750 is \$14.96 per hour or \$31,116.80 annually.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

Relevant evidence submitted on appeal includes counsel's brief, a letter, dated February 9, 2008, from [REDACTED], one of the petitioner's owners, a copy of a previously submitted closing statement, dated January 20, 2004, a copy of the petitioner's previously submitted 2004 through 2006 Forms 1120S, U.S. Income Tax Return for an S Corporation, and a copy of the prior owner's 2002 Form 1120S. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

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 on August 12, 2003 and to currently employ twenty-five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 15, 2003, the beneficiary did not claim to have worked for the petitioner.

The letter, dated February 9, 2008, from [REDACTED] states:

I am writing to you regarding one of my employees, [the beneficiary]. I purchased Gus's Franklin Park Restaurant on January 20, 2004. I have sent to [the beneficiary's] lawyer the restaurant's tax returns for the years they had requested. However, [the beneficiary's] paperwork for his citizenship was denied due to the lack of showing the 2003 tax return for this restaurant. Gus's was owned and operated by a different entity at that time.

I have been trying to request the 2003 tax return from the precious [sic] owners that your letter requests in order to satisfy the denial of the citizenship, but have been unable to receive it. Please be advised that I have attached their 2002 Federal tax return for the business. I think you will find that after reviewing the 2002 and 2004 tax returns you will get an average of what the business did in 2003. I hope this information helps in overturning your decision for [the beneficiary's] citizenship.

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<sup>1</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).

On appeal, counsel asserts:

On February 5, 2008, the Service claimed that the petitioner has failed to establish their ability to pay the proffered wage as of the priority date and the continuing ability to pay the proffered wage.

Here to attach evidence to establish that Gus's Franklin Park Restaurant has the ability to pay the proffered wage to [the beneficiary].

- A letter from Gus's Franklin Park Restaurant dated February 9, 2008 signed by  
[REDACTED]
- Closing Statements.
- Form 1120S, U.S. Income Tax Return for an S Corporation with all schedules and attachments of the business.

In *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), [USCIS] was directed to approve a case where the petitioner showed a net profit of \$280. The Commissioner reasoned that the low net profit or loss in and of itself does not preclude the establishment that the petitioner would be able to meet the conditions of the job offer where company has been a viable business entity.

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. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 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 2003 or subsequently through 2006.

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). 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, 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 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).

The petitioner's tax returns demonstrate its net income for 2004 through 2006, as shown in the table below.

- In 2004, the Form 1120S stated net income<sup>2</sup> of \$17,074.
- In 2005, the Form 1120S stated net income of \$76,949.
- In 2006, the Form 1120S stated net income of \$84,202.

Therefore, for the year 2004 the petitioner did not have sufficient net income to pay the proffered wage of \$31,116.80. In 2005 and 2006, the petitioner did have sufficient net income to pay the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage of \$31,116.80 in 2005 and 2006 from its net income.

The prior owner's tax returns demonstrate its net income for 2002, as shown in below.<sup>3</sup>

- In 2002, the Form 1120S stated net income of \$26,403.

Therefore, for the year 2002 the prior owner did not have sufficient net income to pay the proffered wage of \$31,116.80.

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.<sup>4</sup> A corporation's year-end current assets are shown

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<sup>2</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See Instructions for Form 1120S, 2006*, at <http://www.irs.gov/pub/irs-pdf/f1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2005 and 2006, the petitioner's net income is found on Schedule K of its 2005 and 2006 tax returns. Because the petitioner and the previous owner did not have additional income, credits, deductions, or other adjustments shown on their Schedule K for 2002 and 2004, the petitioner's net income is found on line 21 of page one of their 2002 and 2004 tax returns.

<sup>3</sup> The petitioner did not submit the prior owner's 2003 tax return. The Closing Statement reflecting the purchase of the business by the petitioner as of January 20, 2004 establishes that the petitioner is a successor-in-interest to the prior owners. Therefore, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

<sup>4</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

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 petitioner's tax returns demonstrate its end-of-year net current assets for 2004, as shown below.

- In 2004, the Form 1120S stated net current assets of \$14,872.

Therefore, for the year 2004, the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner has already established its ability to pay the proffered wage in 2005 and 2006 from its net income in those years.

The prior owner's tax returns demonstrate its net current assets for 2002, as shown in below.

- In 2002, the Form 1120S stated net current assets of \$65,737.<sup>5</sup>

As the petitioner did not submit the prior owner's 2003 tax return, the petitioner has not established that its predecessor had the ability to pay the proffered wage in 2003. Therefore, the petitioner has not established the ability to pay the proffered wage of \$31,116.80 in 2003 and 2004.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.*

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one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>5</sup> While the prior owner would have had sufficient funds to pay the proffered wage from its net current assets in 2002, the tax returns for 2002 is for the year prior to the priority date of April 14, 2003, and therefore, has limited probative value when determining the prior owner's ability to pay the proffered wage from the priority date. Therefore, the AAO will not consider the prior owner's 2002 tax return when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated on August 12, 2003. The petitioner has provided its tax returns for 2004 through 2006, with only the 2005 and 2006 tax returns establishing the petitioner's ability to pay the proffered wage of \$31,116.80. In addition, the petitioner has not submitted the prior owner's 2003 tax returns. Therefore, the petitioner has not established the ability to pay the proffered wage in 2003 and 2004. Furthermore, although the petitioner states "that after reviewing the 2002 and 2004 tax returns you will get an average of what the business did in 2003," the AAO is unable to approve a petition without probative evidence that clearly shows that the previous owner had the ability to pay the proffered wage in 2003. In addition, the tax returns are not enough evidence to establish that the prior business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the prior owner's or current owner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. 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.

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether or not the petitioner misrepresented the job to DOL in the labor certification process. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v.*

*Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on April 14, 2003 and the job offer consists of the name of job title: "Cook"; the name of employer: "Franklin Park Restaurant," the instant petitioner; and the location of the employment: [REDACTED]  
[REDACTED],

As the petitioner was not incorporated until August 12, 2003, and it did not purchase the business until January 20, 2004, the record does not establish that the position was available at the time the job offer was made. Therefore, the Form was not approvable at the time of filing pursuant to 20 C.F.R. § 656.20(c) as of its date. The job offer was not a bona fide offer from the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent 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. § 1324b, provides that burden has not been met.

**ORDER:** The appeal is dismissed.