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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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 2 2 2010

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IN RE: Petitioner: [redacted]
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:

[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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 an equestrian center. It seeks to employ the beneficiary permanently in the United States as a stable manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 5, 2007 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 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 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage stated on that form is $17.51 per hour or $36,421 per year. Further, the Form ETA 750 states that the position requires a minimum of 2 years work experience.

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.[1]

The petitioner submits the following evidence to show that it has the continuing ability to pay the proffered wage beginning on the priority date:

- Photocopies of Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, 2003, 2004, 2005, and 2006;
- Photocopies of the beneficiary's W-2s for 2002 through 2006;
- A signed statement of the petitioner's certified public accountant (CPA) dated August 28, 2007; and
- A signed statement of [redacted] and one of the shareholders or officers of the corporation.

The record shows that the petitioner is structured as an S Corporation with 2 shareholders who share the annual profit or loss equally. According to its tax returns, the corporation was first established in April 1997. On the Form I-140, the petitioner indicates that the corporation has 7 employees and has gross annual income of approximately $550,000 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The 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).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

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, although the petitioner has established that it employed the beneficiary continuously from 2002, it has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Instead the W-2 forms submitted show that the beneficiary received the following wages from the petitioner:

- No information is available as to how much the beneficiary received in 2001.
- In 2002, the beneficiary received $21,186 ($15,235 less than the proffered wage).
- In 2003, the beneficiary received $19,265 ($17,156 less than the proffered wage).
- In 2004, the beneficiary received $19,396 ($17,025 less than the proffered wage).
- In 2005, the beneficiary received $20,463 ($15,958 less than the proffered wage).
- In 2006, the beneficiary received $21,000 ($15,421 less than the proffered wage).

When the petitioner fails to pay the beneficiary an amount at least equal to the proffered wage during the relevant timeframe, as it does in this case, USCIS next examines 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 (1st 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 the Service 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).

In this case, as the petitioner has already been paying the beneficiary partial wages since 2002, the petitioner would only need to establish that it could have paid the difference between the actual wages paid and the proffered wage through its net income or net current asset.

For an S Corporation that has income, credits, deductions or other adjustments from sources other than a trade or business, USCIS should not use the figure on line 21 of the Tax Form 1120S as net income, but rather, consider net income to be the figure shown on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf (accessed on April 7, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, the net incomes or losses for the years 2001 through 2006 are found on Schedule K, since the petitioner had additional income, credits, deductions, or other adjustments. The net incomes (losses) are:

- -$73,239 in 2001.
- -$10,389 in 2002.
- -$32,635 in 2003.
- -$107,642 in 2004.
- -$11,298 in 2005.
- -$77,559 in 2006.

Therefore, in none of these years the petitioner was able to pay the beneficiary 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.[2] 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 petitioner's tax returns demonstrate its end-of-year net current assets (liabilities) for the years 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -$28,748.
- In 2002, the Form 1120S stated net current assets of -$29,077.
- In 2003, the Form 1120S stated net current assets of $27,760.
- In 2004, the Form 1120S stated net current assets of -$17,362.
- In 2005, the Form 1120S stated net current assets of $11,100.
- In 2006, the Form 1120S stated net current assets of $10,938.

Therefore, between 2001 and 2006, only in 2003 the petitioner was able to cover the difference between the actual wage paid and the proffered wage through its net current assets.

On appeal, counsel for the petitioner asserts that the director has failed to consider other critical information in calculating its ability to pay during the qualifying period. For instance, counsel states that both the officers' compensation and the annual $90,000 rent expense are not fixed costs, in that they can be adjusted downward by the officers to make additional funds available for the payment of salaries. In a letter dated August 28, 2007, [redacted] the petitioner's CPA notes that since the real property on which the corporation operates its facilities is fully owned by the shareholders, the shareholders can adjust the annual $90,000 rent expense if they so choose. The same is purportedly true of the expense deduction for compensation of officers which is allegedly discretionary and can be adjusted by the shareholders each year as they choose. Further, counsel contends that the petitioner should be allowed to add the depreciation back to calculating the net income (loss). Finally, the petitioner states on appeal that [redacted] is 1 of only 4 equestrian facilities throughout the entire United States that has been qualified and certified by the British Horse Society (BHS) to provide training for professional riding instructors. A printout from BHS' website shows that the corporation has, as a matter of fact, been certified to provide training programs for professional horse riders.

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 Sonegawa,* 12 I&N Dec. 612.

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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. 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.

The AAO notes that the petitioner may have been 1 of only 4 facilities in the United States that is recognized by the BHS as having achieved the requisite facilities and expertise to be certified to provide training programs for professionals. However, no evidence has been presented to show that the corporation has as sound and outstanding a reputation as in *Sonegawa*. The AAO acknowledges that the petitioner has been in business since 1997 and has had gross revenues of around $500,000 since 2002. However, the corporation has had persistent net losses since 2001. In 2004, the AAO observes that the corporation suffered more than $100,000 net loss. Additionally, its net current assets over the years from 2001 have not been more than $12,000. Although wages and salaries have steadily increased over the years since 2001, no evidence has been submitted to show how many people were employed and how much each employee made in wages and salaries during the qualifying period between 2001 and 2006. The record, as a matter of fact, shows that the petitioner's financial outlook since 2001 has not been profitable.

Concerning the annual rent expense for $90,000, other than statements made by [redacted] and her CPA, no concrete evidence has been presented to show that such expenditure is discretionary. Both [redacted] and her CPA claim that the real estate on which the equestrian center operates is 100% owned by the officers. The evidence of record does not contain any documentation showing ownership of the real estate by the officers. Further, it is not clear whether the officers own the real estate free and clear of any mortgages. Merely stating that the officers own the real property on which the center operates without submitting any evidence to support it does not establish the reliability of the statement. The AAO finds no evidence to support the assertion that the $90,000 annual rent expenditure is discretionary.

As far as officers' compensation, the evidence of record does not support that the officers are willing and able to forego their past, present, or future compensation to pay the proffered wage. The two officers of the corporation received $40,000 in 2006. In that year, the beneficiary received $21,000, about $15,400 less than the proffered wage. This amount is almost 40% of the two officers' compensation. The mere fact that the officers' compensation can be adjusted is not sufficient to show that the officers are willing and able to forego their compensation to pay the beneficiary's proffered wage.

The law is clear concerning depreciation. As stated above, the court in *River Street Donuts* has held that depreciation expense is real expense, thus it should not be added back to the calculation of net income or loss. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.[3] The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[3] When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.