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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 02 2010

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, * 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, 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 2002 priority date of the visa petition. The director 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 May 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. The AAO notes that although the director in his Notice of Intent to Deny (NOID) the petition, questioned whether a familial relationship existed between the beneficiary and the petitioner, he did not address this issue in his decision. The AAO will briefly address this issue after an examination of the petitioner's ability to pay the proffered wage.

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 13, 2002. The proffered wage as stated on the Form ETA 750 is $12.45 per hour ($25,896 per year). The Form ETA 750 states that the position requires four years of work experience in the proffered wage.

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.[1]

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 2001, to have a gross annual income of [redacted] a net annual income of $10,000, 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. On the Form ETA 750B, signed by the beneficiary on January 10, 2003, 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. 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).

The AAO notes that the petitioner submitted its balance sheets for tax years 2002 to 2006 in response to the director's RFE dated September 20, 2007. The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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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 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).

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 2002 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 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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) [redacted] 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.[2] Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In [redacted] 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*, --- F. Supp. 2d. at *6 (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

[2] In response to the director's RFE dated September 20, 2007, counsel states that the petitioner's total income, indicated on line 6 of its tax returns, was greater than the proffered wage in all relevant years. Contrary to counsel's assertion, as stated above, USCIS examines the petitioner's net income in its deliberations, not total income.

> 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." [redacted] 537 (emphasis added).

The record before the director closed on February 13, 2008 with the receipt by the director of the petitioner's submissions in response to the director's NOID. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income, as shown in the table below.

[redacted]

[3] 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 [redacted] *see* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In tax years 2002 and 2006, the petitioner had additional income, or other adjustments shown on its [redacted] With regard to the remaining tax years, the petitioner had additional income noted on its Schedule K for tax year 2004, but did not complete this schedule. With regard to tax years 2003 and 2005, the petitioner also did not complete the schedule. Therefore the AAO uses the figure of ordinary income shown on line 21 for these three years.

Therefore, for the years 2002 to 2006, 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.[4] Net current assets are the difference between the petitioner's current assets and current liabilities.[5] 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 AAO notes that, contrary to the director's decision, the petitioner did submit its [redacted] with the initial I-140 petition. The petitioner's remaining tax returns were submitted to the record with blank Schedules L. In response to the director's RFE, the petitioner submitted an amended Schedule L for tax year 2006. In response to the director's NOID, the petitioner submitted a letter dated February 11, 2008 from [redacted] This letter states that according to line 9, Schedule B of the tax return, a petitioner is not required to complete [redacted] total receipts for the tax year and its total assets at the end of the tax year were less than $250,000. [redacted] then stated that per client's request and for the use by USCIS, he prepared Schedules L for tax years 2002, 2003, 2005 and 2006 showing the petitioner's total assets.

Despite the petitioner's explanation of the rationale for not completing the Schedules L and then submitting completed Schedules L for tax years 2003 to 2006, the AAO notes that the petitioner's total assets for tax year 2002 are listed as $29,191, with gross receipts of $242,537. Nevertheless, the petitioner did submit a completed Schedule L for this tax year. The Schedules L submitted in the middle of the proceedings do not indicate that these forms were submitted to the IRS. Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, USCIS will only examine the petitioner's 2002 tax return that were initially submitted with the completed Schedule L and not the other Schedules L submitted in response to the director's NOID. [6] The AAO

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[4] On appeal counsel incorrectly identifies the petitioner's assets as the sums on Line 15 of the petitioner's Schedule L.

[5] 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.

[6] If the completed Schedules L had been accepted, the petitioner's net current assets for tax years 2003 to 2006 are -$56,421 in 2003: -$28,092 in 2004; $889 in 2005; and $45,614 in 2006. Therefore only in tax year 2006, would the petitioner's net current assets as noted on the completed Schedule L, have been sufficient to pay the proffered wage.

withdraws the director's determination that the petitioner had established its ability to pay the proffered wage in 2006 based on its net current assets.

The petitioner's tax returns demonstrate its end-of-year net current assets for 2002 were $1,747. Therefore, for the year 2002, 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 appeal, counsel asserts that the petitioner paid compensation to its officers and wages during tax years 2002 through 2005, and notes that the compensation paid to corporate officers is not a liability but merely a normal accounting procedures to avoid double taxation. Counsel also notes that USCIS should consider the petitioner's totality of circumstances.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

As counsel notes on appeal, 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. [redacted] 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 [redacted] 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 submitted copies of its Form 941 Employer's Quarterly Federal Tax Return, in response to the director's NOID. These documents indicate that in tax years 2002 and 2003, the petitioner had six employees, while in more recent years, the petitioner had two employees who are also the two corporate officers. With regard to officer compensation, the AAO views the petitioner's compensation to officers to be modest, along with the petitioner's gross receipts and wages. The record is devoid of any further evidence with regard to the petitioner's business reputation. [redacted] when it submitted the ETA Form 750 for certification. The petitioner filed the I-140 petition in 2006, some six years later. 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.

Beyond the decision of the director, the AAO notes that the director raised the question of whether a bona fide position existed in the instant matter, based on the familial relationship between the beneficiary and the petitioner's owners, but he did not address this issue in his decision.

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). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

In the petitioner's response to the director's RFE, dated October 20, 2007, counsel stated that the beneficiary in the instant matter was the daughter of the petitioner's owners. The AAO also notes that the record contains a Form G325-A, Biographic Information signed by the beneficiary on June 12, 2007 in conjunction with her I-485 Adjustment of Status application. This document identifies [redacted] as the beneficiary's parents. These two individuals are also identified as the petitioner's officers on the petitioner's Articles of Incorporation, submitted to the record with the I-140 petition.

The director cited *Matter of Amger Corp*, and *Matter of Summart* in his NOID. The director did not provide legal authority for the applicability of BALCA's precedent decisions to these proceedings occurring under the [redacted] for the proposition that it is not an automatic disqualification for a beneficiary to have an interest in a petitioning business, however, if the beneficiary's true relationship to the petitioner is not apparent in the labor certification proceeding, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. The beneficiary's relationship to the instant petitioner does not appear analogous to the beneficiary's circumstances in [redacted]

this precedent decision, the beneficiary was the owner of 50 percent of the petitioner's issued shares, signer of the petitioner's tax returns, and at the time of filing the labor certification, the sole officer of the petitioning corporation. Nevertheless the precedent decision provides some guidance, as do the BALCA decisions.

The director requested that the petitioner provide evidence that the familial relationship was known to the Department of Labor (DOL) at the time of the labor certification process. In response, counsel submitted the petitioner's final Recruitment Report dated April 23, 2007 that it submitted to DOL. This document states that no applicants applied for the position. Counsel also submitted copies of the petitioner's posting notice and other documentation. However, the petitioner provided no evidence that DOL was aware of the familial relationship between the beneficiary and the petitioner's owners prior to the certification of the labor certification application.

[redacted]
the court describes the totality of circumstances to be examined when determining whether a job is clearly open to U.S. workers in cases involving questions of the beneficiary's relationship to the petitioner. The circumstances include but are not limited to whether:

[redacted]
Is related to the corporate director, officers, or employees;

Was an incorporator or founder of the company;

Has an ownership interest in the company; is involved in the management of the company; is on the board of directors; is one of a small number of employees;

Has qualification for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and

Is so inseparable from the sponsoring employer because of his or her pervasive presence and personal attributes that the employer would be unlikely to continue in operation without the alien. In addition, the business cannot have been established for the sole purpose of obtaining certification for the beneficiary, and also that totality of the circumstances standard also includes a consideration of the employer's level of compliance and good faith in the processing of the claim.

In the instant petition, the AAO notes that the beneficiary is not an officer, incorporator of the petitioner, or on the board of directors. However, she is the daughter of the petitioner's owners, and would be one of a small number of employees, all of whom are family members. Furthermore the AAO would question the petitioner's level of compliance and good faith in the processing of the claim based on the relationship between the beneficiary and the petitioner's owners. For this additional reason, the petition is denied, and the appeal is dismissed.

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.