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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: TEXAS SERVICE CENTER Date: FEB 02 2010

SRC 08 022 53793

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 203 (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 or reopen, 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a horse stable. It seeks to employ the beneficiary permanently in the United States as a horse groom. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), 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 and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

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).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for

processing on April 25, 2001.[1] The proffered wage is stated as $11.50 per hour, which amounts to $23,920 per year. Part B of the Form ETA 750 was signed by the beneficiary on April 22, 2001. It indicates that the petitioner has employed the beneficiary since March 1997 to (date of signing).

In view of the petitioner's employment of the beneficiary, this office issued a request for evidence on October 5, 2009, instructing the petitioner to submit evidence of its ability to pay the proffered wage including whether it has employed and paid the beneficiary during 2001, 2004, 2005, 2006 and continuing to the present. The petitioner responded to this request and indicated that the beneficiary has not been issued any checks, Wage and Tax Statements (W-2s) or Form 1099s for work performed.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on October 26, 2007. Part 5 of the petition indicates that the petitioner was established on January 2, 1985 and claims five current workers.

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 overall 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 support of its ability to pay the proffered wage of $23,920, the petitioner provided copies of its 2001, 2002, 2003, 2004, 2005 and 2006 Form 1120S, U.S. Income Tax Return for an S Corporation. They reflect that its fiscal year is a standard calendar year. The tax returns contain the following information:

Year	2001	2002	2003

[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Net Income[2]	$ 12,255	$ 51,785	$24,885
Current Assets	$ 16,189	$ 70,676	$62,837
Current Liabilities	$ 1,249	$ 1,995	$ 1,995
Net Current Assets	$ 14,940	$ 68,681	$60,842

	2004	2005	2006
Net Income	$ 4,744	$ 7,203	$ 6,724
Current Assets	$ 14,034	$ 12,735	$13,969
Current Liabilities	$ 2,648	$ 9,556	$ 8,701
Net Current Assets	$ 11,386	$ 3,179	$ 5,268

	2007	2008
Net Income	$10,127	$18,108
Current Assets	$13,607	$13,081
Current Liabilities	$ 5,060	$ 3,884
Net Current Assets	$ 8,547	$ 9,197

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current

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[2]Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 (2001, 2002, 2003) line 17e (2004, 2005) or line 18 (2006, 2007, 2008) of Schedule K. *See* Instructions for Form 1120S, 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.). Here, the petitioner's net income is reflected on line 23 of Schedule K in 2001-2003, line 17e in 2004-2005 and on line 18 in 2006.

[3] 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.

assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[4]

As shown above, the net income reported for 2002 and 2003 was sufficient to cover the proffered wage of $23,920 and demonstrate the ability to pay for these years. In 2001, 2004, 2005, 2006, 2007 and 2008, neither the net income nor net current assets was sufficient to cover the proffered wage.

The director denied the petition on January 21, 2009, determining that the petitioner had failed to demonstrate its continuing financial ability to pay the proffered salary.

On appeal, counsel asserts that the petitioner's depreciation expense should be added back to its net income in reviewing its ability to pay the proffered wage. Counsel also asserts that the value of the real property where the stable is located should be considered and submits a copy of a current municipal property valuation. Counsel also maintains that an individual identified as [redacted] is a shareholder of the petitioning corporation and also owns the real estate where the stable is located, and, could theoretically forgive rent paid from the corporation in order to supplement the payment of the proffered wage.

Counsel cites no legal authority that rent paid to one of the shareholders should be added back to the petitioner's net income. Moreover, it is noted that the only shareholder identified on the 2001 tax return is [redacted]. No shareholders are identified on the 2002 tax return and [redacted] is included as one of the three shareholders on the 2003 and 2004 tax returns, holding a 43.5 percent of the shares in 2004 and 49.71 percent of the shares in 2004. She is one of two shareholders on the 2005, 2006, 2007, and 2008 tax returns, shown as holding 49.71 percent of the share totals. Therefore, she is not the corporation's sole shareholder and it is not clear that she has had the authority to allocate funds for the petitioner in all years.

The petitioner has not established its ability to pay the proffered wage of $23,920 per year. It is noted that if a 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to

[4] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

pay the full proffered wage for that period will also be demonstrated. Here, as noted above, the petitioner has provided no first-hand evidence of wages paid to the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent 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). 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 as claimed by counsel, 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).

Additionally, counsel's assertions that the value of the real property where the petitioning business is located should be considered in it ability to pay the proffered wage is not persuasive. Real property is considered a long-term asset, not a net current asset as noted above and would not be considered as a readily available cash or cash equivalent asset to pay the proffered wage. Moreover, as part of the petitioning corporation's operation it would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, a petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

As shown above, and as advised in the AAO's request for evidence, the petitioner's net income reported for 2002 and 2003 was sufficient to cover the proffered wage of $23,920 and demonstrate the ability to pay for these years. In 2001, 2004, 2005 and 2006, 2007, and 2008, neither the net income nor net current assets was sufficient to cover the proffered wage.

Specifically, in 2001, the petitioner's federal tax return reflected that neither its $12,255 in net income nor its net current assets of $14,940 was sufficient to cover the proffered wage of $23,920. The petitioner's ability to pay the proffered salary has not been established in 2001.

In 2004, neither the petitioner's net income of $4,744 nor its net current assets of $11,386 was enough to cover the proffered wage in this year. The petitioner's ability to pay the certified wage has not been demonstrated in 2004.

In 2005, the petitioner's federal tax return reflected that neither its $7,203 in net income nor its net current assets of $3,179 was sufficient to cover the proffered wage of $23,920. The petitioner's ability to pay the proffered salary has not been established in 2005.

Similarly, in 2006, the petitioner's federal tax return reflected that neither its $6,724 in net income nor its net current assets of $5,268 was sufficient to cover the proffered wage. The petitioner's ability to pay the proffered salary has not been established in 2006.

In 2007, neither the petitioner's net income of $10,127 nor its net current assets of $9,197 was insufficient to cover the proffered salary of $23,920, or demonstrate its ability to pay in this year.

Finally, in 2008, neither the net income of $18,108 nor the net current assets of $9,197 was sufficient to pay the proffered wage or establish the petitioner's ability to pay.

Counsel asserts that due to the beneficiary's skills, the petitioner's revenue will significantly increase because he is a highly skilled artisan and has his own clientele. Counsel relies on *Matter of Sonegawa, supra* for this contention, but provides no detail or documentation in support. This hypothesis cannot be concluded to outweigh the evidence presented in the tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

As the record reflects that the petitioner already employs the beneficiary, his efforts would already be factored into the petitioner's tax returns.

Matter of Sonegawa, is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

Although this petitioner was established in 1985, six out of the eight corporate tax returns provided reflect both net income net current assets figures that are all substantially less than the beneficiary's proposed wage offer. It may not be concluded that such analogous circumstances to *Sonegawa* are present in this case that would overcome the evidence reflected in the tax returns. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter. The AAO can not conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.