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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: FEB 05 2010

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IN RE: Petitioner:
Beneficiary: [redacted]

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.[1]

The petitioner is a catering service. It seeks to employ the beneficiary permanently in the United States as a catering chef. 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 2001 priority date of the visa petition. Specifically the director determined that the petitioner had not established its ability to pay the proffered wage in tax years 2003, 2004 and 2006. 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 September 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.

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[1] The AAO notes that the record of proceedings has an approved I-130 petition for the beneficiary dated April 7, 2009 with an accompanying I-485 (MSC 09 043 20501) with no final adjudication. United States Citizenship and Immigration Services (USCIS) computer records do not reflect any additional action on the I-485 application. The AAO will transfer the record back to the Service Center for final processing of the I-485 application.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $18.89 per hour ($39,291.20 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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.[2]

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 December 1986. It did not indicate the number of current 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 April 11, 2001, the beneficiary claimed that he had worked for the petitioner from November 1998.

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, 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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[2] 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, although the beneficiary claims that he has worked for the petitioner since 1998, 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 2001 with the exception of the months of May through November 2007. The AAO notes that the director's decision gave no weight to the checks paid out to the beneficiary that identify the petitioner as the payee. While the director is correct that the petitioner does not identify the periods of time represented by the checks, the checks themselves do identify the gross wages paid to the beneficiary, plus tax deductions, and have dates identical to those identified on the petitioner's earning statements. While some checks appear to reflect weekly wages of $750 rather than biweekly wages of $1,440, the AAO would accept these checks as evidence of wages paid to the beneficiary in tax year 2007. Without a W-2 statement, the AAO cannot determine whether the petitioner paid the beneficiary such biweekly wages throughout the year, which would have amounted to overall wages greater than the proffered wage.

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). 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 record before the director closed on August 3, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. 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 for tax years 2001 to 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income[3] of $60,536.
- In 2002, the Form 1120S stated net income of $47,328.
- In 2003, the Form 1120S stated net income of -$21,871.

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[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 line 23 (1997-2003) line 17e (2004-2005) and line 18 (2006) of Schedule K. *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.). Because the petitioner did have additional credits and deductions shown on its Schedule K for all relevant tax years, the petitioner's net income is found on Schedule K of its tax returns. The petitioner did not provide a final income or loss on either lines 23 or 17e on Schedules K for tax years 2001 to 2004. Therefore the AAO added any additional item(s) in the first part of Schedule K and then subtracted any relevant figures from the latter part, per the instructions on the Schedule K, from the petitioner's net income identified on the first page of the Form 1120S, (line 21, ordinary net income), to arrive at the petitioner's actual net income in tax years 2001 to 2004.

- In 2004, the Form 1120S stated net income of $ 0(zero).
- In 2005, the Form 1120S stated net income of $ 672.
- In 2006, the Form 1120S stated net income of $21,214.

Therefore, for the years 2003 to 2006, the petitioner did not have sufficient net income to pay the proffered wage. It did establish its ability to pay the proffered wage as of the 2001 priority year and during tax year 2002.

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.[4] 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 for tax years 2003 to 2006, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of $27,000.
- In 2004, the Form 1120S stated net current assets of $24,625.
- In 2005, the Form 1120S stated net current assets of -$4,495.
- In 2006, the Form 1120S stated net current assets of -$47,990.

Therefore, for the years 2003 to 2006, the petitioner did not have sufficient net current assets to pay the proffered wage of $39, 291.20.

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 except for the 2001 priority year, and tax year 2002.

On appeal, counsel submits W-2 Statements issued by [redacted] for tax years 2001, 2002, 2003 and 2006, to [redacted].[5] Counsel identifies [redacted] as "the employer." Counsel makes no comments as to the relevancy of these wage statements to the petitioner's ability to pay the proffered wage.

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[4]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.

[5] This business has the same Employer Identification Number on its W-2 Forms as the petitioner. On appeal, counsel also submits a 2005 W-2 Form for an additional employee that also appears irrelevant to these proceedings.

Counsel also submits a 2007 Current Earning Statements for the beneficiary as of May 2007 and onward, and states that the beneficiary earns a bi-weekly salary of $1,440. Counsel also resubmits the petitioner's Forms 1120S for tax years 2001 to 2006. Counsel states that based on a Department of Labor's (DOL) decision the petitioner does not have to pay the beneficiary the prevailing wage until the beneficiary has adjusted to lawful permanent resident status. Counsel also cites to *Matter of Sonegawa* I&N Dec. 612 (BIA 1967) and states that in this precedent decision, the commissioner determined that although the petitioner's net income was not sufficient to pay the proffered wage, the petitioner was a viable business since 1986.

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 the director noted in his decision, the copies of the petitioner's checking bank statements for December 2001 to 2005 submitted in response to the director's RFE dated June 22, 2007, also are not sufficient to document the petitioner's ability to pay the proffered wage in tax years 2003, 2004, and 2006.

With regard to the additional checks submitted to the record on appeal, and the copy of the quarterly payroll record, these documents do not establish the petitioner' ability to pay the proffered wage as of tax years 2003 through 2006. They only indicate that the petitioner paid the beneficiary either a weekly wage of $720 or a bi-weekly wage of $1,440 during the months of May through November 2007.

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 (BIA 1967). 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.

While the tax returns indicate that the petitioner has been in business since 1986, this is the only evidence of the record as to the petitioner's longevity. The New York State Department of State database[6] however, indicates a business, [redacted] filed for corporate status on September 14, 2004. Although the database identified four other businesses utilizing the word [redacted] in their corporate names, this business lists [redacted] and registered agent, and identifies [redacted] at the [redacted] located at [redacted] The corporate name "[redacted]" is not found in the state database. If this entry in the state corporate database is for the petitioner, the state corporate database does not corroborate that the petitioner was established in 1986.

With regard to the petitioner's business growth, the petitioner submitted Forms 941, Employer's Quarterly Federal Tax Returns for the last quarter of 2001 through 2006. These documents indicate an increase of employees from twelve employers in the last quarter of 2001 to 30 employees in the last quarter of 2006. The respective wages paid during these two quarters was $112,843.50 in 2001 and $107,088.81, two sums that are not indicative of significant employment growth during the ensuing five-year period between 2001 and 2006. Further, the increased number of employees with stagnant wages in 2006 could indicate a higher number of part-time employees in 2006, rather than a significant increase in the petitioner's business operations. Finally the Forms 941 only reflect the final quarter of business operations which may be higher than the remainder of the year. Thus, they are not sufficient to establish an increasing number of the petitioner's workers and wages paid throughout the relevant period of time in question. The record contains no evidence as to the petitioner's reputation in the catering business or related business activities.

With regard to officer compensation, the tax documents for tax years 2001 through 2004 either do not identify any wages or officer compensation on the first page of the respective return, or these items are annotated "Included with cost of goods sold." Only the petitioner's tax returns for tax years 2005 and 2006 identify officer compensation in the following amounts: officer compensation of $34,000 in 2005; and officer compensation of $18,000 in 2006. However, both figures are less than the proffered wage of $39,291.20. The AAO also notes that the record does not indicate the number of the petitioner's officers. The record also does not indicate that any officer is willing to forego his or her compensation so that these funds can be utilized to show the S Corporation petitioner's flexibility to use its officer compensation as an additional source of funding to pay the proffered wage. Thus, the record contains no information with regard to discretionary sources of additional funding such as officer compensation that might be utilized to establish the S Corporation petitioner's ability to pay the proffered wage.

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[6] *See* http://www.dos.state.ny.us/corps/bus_entity_search.html (available as of December 30, 2009). No business records were found under the name "[redacted]" the entity identified on the checks found in the record. However, the petitioner's tax returns and the W-2 Forms found in the record issued by [redacted], have the same Employer Identification Number (EIN), namely, [redacted]

Counsel on appeal submits evidence on appeal with regard to the wages paid to [redacted] whom counsel identifies as "the employer." Counsel's assertion does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO does note that the New York State corporate database identifies [redacted] as the petitioner's chief executive officer, but this fact would not support the use of wages paid to one employee or officer to establish the petitioner's ability to pay the proffered wage to the beneficiary. Further counsel makes no further comment as to the relevancy of the W-2 Forms to the petitioner's ability to pay the proffered wage. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

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.

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.