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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 04 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:

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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 Director, Nebraska Service Center, denied the preference visa petition. The petitioner filed a motion to reopen and reconsider. The director granted the motion but determined that the petitioner had not overcome the grounds for denial of the petition. The matter 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 wine steward. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least two years of training or experience and, therefore, that the beneficiary cannot be found qualified for classification as a skilled worker. The director denied the petition accordingly, additionally noting that the petitioner's initial evidence had not established its ability to pay the proffered wage. The petitioner filed a motion to reopen and reconsider, submitting additional evidence. The director reaffirmed his initial denial of the petition and further determined that the petitioner had not established its continuing ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 denial, the initial issue in this case is whether the petitioner established that the job offered requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker as designated by the petitioner on the Immigrant Petition for Alien Worker (Form I-140).

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. Section 203(b)(3)(A)(iii) of 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.

Here, the Form I-140 was filed on March 7, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that there are no education or training requirements for the position. The only requirement is that the applicant must have three months of experience in the offered position as a wine steward.[1] However, the petitioner requested the skilled worker classification on the Form I-140. Because the petitioner failed to establish that the labor certification supported the selection of visa classification of a skilled worker (requiring a minimum of two years of experience or training) on the Form I-140, the director denied the petition.

On motion, the petitioner, through counsel, asserts that the skilled worker designation was a typographical error and submitted a copy of a new Form I-140 with the correct designation as set forth on Part 2, paragraph g rather than paragraph e as originally filed. The director rejected this amendment. In the appeal from this decision, counsel asserts that the director should have offered the petitioner an opportunity to change the visa classification. Counsel submits copies of excerpts of a USCIS SOP, asserting that it supports this argument. Therefore, counsel asserts that the visa petition should be approved as an unskilled worker, pursuant to Section 203(b)(3)(A)(iii) of the Act (Part 2, paragraph g of the Form I-140).

It is noted that the AAO is bound by the Act, regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from the circuit where the action arose. *See N.L.R.B v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. Further, there is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec.

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[1] The experience letter submitted does not contain the requisite translation. The regulation at 8 C.F.R. § 103.2(b)(3) requires:

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

In any further filings, the petitioner must submit proof of the required translation.

169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee, select the proper category and submit the required documentation.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

The AAO additionally concurs with the director's finding that the petitioner had not established its continuing financial ability to pay the proffered wage.[2]

The petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date,[3] which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the ETA Form 9089 was accepted on November 21, 2006, which establishes the priority date. The proffered wage as stated on Part K of the ETA Form 9089 is $9.48 per hour, which amounts to $19,718.40 per year. On Part 5 of the Form I-140, filed on March 7, 2007, the petitioner indicates that it was established on April 1, 1995, currently employs 56 workers, and has a gross annual income of over $3,000,000. On Part K of the ETA Form 9089 instructing the filer to list all jobs that the alien has held in the past three years and any other qualifying experience for the certified position, there is no indication that the petitioner has employed the beneficiary.

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[2]The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

[3]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.

In support of its ability to pay the proffered salary of $19,718.40, the petitioner has provided copies of its 2005 and 2006, Form 1120S, U.S. Income Tax Return for an S Corporation. They indicate that the petitioner's fiscal year is a standard calendar year. They contain the following information:

Year	2005	2006
Net Income[4]	-$219,931	-$ 23,663
Current Assets	$453,843	$529,039
Current Liabilities	$465,017	$670,550
Net Current Assets	-$ 11,174	-$141,511

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

The petitioner has also provided copies of its bank statements covering 2005, 2006, and 2007, as well as a letter from its accountant emphasizing that net income figure on the 2005 corporate

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[4]Where an S Corporation's income is exclusively from a trade or business, USCIS considers its net income to be the figure reported on line 21 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 17e (2005) and line 18 (2006) 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 17e of Schedule K in 2005, and on line 18 in 2006.

[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).

[6] 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.

tax return was affected by payment of bonuses to its officers as compensation, accelerated depreciation, deferred rent charges and accelerated deduction of certain prepaid expenses.

First, the alternative interpretation of the 2005 tax return as presented in the accountant's letter is not specifically relevant to a case where the priority date is November 21, 2006. The letter does not specifically address the petitioner's 2006 tax return except that advertising allowed the petitioner "to double bonuses its officers in 2006." Second, we do not find persuasive the assertion that the officer compensation represented on this petitioner's tax return should be added back to the corporate petitioner's income. It is observed that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the three officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. There is also no first-hand evidence from any of the three officer(s) that they were wiling or able to forego such compensation during the period given. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for these officer(s) or other documentation to identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the willingness to forego compensation and that the beneficiary would assume any portion of such duties or compensation. In any further filings, the petitioner should submit such evidence. 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)).

It is further noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is additionally noted that attempting to minimize taxable income may be a common strategy, but it remains that the regulation at 8 C.F.R. § 204.5(g)(2) allows a corporate petitioner to elect between annual reports or audited financial statements if it considers its tax returns a poor reflection of its financial position.

Additionally, as noted by the director, reliance on the petitioner's bank statements does not overcome the evidence reflected on the petitioner's tax return(s). Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial

portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L.

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. To the extent that the petitioner may have paid the alien 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 pay the full proffered wage for that period will also be demonstrated. Here, the record does not indicate that the petitioner has employed the beneficiary or paid the beneficiary any wages.

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) (*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. *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 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." *Chi-Feng Chang* at 537 (emphasis added).

In this case, in each of the corporate tax returns submitted to the record, the petitioner's declared net income of -$219,931 in 2005 and -$23,663 in 2006 were not sufficient to cover the proffered wage of $19,718.40. Similarly, the petitioner's net current assets of -$11,174 in 2005 and net current assets of -$141,511 in 2006 were not sufficient to cover the proffered wage or establish its ability to pay.[7]

In some cases, 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). That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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

[7] USCIS records also reflect that the petitioner has filed for a second worker with a 2008 priority date. The petitioner must establish its continuing ability to pay for both sponsored workers from each respective priority date.

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.

In the instant case, it may not be concluded that the two tax returns submitted to the record establish a framework of profitability as in *Sonegawa*. It is noted that the petitioner's net income and net current assets in each of the years reflect losses. Further, unlike *Sonegawa,* the instant petitioner has not submitted evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other overall circumstances similar to *Sonegawa* justify the petition's approval. The AAO does not conclude that the petitioner has established that it has had the *continuing* ability to pay the proffered wage beginning as of 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.