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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:

NOV 22 2010

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:

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. 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 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 an auto repair company. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 demonstrated its ability to pay the proffered wage. 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 14, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the date the labor certification was filed onward. On appeal, we have identified an additional ground of ineligibility: whether the beneficiary had the required two years of experience as of the priority date.

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 March 23, 2005. The proffered wage as stated on the Form ETA 750 is $38,563 per year. The Form ETA 750 states that the position requires two years of experience as an auto mechanic.

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 a C corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. On the Form ETA 750B, signed by the beneficiary on March 21, 2005, the beneficiary did not state that he had ever 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).

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. The petitioner submitted no evidence that it ever employed or paid the beneficiary.

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*, 696 F. Supp. 2d 873, 881 (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

[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).

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. *See Taco Especial*, 696 F. Supp. at 881 (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,* 558 F.3d 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,* 719 F.Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return or Line 24 of the Form 1120-A U.S. Corporation Short-Form Income Tax Return. The record before the director closed on May 5, 2008 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 the most recently available return. The petitioner's tax returns demonstrate its net income for 2005 to 2007, as shown in the table below.

- The 2005 Form 1120 stated net income of $513.
- The 2006 Form 1120 stated net income of $16,266.

- The 2007 Form 1120 stated net income of $2,635.

Therefore, for all of the relevant years, the petitioner's tax returns demonstrated insufficient net income to demonstrate the ability to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] On the Form 1120, a corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. On the Form 1120-A, a corporation's year-end current assets are shown on Part III, lines 1 through 6. Its year-end current liabilities are shown on lines 13, 14, and 16. 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 2005 to 2007, as shown in the table below.

- The 2005 Form 1120 stated net current assets of -$86,071.
- The 2006 Form 1120 stated net current assets of $31,907.
- The 2007 Form 1120 stated net current assets of $62,615.

The petitioner's net current assets were insufficient to demonstrate its ability to pay the proffered wage in 2005 or 2006. The petitioner's net current assets were sufficient to demonstrate its ability to pay the proffered wage in 2007, however, USCIS records reflect that the petitioner filed for a second worker with a 2002 priority date who did not adjust to permanent residence until May 2007. The petitioner must show that it can pay the respective proffered wage for each sponsored worker until they both obtain permanent residence. Here, the petitioner would need to establish that it could pay the beneficiary's proffered wage and the second sponsored worker until he adjusted in May 2007. The petitioner would not be able to pay both sponsored workers in 2005 and 2006. From the record, it is unclear that the petitioner could pay both from its 2007 net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner did not establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income, or net current assets.

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

On appeal, the petitioner submitted a letter from Young Park, CPA, dated June 11, 2008, which provides explanations of the petitioner's income for each year. The letter states that the petitioner's finances were not audited or reviewed and that the conclusions were based on "the representation of management." The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The attachment for 2005 states that the salaries and wages paid in 2005 were too high, "[the petitioner] hired more technicians than necessary, that is to say, overstaffing." 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). If the petitioner already had too many workers, it is unclear that the job offer extended to the beneficiary would be a *bona fide* full-time job offer from the time of the priority date onward. The job offer must be for full-time employment. *See* 20 C.F.R. § 656.3The attachments to the accountant's letter for 2006 and 2007 state that the company's expenses could have been lowered if it had not taken such a high depreciation amount. As stated above, depreciation costs represent a real cost of doing business and the courts have recognized that depreciation amounts cannot be added into the calculation of the petitioner's assets in determining its ability to pay the proffered wage. *See River Street Donuts,* 558 F.3d at 116; *Taco Especial*, 696 F. Supp. at 881. "[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,* 719 F.Supp. at 537 (emphasis added).

On appeal, counsel cited the amount of officer compensation paid per year as proof of the petitioner's ability to pay the proffered wage. No evidence appears in the record from the officer to show that the officer would be willing or financially able to forego all or part of the compensation to pay the proffered wage for this beneficiary or the other sponsored worker. Further, as the petitioner's net current assets for 2005 were negative and the net income was very low, a substantial amount of the officer compensation would be required in 2005 to pay the sponsored workers. We cannot conclude that is realistic. Should the petitioner seek to rely on officer compensation, in any further filings, the petitioner would need to submit evidence that the officer was willing and able to reasonably forego such compensation. Additionally, the petitioner would need to submit evidence of its total wage obligation to both sponsored workers in order to fully assess if the use of officer compensation is reasonable.

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.

The petitioner presented no evidence that it had one off year or that the financial picture presented by its tax returns is inaccurate. The petitioner's gross receipts have regularly declined from 2005 to 2007. The net income amounts for all years were minimal and the petitioner's net current assets for 2005 were negative and in 2006 were minimal. The petitioner submitted no evidence of its reputation or other information to liken its situation to that of *Sonegawa.* 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 or all its sponsored workers' wages.

Beyond the director's decision, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received

The Form ETA 750 requires two years of experience before the March 23, 2005 priority date as an automobile mechanic. The Form ETA 750B indicates that the beneficiary worked as the owner and auto mechanic for [redacted] beginning in March 2001 and continuing to the date that the labor certification was signed, March 2, 2005. The petitioner submitted a Certificate of Business Registration showing that the beneficiary registered Hyundai Car Master on March 26, 2001, a May 2001 Registration Certificate of Automobile Management Business, and a June 4, 2001 document from [redacted] certifying that the beneficiary was the person responsible for maintenance. This evidence does not indicate how long Hyundai Car Master operated or the role the beneficiary performed so that we are unable to conclude that he had two years of full-time mechanic experience (as opposed to managerial experience as the owner) at the time the labor certification was certified by the DOL. Additionally, the business registration states

that it is a "Retail service" and that its "Business item" is "battery, tire." Nothing shows that the beneficiary worked as an auto mechanic, instead of merely selling batteries and tires.[3]

The petitioner also submitted a Certificate of National Technical Qualification dated February 14, 2001 indicating that the beneficiary passed the qualifications necessary to be certified as a car maintenance engineer. This Certificate does not indicate any sort of employment experience or length of studies to obtain the certificate. The petitioner also submitted a Certificate of Business Cessation indicating that the beneficiary closed a business called [redacted] on September 4, 2000. The petitioner submitted a Certificate of Career and Certificates of Income showing that the beneficiary worked as a staff member at [redacted] from November 8, 1993 to May 30, 1995.[4] The beneficiary failed to list this experience on Form ETA 750B. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). As a result, we are unable to conclude that the petitioner has adequately established that the beneficiary had the necessary two years of prior experience as an auto mechanic at the time the labor certification was accepted by the DOL. In any further filings, the petitioner must submit the requisite certification of translation and additional evidence to address the deficiencies above.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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[3] Additionally, the petitioner failed to submit the certificate of translation in accordance with 8 C.F.R. § 103.2(b)(3):

> T*ranslations.* 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.

[4] The petitioner also submitted a Certificate of Tax Payment for the beneficiary indicating that he made regular VAT payments. None of these documents are translated in accordance with 8 C.F.R. § 103.2(b)(3).