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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: OCT 0 4 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. 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 a jewelry business. It seeks to employ the beneficiary permanently in the United States as a jewelry bench worker (stone setter). 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 from the priority date of the visa petition onwards. 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 June 2, 2008 denial, at issue in this case is whether 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.

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 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 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 26, 2003.[1] The proffered wage as stated on the Form ETA 750 is $18.48 per hour ($38,438.40 per year). The Form ETA 750 states that the position requires two years of experience in the proffered job.

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 on appeal.[2]

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner did not state how many workers it currently employs. According to the tax returns in the record, the petitioner was established in 1992 and its fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on August 19, 2003, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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

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[1] United States Citizenship and Immigration Services (USCIS) records reflect that the petitioner has sponsored two more workers. One of these sponsored worker ([redacted]) was assigned a priority date of April 19, 2002. USCIS approved that petition on April 10, 2007. The beneficiary in that matter adjusted to lawful permanent residence on February 22, 2008. The second additional sponsored worker [redacted] has a priority date of May 28, 2002. USCIS approved that petition on February 17, 2007. The beneficiary in that matter has not adjusted to lawful permanent resident status. Thus, throughout 2003 through 2008, the petitioner has the obligation to show the ability to pay the instant beneficiary's wage as well as the wages of two additional sponsored workers. In 2009 and following, the petitioner must show the ability to pay the instant wage and the wage of one additional sponsored worker.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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).

petitioner's ability to pay the proffered wage. Here, the petitioner has not established that it employed and paid the beneficiary the full proffered wage at any time during the relevant period of analysis. The 2003 Form W-2, Wage and Tax Statement, in the record reflects that the petitioner paid the beneficiary $23,165 in 2003, or $15,273.40 less than the proffered wage. The 2004 Form W-2 shows that the petitioner paid the beneficiary $24,283.50 in 2004, or $14,154.90 less than the proffered wage. The 2005 Form W-2 shows that the petitioner paid the beneficiary $19,469.50 in 2005, or $18,968.90 less than the proffered wage. The 2006 Form W-2 shows that the petitioner paid the beneficiary $21,028 in 2006, or $17,410.40 less 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 the relevant 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 not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

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 [redacted]s 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.
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> 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.

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

The record before the director closed on April 14, 2008 with the receipt of the petitioner's submissions in response to the director's Request for Evidence (RFE). 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 2003 through 2006 tax returns reflect its net income as follows:

- The 2003 Form 1120S states a net income[3] of $113,577.
- The 2004 Form 1120S states a net income (loss) of -$420,754.
- The 2005 Form 1120S states a net income (loss) of -$189,344.
- The 2006 Form 1120S states a net income (loss) of -$162,006.

For the years 2004 through 2006, the petitioner suffered a net loss. Thus, the petitioner has not shown that it had sufficient net income to pay the proffered wage or the difference between the actual wage that it paid the beneficiary, if any, and the proffered wage in those years. It has also not shown an ability to pay the wages of its two additional full-time sponsored workers in those years, using its net income.

In 2003, the petitioner's net income is sufficient to cover the balance of the proffered wage or $15,273.40. After this amount is deducted from the 2003 net income, $98,303.60 remains. The record does not include information regarding the proffered wages of each of the petitioner's two other sponsored workers. Thus, the petitioner has not established that it had sufficient net income to pay the balance of the proffered wage as well as the full-time wages of its two other sponsored workers in 2003.

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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 (2003) line 17e (2004-2005) and line 18 (2006) of the Schedule K. *See* Instructions for Form 1120S, 2006, at [redacted] (accessed September 29, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income and other adjustments shown on its Schedule K for 2005 and 2006, the petitioner's net income is found on Schedule K of its tax return in those years. In 2003 and 2004, the petitioner's net income is found on page one, line 21 of the Form 1120S.

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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 reflect its end-of-year net current assets for 2003 through 2006, as:

- The 2003 Form 1120S states net current assets (liabilities) of -$729,186.
- The 2004 Form 1120S states net current assets (liabilities) of -$1,226,035.
- The 2005 Form 1120S states net current assets (liabilities) of -$1,471,149.
- The 2006 Form 1120S states net current assets (liabilities) of -$1,465,871.

For the years 2003 through 2006, the petitioner had negative net current assets. Thus, it has not established that it had sufficient net current assets in those years to cover the portion of the proffered wage that it did not pay the beneficiary in those years (if any) and the wages of its two other sponsored workers.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage, as well as its two other sponsored workers' wages, from the priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel indicated that the petitioner will have the beneficiary replace two of its current employees.[5] Counsel also indicated that funds paid to these workers are available to pay the beneficiary's proffered wage. However, neither counsel nor the petitioner provided documents to support these assertions. 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)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For example, the record does not include evidence that the petitioner has replaced or will replace these two workers with the beneficiary. 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.

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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] In 2005, the combined salaries of these two employees, according to the Forms W-2 in the record, totaled $108,500.42.

Moreover, there is no evidence that the position(s) of these two other workers named by the petitioner involve the same duties as the proffered position as set forth on the Form ETA 750. In sum, the petitioner has not documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If those two employees named by the petitioner perform other kinds of work, then the beneficiary could not replace them.

Counsel also suggested on appeal that the petitioner's bank statements in the record demonstrate the petitioner's ability to pay the proffered wage from the priority date onwards. This is not correct. First, bank statements are not among the three types of evidence, enumerated at 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 evidentiary material "in appropriate cases," here counsel and the petitioner have not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

USCIS may also 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.

Here, the record indicates that the petitioner incorporated in 1992. The petitioner did not provide for the record the number of workers that it currently employs. The petitioner has not established its historical growth since incorporating. Its gross sales or receipts have not steadily increased, but have decreased from one year to the next during the relevant period of analysis, as follows: $5,886,984 in

2003; $4,688,454 in 2004; $2,466,699 in 2005; and $1,170,075 in 2006. Further, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry. The petitioner has not provided documentation which demonstrates that the beneficiary will be replacing former employee(s) or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, the AAO finds 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 from the priority date onwards. 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.