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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 28 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A).

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 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 $630. 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).

Thank you,

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.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a home health aide (caregiver). 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 ability to pay the proffered wage from the date the labor certification was accepted onwards and that the beneficiary did not possess the specific skills required by the terms of the labor certification. 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 18, 2009 denial, the issues in this case are whether or not the petitioner demonstrated that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and whether the beneficiary had the specific skills required by the terms of the labor certification as of the priority date.

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]

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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

[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 documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 July 20, 2001. The proffered wage as stated on the Form ETA 750 is $8.17 per hour ($16,993 per year).[2]

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation from 2001 to 2005 and was thereafter structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ two workers. On the Form ETA 750, the beneficiary indicated that she began working for [redacted] in March 2001.[3]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

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[2] The labor certification states that overtime would be remunerated at 1.5 times the hourly wage but does not indicate that any specific amount of overtime was required.

[3] The Form ETA 750 states that the beneficiary began working for [redacted] in March 2001 as a caregiver in the residential care home. The Form I-140 states that the name of the petitioner is [redacted] and that the petitioner's representative is [redacted] The addresses of the two entities are the same. Earlier tax returns show [redacted] as the petitioner's shareholder. Later tax returns show [redacted] as the 50% shareholder. It is unclear if these two individuals are the same or whether the beneficiary worked for [redacted] individually, or whether she began working for the petitioner in 2001.

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, the petitioner submitted the following Forms W-2 for the beneficiary:

- The 2001 Form W-2 states that the petitioner paid the beneficiary $7,550.
- The 2002 Form W-2 states that the petitioner paid the beneficiary $4,300.
- The 2003 Form W-2 states that the petitioner paid the beneficiary $1,850.
- The 2004 Form W-2 states that the petitioner paid the beneficiary $11,000.
- The 2005 Form W-2 states that the petitioner paid the beneficiary $11,960.
- The 2006 Form W-2 states that the petitioner paid the beneficiary $3,120.[4]
- The 2007 Form W-2 states that the petitioner paid the beneficiary $15,485.

As none of these amounts are more than the proffered wage, the petitioner must establish its ability to pay the difference between the actual wage and the proffered wage, which in 2001 is $9,443; in 2002 is $12,693; in 2003 is $15,143; in 2004 is $5,993; in 2005 is $5,033; in 2006 is $13,873; and in 2007 is $1,508.

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 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. 2d 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:

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[4] Some of the W-2 statements seem to reflect part-time employment. The job offer must be for full-time employment. 20 C.F.R. § 656.3.

> 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).[5]

The record before the director closed on January 26, 2009 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 2008 federal income tax return was not yet due. The petitioner submitted the following tax returns:

- In 2007, the Form 1120S stated net income[6] of $23,642.
- In 2006, the Form 1120S stated net income of $2,520.

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[5] Counsel argued that depreciation should be considered in response to the director's request for evidence. As noted in *River Street Donuts*, as set forth above, these arguments have been considered by the courts and rejected.

[6] 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), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 3, 2009) (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 adjustments shown on its Schedule K for 2006 and 2007, the petitioner's net income is found on Schedule K for those years.

- In 2005, the Form 1120 stated net income[7] of $709.
- In 2004, the Form 1120 stated net income of $3,874.
- In 2003, the Form 1120 stated net income of -$3,064.
- In 2002, the Form 1120 stated net income of $4,158.
- In 2001, the Form 1120 stated net income of -$3,738.

The petitioner also filed Form I-140 petitions sponsoring three additional workers; two of whom have priority dates of 2010, one of whom has a priority date of 2006. The director noted in his decision that the petitioner had sponsored a second worker. Counsel did not address this issue on appeal despite the director's notation of the issue. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner's net income would not establish the petitioner's ability to pay the difference between the actual wage paid and the proffered wage for the instant beneficiary in 2001, 2002, 2003, 2004, or 2005; and the petitioner's net income would not establish the petitioner's ability to pay both the difference between the actual wage paid and the proffered wage to the instant beneficiary and the proffered wage to a second beneficiary in 2006. From the record, it is unclear whether the petitioner could establish its ability to pay the difference between the instant beneficiary's wages paid and the proffered wage as well as pay the second worker's proffered wage in 2007.

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.[8] 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.

- In 2007, the petitioner's net current assets were $40,097.
- In 2006, the petitioner's net current assets were $8,407.

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[7] 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.

[8] 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.

- In 2005, the petitioner's net current assets were $0.[9]
- In 2004, the petitioner's net current assets were $0.
- In 2003, the petitioner's net current assets were $0.
- In 2002, the petitioner's net current assets were $0.
- In 2001, the petitioner's net current assets were $2,295.

The net current assets in 2001, 2002, 2003, 2004, and 2005 were insufficient to demonstrate the petitioner's ability to pay the difference between the actual wage paid and the proffered wage for the beneficiary. In 2006 and 2007, it is unclear from the record whether the petitioner's net current assets were sufficient to establish the ability to pay the difference between the actual wage paid and the proffered wage for the instant beneficiary as well as the proffered wage for a second sponsored worker. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

The petitioner submitted the first page of bank statements for the months of December 2001, 2002, 2003, 2004, 2005, and 2006. First, 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 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 would reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would be considered in determining the petitioner's net current assets.

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

[9] On IRS Form 1120, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) and total assets at the end of the tax year less than $250,000 are not required to complete Schedules L, M-1, and M-2 if the "Yes" box on Schedule K, question 13, is checked. *See* http://www.irs.gov/instructions/i1120 (accessed April 28, 2010). The petitioner had total receipts less than $250,000 and checked the "Yes" box in 2002, 2003, 2004, and 2005.

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.

In the instant case, the evidence concerning the petitioner's financial position shows that it had minimal or negative net income and minimal net current assets for the years it reported its assets on Schedule L (three out of seven years). The tax returns in the record thereby do not indicate that the petitioner had one off year like the petitioner in *Sonegawa.* The record contains no information about the other sponsored workers who petitions were pending at the same time as the instant beneficiary's petition. Also, the total wages paid in 2001 were less than the proffered wage and the total wages paid in 2002 and 2003 were little more than the proffered wage to the beneficiary even though the petitioner claimed to have two workers on its Form I-140. In addition, the petitioner did not submit evidence of its reputation to liken its situation to the one presented in *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.

Regarding the beneficiary's qualifications for the position, 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 four years of high school, three months of experience and specific requirements that include: "Must know food nutrition, food preparation, food storage, menu planning; must obtain First Aid, CPR, Health Screening Report issued by the State of California Health and Welfare Agency." The petitioner submitted the beneficiary's high school diploma demonstrating that she meets the education requirement of the labor certification. The petitioner also submitted a letter from [redacted] stating that the beneficiary lived in her house from January 2001 to March 2001 and took care of her personal and medical needs. Although the director noted in his decision that the letter submitted by the petitioner from [redacted] did not contain specific dates so that it was unclear whether the beneficiary had three full months of experience as of the priority date, the petitioner submitted no new evidence on appeal. The director also noted that the petitioner submitted no evidence that the beneficiary met the specific requirements of the labor

certification; the petitioner submitted nothing on appeal to address this deficiency. Accordingly, the petitioner has failed to demonstrate that the beneficiary had the experience required by the priority date.

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.