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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

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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JAN 31 2011

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

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 your 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 $630. 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 employment based visa petition was denied by the Director, Vermont Service Center. The petitioner appealed. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The Director, Texas Service Center issued a new decision and denied the petition again and certified the decision to the AAO. The matter is now before the AAO on certification. The director's decision to deny the petition is affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Spanish style cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification[1] approved by the Department of Labor (DOL), accompanied the petition. On December 29, 2004, the Director of the Vermont Service Center denied the petition. Finding that the record failed to contain sufficient initial evidence to establish eligibility, he determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage of $39,291.20 as of the priority date of the visa petition.

The petitioner, through counsel, appealed this decision. On December 19, 2007, the AAO withdrew the decision to deny the petition, and remanded the case to the director to obtain additional evidence of the petitioner's ability to pay the proffered salary.

On remand, the Director, Texas Service Center issued a Request for Evidence (RFE), dated February 16, 2010, to the petitioner. Based upon the lack of response provided by the petitioner, the director denied the petition on April 23, 2010, and certified it to this office for review.[2] On both the RFE and the Notice of Certification (NOC) issued by the director, it is indicated that both the petitioner and the petitioner's counsel were sent copies. As nothing further has been received to the record or by this office, this decision will be rendered on the current record as it stands.

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[1] After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[2] The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

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).

For the reasons stated below, the AAO concurs with the director's denial of the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage and its failure to respond to the NOC or to the director's RFE.[3] The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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:

> *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 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 [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the Form ETA 750 was accepted for processing on April 30, 2001, which establishes the priority date. The proffered wage as stated on the labor certification is $18.89 per hour, which amounts to $39,291.20 per year.

[3] The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an 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.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on April 29, 2004, the petitioner claims that it was established in 1993, has a gross annual income of $327,952 and claims that it employs three workers.

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 overall 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 the initial denial of the Form I-140, the director noted that the petitioner's corporate federal income tax return for 2001 had failed to show sufficient net income to cover the proffered salary. The director also concluded that the petitioner's current liabilities exceeded its current assets as shown by Part III of the tax return.[4]

[4] The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120-A corporate tax returns, the petitioner's net income is found on line 24 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 22 of page 1 of the Form 1120-A return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Further, it is noted that 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. 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 Part III of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 13 and 14. If a corporation's end-of-

On appeal, counsel submitted copies of the petitioner's 2002 and 2003 federal corporate income taxes and copies of Wage and Tax Statements (W-2s) purportedly issued to the beneficiary in 2001, 2002, and 2003. Counsel asserted that the director should have issued a request for evidence before denying the visa preference petition and maintained that the petitioner had the continuing ability to pay the proffered wage of $39,291.20.

For the reasons set forth in the AAO's decision of December 19, 2007, which will not be repeated here, the AAO determined that the director did not error in denying the petition based on the initial evidence submitted.[5] However, relevant to the copies of the W-2s submitted on appeal, we observed:

> It is noted that the W-2s provided on appeal disclose the same amount of wages paid each year in the exact amount of the proffered wage and all list the same tax identification / social security number for both the beneficiary and the employer. It is unclear when the petitioner first employed the beneficiary. The record shows that such employment was not included on the ETA 750B, signed by the beneficiary in April 2001. It is also not included on the biographic questionnaire (Form G-325) submitted with the beneficiary's application for permanent residence status in 2004, however it is noted that no date appears on the Form G-325. Further corroboration of such employment and payment of wages should be requested on remand.

Because of these inconsistencies, the petition was remanded in order for the director to investigate the reliability of the W-2s, request additional evidence and issue a new decision.

The record indicates that on February 16, 2010, the director requested additional evidence from the petitioner demonstrating that it had employed the beneficiary and that the wages claimed were paid to the beneficiary in 2001, 2002, and 2003. Further, the director requested that the petitioner submit evidence of its continuing ability to pay the proffered wage from 2004 to the present, including annual reports, federal tax returns or audited financial statements. The petitioner was allowed thirty-three (33) days to submit such evidence.

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year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

[5]The AAO further reviewed the petitioner's 2002 and 2003 income tax returns and found that neither its net income nor its net current assets could cover the proffered wage or demonstrate its ability to pay in either of those years.

The director issued his notice of certification reaffirming the denial of the Form I-140 based on the evidence in the record and on the petitioner's failure to respond to the request for evidence[6] that the director had issued on remand.

We concur with the director's denial of the petition. As set forth in the AAO's previous decision, in determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary.

In this case, the petitioner's failure to resolve the questions raised in the AAO's decision related to the petitioner's employment and payment of wages to the beneficiary in 2001, 2002, and 2003 does not establish that the Form I-140 is approvable based on wages paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In determining the petitioner's continuing financial ability to pay the proffered wage, USCIS will generally 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, (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.

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[6]The regulation at 103.2(b) provides in pertinent part:

> (13) *Effect of failure to respond to a request for evidence or a notice of intent to deny or to appear for interview or biometrics capture—(i) Failure to submit evidence or respond to a notice of intent to deny.* If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the application or petition may be summarily denied as abandoned, denied based on the record, or denied for both reasons. . .

Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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*, 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 as claimed by counsel, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As mentioned above and as set forth in the AAO's December 19, 2007 decision, the petitioner's tax returns failed to demonstrate that it had established the ability to pay the proffered wage. Neither the petitioner's net income of: -$34 in 2001; $5,220 in 2002; or $4,184 in 2003, could cover the proffered wage in any of those years. Similarly, its net current assets consisting of: -$121,788 in 2001; -$83,786 in 2002; or -$26,585 in 2003, additionally could not cover the proposed wage offer of $39,291.20. Further, the petitioner failed to provide a response to the director's request for evidence issued on remand for clarification of the petitioner's employment and payment of wages to

the beneficiary and updated evidence of its ability to pay the proffered wage from 2004 to the present.[7]

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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 director's decision to deny the petition is affirmed. The petition will remain denied.

[7] *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look.* Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere. In this case, in the years of 2001, 2002, and 2003, the petitioner consistently reported either losses or a very modest net income, as well as losses in net current assets. Further, the W-2s submitted to the record were inconsistent with the beneficiary's job history suggested by the record and the petitioner failed to resolve the inconsistencies with the Form W-2s that the AAO raised. It is not concluded that the petitioner established that a framework of profitability existed in this case analogous to *Sonegawa* or that such unusual or unique circumstances prevailed here as in *Sonegawa.*