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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

PUBLIC COPY

[redacted]

B6

DATE: SEP 0 9 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a Professional 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 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 $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 immigrant visa petition was denied by the Director, Texas Service Center (Director). The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a kitchen cabinet designer that seeks to permanently employ the beneficiary as an administrative supervisor and to classify her as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

Section 203(b)(3)(A)(i) of the Act 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 Director denied the petition on the ground that the petitioner failed to establish its ability to pay the beneficiary the proffered wage.

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 this decision. 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 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 labor certification application (ETA Form 9089) was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application was accepted by the DOL on February 26, 2008. The

[1] 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 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). In this case the petitioner supplemented the evidence submitted on appeal with some additional documentation submitted in response to a Request for Evidence from the AAO.

form states that the "offered wage" for the proffered position is $17.79/hour – which amounts to $37,003.20/year based on a 40-hour week.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, 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, U.S. 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 the decision denying the petition on April 25, 2009, the Director reviewed the petitioner's federal income tax returns (Form 1120) for the years 2006 and 2007 and noted that neither net income nor net current assets in those two years was sufficient to pay the proffered wage. (Since the priority date in this case was not until 2008, the tax returns for 2006 and 2007 have minimal relevance in any event.) The Director also reviewed some bank statements from December 2007 through April 2008 and found that the assets therein were insufficient – from the standpoint of either the actual monthly closing balances or the average monthly closing balance for the five-month period – to establish the petitioner's continuing ability to pay the proffered wage during that time. There was no further evidence in the record of the petitioner's ability to pay.

On appeal counsel submitted copies of the petitioner's federal income tax returns for 2008 (Forms 1120 and 1120X). According to counsel, the tax returns show net current assets of $46,994 in 2008, which exceeded the proffered wage for that year and thereby establishes the petitioner's ability to pay the wage.

Upon review of the 2008 tax returns, however, the AAO noted some anomalies on the forms. Between the original return (Form 1120), dated March 19, 2009, and the amended return (Form 1120X), undated on the copy, the petitioner made some changes on Schedule L (Balance Sheet per Books) – moving a figure of $27,293 originally entered on line 14 (Other assets) to line 3 (Inventories) and changing the amount to $24,000, as well as moving a figure of $57,456 from line 18 (Other current liabilities) to line 21 (Other liabilities). In its "Explanation of Changes" on the Form 1120X the petitioner stated that the changes on Schedule L did not affect the taxable income for 2008, but no illumination was provided on the reasons for the changes.

To obtain further clarification from the petitioner, and confirm the authenticity of the 2008 tax returns, the AAO issued a Request for Evidence (RFE) on May 9, 2011. The petitioner was requested to submit "IRS-certified copies of Form 1120 and Form 1120X" to show that they were actually received and processed by the Internal Revenue Service. The petitioner was also asked to provide a substantive explanation of the amendments to Schedule L. In addition, since the petitioner must establish its continuing ability to pay the proffered wage from the priority date up the present, the petitioner was

advised to submit IRS-certified copies of its federal income tax returns (Form 1120 and any ancillary forms) for the years 2009 and 2010.

The petitioner responded to the RFE on August 8, 2011 by resubmitting the "Explanation of Changes" page of its 2008 Form 1120X, as well as submitting IRS "Tax Return Transcripts" of the petitioner's federal income tax returns for 2008 and 2010, and a one-page IRS "Account Transcript" of the petitioner's federal income tax return for 2009. The transcripts have less information than a Form 1120.

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines 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. In this case, there is no evidence that the beneficiary has ever been employed by the petitioner. Thus, the petitioner cannot establish its ability to pay the proffered wage through its actual compensation to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See 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. *See 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 wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary 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 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, 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 [sic] represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income. As shown in the petitioner's federal income tax returns for 2008 (Form 1120, line 30, Form 1120X, line 3), its net income was -$15,814 that year. The same figure was entered as "taxable income" on the petitioner's 2008 "Tax Return Transcript" from the IRS. No copies of Form 1120 have been provided for 2009 and 2010, despite the AAO's request for those documents in its RFE. Nevertheless, the AAO notes that on the IRS "Account Transcript" for 2009 a figure of $0.00 was entered for "net taxable income," and on the IRS "Tax Return Transcript" for 2010 a figure of $6,309.00 was entered for "net income." Based on the foregoing documents, all of which show that the petitioner's net income never exceeded the proffered wage in the years 2008-2010, it is clear that the petitioner cannot establish its continuing ability to pay the proffered wage based on its net income.

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax return. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] 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.

Schedule L of the petitioner's amended federal income tax return for 2008 lists current assets of $46,994 and no current liabilities, resulting in net current assets of $46,994. This figure is above the proffered wage ($35,460) and, if credible, would establish the petitioner's ability to pay the proffered wage in 2008. The original tax return, however, listed cash in the amount of $18,594 as its only current asset and, as previously discussed, an amount of $57,456 in the category of "other current liabilities." Based on these figures, the petitioner would have had no net assets and net

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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.

liabilities of close to $40,000 in 2008. The petitioner has provided no substantive explanation for the shifting of figures on Schedule L, despite the AAO's request therefor in its RFE. Nor has the petitioner submitted IRS-certified copies of its Form 1120 and Form 1120X for 2008, which the AAO also requested in the RFE to verify that the copies in the file, which are neither dated nor signed by the petitioner, are authentic – *i.e.*, that the forms were actually filed with and processed by the IRS. Instead of certified tax forms, the petitioner submitted the aforementioned IRS "Tax Return Transcript" for 2008. That document, in its entries under Schedule L, includes "other current liabilities" of $57,456. This entry contradicts the petitioner's claim to have moved this figure to "other liabilities" on its amended tax return. Furthermore, none of the current assets listed on the petitioner's amended federal tax return for 2008 (including cash of $18,594, inventories of $24,500, and "other current assets" of $3,900) are listed on the IRS "Tax Return Transcript."

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

The petitioner has not only failed to resolve the evidentiary questions involving its 2008 tax returns, it has exacerbated its credibility problem with the contradictory IRS "Tax Return Transcript." Based on that document it appears that the amended tax return in the record was not actually filed by the petitioner with the IRS. Since the petitioner has not submitted IRS-certified Forms 1120 and 1120X, as requested in the RFE, the authenticity of the 2008 federal income tax returns in the file remains in serious doubt. 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 the absence of IRS-certified federal income tax returns for 2008, the AAO regards the IRS "Tax Return Transcript" as the authoritative document on file for that tax year. As noted above, this document lists "other current liabilities" of $57,456 and no current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage in 2008 based on its net current assets.

As for 2009, the one-page IRS "Account Transcript" does not contain any specific information about current assets and current liabilities for that year. The IRS "Tax Return Transcript" for 2010, under Schedule L, lists "other current liabilities" of $-325 and no current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage in 2010 based on its net current assets.

It is clear from the foregoing analysis that the petitioner has not established its ability to pay the proffered wage in 2008, 2009, or 2010 on the basis of wages actually paid to the beneficiary, its net income, or its net current assets during those years.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. 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 instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner is a kitchen cabinet designer, established in 2000, with three employees at the time the petition was filed in 2008. According to the petitioner's federal income tax returns and the IRS tax transcripts in the file, the petitioner's gross income during the years 2006-2010 was as follows: $589,582 (2006), $854,300 (2007), $777,792 (2008), $720,556 (2009), and $687,263 (2010). From a high in 2007, therefore, the petitioner's business tailed off the next three years. The dollar volume of the business dropped a total of 20% during that time. Moreover, the tax documentation on file does not indicate that the petitioner has been able to establish consistent profitability over the years. Business has hovered around the break even point – varying between a modest net income and a modest net loss – during the years 2006-2010. Thus, the record does not show that the petitioner's business is on a steady path of growth, creating an income pool from which the proffered wages for an administrative supervisor could be paid in full.

In view of the foregoing factors, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage for the subject position from the priority date (February 26, 2008) up to the present.

Conclusion

For all of the reasons discussed herein, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage for the subject position from the priority date up to the present. Accordingly, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.