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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

[redacted]

B6

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

FEB 10 2012

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker 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 $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,
Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the preference visa petition on December 30, 2008 because the petitioner failed to submit required initial evidence. The petitioner filed an untimely appeal of the director's decision, which the director considered as a motion to reopen. The director granted the motion to reopen and issued a decision dated July 27, 2009 denying the petition. This appeal to the Administrative Appeals Office (AAO) followed. The appeal will be dismissed.[1]

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty chef. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner did not submit the requisite evidence to show that it had the ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 27, 2009 denial, the issue in this case is whether the petitioner submitted evidence of its ability to pay the proffered wage.

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 AAO maintains plenary power to review each appeal on a de novo basis. *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.[2]

With regard to the petitioner's ability to pay the proffered wage, 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

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[1] This revised decision corrects a typographical error on page 8 of the AAO decision dated February 9, 2012 indicating that the petitioner sustained its burden of proof. The revised decision is reissued this date to the petitioner and its counsel of record and supercedes and replaces the February 9, 2012 decision.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $810 per week ($42,120 per year).

The evidence in the record shows that the petitioner is an S corporation. On the petition, the petitioner stated it was established in 1982 and currently employs 28 workers. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary stated that he had begun working for the petitioner in October 1993.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted the following Forms W-2:[3]

- The 2001 Form W-2 shows that the petitioner paid the beneficiary $21,001.50.

[3] The petitioner also submitted the 2000 Form W-2 for the beneficiary, but as that period precedes the priority date, it will be considered only generally.

- The 2002 Form W-2 shows that the petitioner paid the beneficiary $20,925.00.
- The 2003 Form W-2 shows that the petitioner paid the beneficiary $21,735.00.
- The 2004 Form W-2 shows that the petitioner paid the beneficiary $20,925.00.
- The 2005 Form W-2 shows that the petitioner paid the beneficiary $21,060.00.
- The 2006 Form W-2 shows that the petitioner paid the beneficiary $20,810.00.
- The 2007 Form W-2 shows that the petitioner paid the beneficiary $21,970.00.

As the amounts paid to the beneficiary in every year are less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage. In 2001, this amount is $21,118.50; in 2002, the amount is $21,195; in 2003, the amount is $20,385; in 2004, the amount is $21,195; in 2005, the amount is $21,060; in 2006, the amount is $21,310; and in 2007, the amount is $20,150.

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 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 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).

The record before the director closed on April 2, 2009 with the receipt by the director of the petitioner's submission in response to the Request for Evidence. As of that date, the most current tax return available was the petitioner's 2007 federal tax return (the petitioner submitted its incomplete 2005, 2006, and 2007 tax returns for the first time on appeal). The petitioner submitted the following tax returns:

- In 2001, the Form 1120S stated net income[4] of $7,577.[5]
- In 2002, the Form 1120S stated net income of $35,427.
- In 2003, the Form 1120S stated net income of -$28,089.
- In 2004, the Form 1120S stated net income of -$12,587.
- In 2005, the Form 1120S stated net income of $98,332.[6]

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[4] 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 submitted incomplete tax returns for all years, the petitioner's net income cannot be determined.

[5] The petitioner's 2001, 2002, 2003, and 2004 Forms 1120S are incomplete in that they do not include anything other than Schedule K-1. As the Schedule K-1 has a line for ordinary income (loss), we have used that figure. The petitioner must submit complete tax returns for these years in any further filings.

[6] The petitioner's 2005, 2006, and 2007 Forms 1120S are incomplete in that they do not include the entire Schedule K for those years. In the absence of a full Schedule K, we have taken the net income

- In 2006, the Form 1120S stated net income of -$32,898.
- In 2007, the Form 1120S stated net income of $106,981.

As the petitioner's net income cannot be determined from the tax returns, the AAO cannot determine whether the petitioner had the ability to pay the beneficiary in any of the years. Were we to utilize the figures from the incomplete returns as noted in footnotes 4 and 5, the petitioner would have sufficient net income to pay the difference between the actual wage paid and the proffered wage in 2002, 2005, and 2007 only. The petitioner's net income, if the figures on the incomplete returns are correct, was insufficient to pay the difference between the wages paid and the proffered wage in 2001, 2003, 2004, and 2006.

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.[7] 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 2001, the Form 1120S stated net current assets of $36,676.[8]
- In 2003, the Form 1120S stated net current assets of $32,405.
- In 2004, the Form 1120S stated net current assets of $3,783.
- In 2006, the Form 1120S stated net current assets of -$29,862.

The AAO will not accept the Schedule L submitted without corresponding Schedules and Statements to establish the petitioner's net current assets. If we were to accept these figures, the net current assets in 2001 and 2003 would be sufficient to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage. The petitioner's net current assets, if the figures are reliable on the incomplete tax returns, in 2004 and 2006 would be insufficient to demonstrate the ability to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the

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stated on line 21 of page 1 for those years. The petitioner must submit complete Schedule K's in any further filings so that the petitioner's net income can be properly determined in these years.

[7] 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.

[8] The petitioner submitted a copy of its Schedule L for each year but did not submit full tax returns including the other Schedules. Thus, the petitioner's net current assets are not corroborated by corresponding schedules.

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 complied accountant reports for 2002, 2003, and 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the tax returns in the record are incomplete. As such, the AAO requested additional information from the petitioner including copies of complete tax returns for all years.[9] The petitioner responded on May 27, 2011 attaching incomplete copies of the petitioner's 2001 through 2007 IRS Forms 1120S, bank records for 2008; pages 1-2 of the individual tax return of the petitioner's 100% shareholder; and Forms W-2 of the beneficiary for 2001 through 2007. The

[9] The AAO's RFE requested the beneficiary's Forms W-2 for 2004, 2007, 2008, 2009, and 2010; and a complete copy of IRS Forms 1120S for 2001 to 2009 to include all Schedules and attachments.

petitioner stated that additional documentation would be provided. As of this date, the petitioner has submitted nothing further into the record. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Regarding the 2008 bank records submitted, reliance on the balance in the petitioner's bank account is misplaced. 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. The petitioner submitted only the statements from 2008, so the monthly balance, which ranged from $4,744.43 to $45,004.14, would have only been available during that year and not during the other years from the priority date onwards.

Regarding the tax returns of the petitioner's 100% shareholder, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The petitioner submitted evidence of its reputation in the form of articles in publications such as the New York Times magazine, the [redacted] review, Center State Chicago, [redacted] and the [redacted] Despite the favorable reviews, without evidence of the petitioner's complete financial position, we are unable to determine that the totality of the circumstances shows the petitioner's ability to pay the proffered wage.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not demonstrated through the overall magnitude of its business activities that it has the continuing ability to pay the proffered wage.

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. The petition is denied.