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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 14 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
ActingChief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an Indian restaurant. It seeks to permanently employ the beneficiary in the United States as a cook and to classify him 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). The petition is accompanied by an Application for Alien Employment Certification, Form ETA 750, which was filed with the U.S. Department of Labor (DOL) on March 25, 2003, and certified by the DOL on June 5, 2007. The Form I-140, Immigrant Petition for Alien Worker, was filed with the Nebraska Service Center on July 16, 2007.

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.

On June 8, 2010 the Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date (March 25, 2003 – the date the labor certification application was filed with the DOL) up to the present.

The petitioner filed a timely appeal, which was later supplemented by additional documentation in response to a Request for Evidence (RFE) from the AAO. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

Thus, the petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date, which is the date the labor certification application 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, Form ETA 750, was received by the DOL on March 25, 2003. Part A, Box 12, of the form, as amended on February 26, 2007, states that the "rate of pay" for the proffered position is $12.71 per hour, which amounts to $26,436.80 per year (based on a work year of 2,080 hours).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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 determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. 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 petitioner has employed the beneficiary at any time.

Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (March 25, 2003) up to the present based on its actual compensation to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines 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) *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

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 on the federal income tax returns in the record – Forms 1120 for the years 2003-2008 and Forms 1120S for the years 2009-2012 – the petitioner's net income over the years was as follows:[1]

2003:	$ 2,898
2004:	$ 97
2005:	$ 820
2006:	$ 7,542
2007:	$ 25,936
2008:	$ 41,030
2009:	$ 103,163

[1] For a C corporation, as the petitioner was in the years 2003-2008, net income is recorded on page 1, line 28, of the IRS Form 1120. For an S corporation, as the petitioner was in the years 2009-2012, if its 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 IRS Form 1120S. However, if 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 18 (for the tax years at issue in this proceeding). *See* Instructions for Form 1120S at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

2010:	$ 172,577
2011:	$ 339,026
2012:	$ 443,089

As these figures show, net income exceeded the proffered wage of $26,436.80 in the years 2008-2012, but not in the years 2003-2007.

Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (March 25, 2003) up to the present based on its net income over the years.

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax returns. 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 of Schedule L. If the total of a corporation's end-of-year net current assets is 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.

As shown in its federal income tax returns for the years 2003-2007 (when net income was insufficient to pay the proffered wage), the petitioner's net current assets were as follows:

2003:	$ (-8,754)
2004:	$ 1,599
2005:	$ 9,173
2006:	$ 14,018
2007:	$ (-4,361)

As these figures show, net current assets were below the proffered wage of $26,436.80 every year. In two of the years, moreover, current liabilities exceeded its current assets, leaving the petitioner with a net loss.

Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (March 25, 2003) up to the present based on its net current assets over the years.

In summation, the foregoing analysis shows that, for the years 2003-2007, the petitioner cannot establish its ability to pay the proffered wage of the job offered by any of the three methods

---

[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.

discussed above – (a) compensation actually paid to the beneficiary, (b) the petitioner's net income, or (c) the petitioner's net current assets.

Counsel claims that the petitioner's president, would be willing to utilize personal funds to pay the full salary of the proffered position. The federal income tax returns identify Mr. as the petitioner's leading shareholder. Because a corporation is a separate and distinct legal entity from its owners and shareholders, however, the assets of its shareholders 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 *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated that "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."

Counsel also claims that Mr. would be willing to forego some of his discretionary income – recorded as "compensation of officers" on the Form 1120 at page 1, line 12, and on the Form 1120S at page 1, line 7 – to pay the proffered wage. The assertions of counsel, however, do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no letter in the record from stating that he would have foregone some of his compensation to pay the difference between the proffered wage and the company's net income or net current assets in any of the years 2003-2007. Moreover, the officer's compensation received by Mr. totaled only $44,550 in 2003 and $44,110 in 2004, as recorded in the petitioner's federal income tax returns. That means Mr. would have had to contribute more than half of his officer's income in both of those years to cover the shortfall between the proffered wage and the petitioner's net income (2003) and net current assets (2004), respectively. It is unlikely that Mr. could or would have foregone such a hefty portion of his income in those years. In any event, the petitioner has submitted no letter from Mr. claiming otherwise.

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.[3] USCIS may, at its discretion,

---

[3] 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.

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 stated that it began operations in 2001 and had 15 employees at the time the instant petition was filed in July 2007. The federal income tax returns in the record show that petitioner's gross annual income roughly doubled between 2003 and 2012, with steady if somewhat uneven growth over those years. While the petitioner established its likely ability to pay the proffered wage since 2008, and perhaps 2007, the record does not establish that it was able to do so during its early years, particularly during the time period of 2003-2006. During those years its net income and net current assets were meager to non-existent, and there is no evidence in the record that the restaurant had other financial resources at its disposal. Thus, the petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage from the priority date up to the present.

For all of the reasons discussed above, the record fails to establish the petitioner's continuing ability to pay the proffered wage of the job offered from the priority date up to the present. Accordingly, the petition cannot be approved, and the appeal will be dismissed.

Beyond the decision of the director, the petitioner must also establish that the beneficiary has the requisite experience to be eligible for classification as a skilled worker and to qualify for the proffered position under the terms of the labor certification. The beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date to be eligible for approval under section 203(b)(3) of the Act. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The Form ETA 750 (Part A, boxes 14) requires two years of experience in the job offered, and states that the beneficiary worked as an Indian food cook at the [redacted] India, from March 1991 to May 1995. In its RFE on February 5, 2013, the AAO noted that there was no evidence in the record of the beneficiary's claimed employment at the [redacted] The AAO quoted the regulation at 8 C.F.R. § 204.5(g)(1), which provides as follows:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

In response to the RFE counsel submitted an affidavit from the beneficiary and a letter from the manager of the said hotel in India, whose name is indecipherable on the letter. The manager "certified" that the beneficiary worked for the [redacted] as its "chief cook" from

March 1991 to May 1995 and "managed the kitchen in [an] admirable manner." The manager did not say anything more about the beneficiary's employment. He (or she) did not provide "a specific description of the duties performed by the [beneficiary]," as required by the regulation. The lack of this substantive input detracts from the letter's credibility, and does not comply with the regulation. Accordingly, the AAO determines that the petitioner has failed to establish that the beneficiary has the requisite experience to be eligible for classification as a skilled worker and to qualify for the proffered position under the terms of the labor certification. For this reason as well, the petition cannot be approved.

Conclusion

The appeal will be dismissed on two grounds, with each of these grounds constituting an independent and alternative basis for denial:

(1) The record fails to establish that the petitioner has had the continuing ability to pay the proffered wage from the priority date up to the present.

(2) The record fails to establish that the beneficiary has the requisite two years of experience as a cook to be eligible for classification as a skilled worker under section 203(b)(3)(i) of the Act and to qualify for the job under the terms of the labor certification.

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.