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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]

B3

DATE **JUL 02 2012** OFFICE: TEXAS SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 22, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 Form ETA 750 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on June 18, 2003. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour or \$24,960.00 annually. The Form ETA 750 states that the position requires eight years of grade school, four years of high school, no training, and two years of

experience in the proffered position or two years of experience in the alternate occupation of “similar business management.”

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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on November 3, 1978, and failed to list the number of its current workers. According to the tax returns in the record, the petitioner’s fiscal year runs from November 1 of each respective year to October 31 of the successive year. On the Form ETA 750B, signed by the beneficiary on April 3, 2003, the beneficiary claimed to have worked for the petitioner since April 2000.

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. 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’l Comm’r 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 Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 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. In the instant case, the petitioner submitted copies of payment vouchers dated the fifth day of every month beginning July 5, 2003 through January 5, 2007, purportedly reflecting the monthly payment of \$2,100.00 in cash by the petitioner to the beneficiary. The payment voucher dated July 5, 2003 is numbered 70415, with the remaining 41 payment vouchers being consecutively numbered from 70421 through 70462. The petitioner also provided photocopies of checks dated January 31, 2007, February 24, 2007, March 31, 2007, April 30, 2007, May 30, 2007, and June 20, 2008, purportedly reflecting the payment of \$2,100.00 by the petitioner to the beneficiary on these dates. The checks dated January 31, 2007, February 24, 2007, March 31, 2007, April 30, 2007, and May 30, 2007, are consecutively numbered 3134, 3135, 3136,

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).

3137, and 3138. The petitioner included copies of bank statements containing photocopies of cancelled checks dated June 30, 2007, August 2, 2007, September 5, 2007, October 1, 2007, October 30, 2007, November 30, 2007, December 31, 2007, January 31, 2008, March 1, 2008, March 31, 2008, reflecting the payment of \$2,100.00 by the petitioner to the beneficiary on these dates. The checks dated October 30, 2007, November 30, 2007, and December 31, 2007, are consecutively numbered 3225, 3226, and 3227. The petitioner also submitted the imprint copy of check 3274 that is dated May 30, 2008, purportedly reflecting the payment of \$2,100.00 by the petitioner to the beneficiary on this date.

However, the credibility of the documents provided to demonstrate the petitioner's continuing ability to pay the proffered wage of \$24,690.00 to the beneficiary since the priority date of June 18, 2003, is questionable at best. The record contains no evidence to establish that wages paid to the beneficiary as reflected in these documents has been reported to the Social Security Administration (SSA), Internal Revenue Service (IRS), or Pennsylvania state and local tax authorities. In addition, the record contains no independent evidence such as the beneficiary's federal tax returns, state tax returns, or bank records for 2003, 2004, 2005, 2006, 2007, and 2008, to corroborate any of the claimed payments made by the petitioner to the beneficiary as reflected in these documents. Further, the credibility of the payment vouchers is diminished by the fact that 41 of 42 payment vouchers dated the fifth day of every month beginning July 5, 2003 through January 5, 2007, purportedly reflecting the monthly payment of \$2,100.00 in cash by the petitioner to the beneficiary are consecutively numbered from 70421 through 70462. The fact that checks dated January 31, 2007, February 24, 2007, March 31, 2007, April 30, 2007, and May 30, 2007, are consecutively numbered 3134, 3135, 3136, 3137, and 3138, respectively, and checks dated October 30, 2007, November 30, 2007, and December 31, 2007, are consecutively numbered 3225, 3226, and 3227, respectively, raises questions as it does not appear that these checks were written as dated. Finally, the imprint copy of check 3274 that is dated May 30, 2008, cannot be considered credible evidence of wages paid to the beneficiary without additional independent documentation to corroborate that such payment was made. The payment vouchers, copies of checks, photocopies of checks from the petitioner's bank statements, and an imprint copy of a check are not reflective of a commercially viable employer-employee relationship because the record is absent any independent evidence establishing the petitioner's payment of a regular salary to the beneficiary, purportedly a full-time employee working forty hours per week and being paid an annual wage of \$24,960.00. 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. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the payment vouchers, copies of checks, photocopies of checks from the petitioner's bank statements, and an imprint copy of a check as persuasive evidence of wages paid to the beneficiary.

It is further noted that, assuming any of these payments were ever made to the beneficiary, the record does not establish that these payments represent the payment of wages in exchange for labor by the beneficiary. Gratuitous transfers of funds between the petitioner and the beneficiary does not establish a continuing ability to pay the proffered wage. Finally, given that the tax returns in the

record do not reflect the payment of wages, it is not credible that the various voucher and checks in the record represent the continuous payment of a salary to the beneficiary.

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 (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. *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 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).

The record before the director closed on June 27, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE) issued on May 29, 2008. Therefore, the petitioner’s income tax return for 2006 is the most recent return available as its fiscal year runs from November 1 of each respective year to October 31 of the successive year. The record contains the petitioner’s Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns for 2002, 2003, 2004, and 2005, despite the fact that the director specifically requested the petitioner’s 2006 federal tax return in the RFE issued on May 29, 2008. 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).

These Form 1120-A tax returns demonstrate the following financial information concerning the petitioner’s ability to pay the beneficiary the proffered wage of \$24,960.00 per year from the priority date of June 18, 2003:

- In 2002, the Form 1120-A stated a net income² of <\$3,338.00.>³
- In 2003, the Form 1120-A stated a net income of <\$9,712.00.>
- In 2004, the Form 1120-A stated a net income of <\$25,438.00.>
- In 2005, the Form 1120-A stated a net income of <\$41,663.00.>
- The petitioner’s net income for 2006 cannot be determined as the petitioner failed to provide its Form 1120-A tax return.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the fiscal years 2002, 2003, 2004, 2005, 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.⁴ A corporation’s year-end current assets are shown on the Form 1120-A tax return at Part III, lines 1 through 6. Its year-end current liabilities are

² Taxable income before net operating loss deduction and special deductions on Line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁴ 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.

shown on the Form 1120-A tax return at Part III, lines 13 and 14. 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2003, 2004, 2005, and 2006 as shown in the table below.

- In 2002, Part III of the Form 1120-A stated net current assets of \$1,284.00.
- In 2003, the petitioner's net current assets cannot be determined as Part III of the Form 1120-A was not provided.
- In 2004, Part III of the Form 1120-A stated net current assets of \$1,373.00.
- In 2005, Part III of the Form 1120-A stated net current assets of \$3,360.00.
- In 2006, the petitioner's net current assets cannot be determined as Part III of the Form 1120-A was not provided.

Consequently, the petitioner did not have sufficient net current assets to pay the proffered wage in 2002, 2003, 2004, 2005, and 2006.

The record contains monthly bank statements from [REDACTED] dated from January 31, 2003 through May 31, 2007 for the petitioner's business checking account as evidence that the petitioner possesses the continuing ability to pay the beneficiary the proffered wage since the priority date of June 18, 2003. However, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to pay the proffered wage to the beneficiary since the priority date. In addition, the balances in this account are well below the proffered wage and many of these monthly statements are incomplete with missing pages. Finally, it cannot be considered to be credible that the petitioner would liquidate any business assets to pay the proffered wage as such assets are needed by the petitioner to conduct regular day-to-day operations rather than a readily available and convertible asset.

Furthermore, the petitioner's 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Part III of its Form 1120-A tax returns in determining the petitioner's net current assets.

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 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.

On appeal, counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since the priority of June 18, 2003, according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). Counsel asserts that Mr. Yates makes a clear distinction between past and current salaries and, since he used the conjunction “or” in the context of evidence that the petitioner “has paid or currently is paying the proffered wage,” counsel urges USCIS to consider the wage rate paid as reflected in the payment vouchers, copies of checks, photocopies of checks from the petitioner’s bank statements, and an imprint copy of a check contained in the record as satisfying that particular method of demonstrating a petitioning entity’s ability to pay.

The Yates’ Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity’s ability to pay if, in the context of the beneficiary’s employment, “[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage.”

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel’s assertion that the payment vouchers, copies of checks, photocopies of checks from the petitioner’s bank statements, and an imprint copy of a check should be accepted as evidence must be rejected as these documents cannot be considered as credible for the reasons previously discussed.

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 Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception on November 3, 1978. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 appeal is dismissed.