

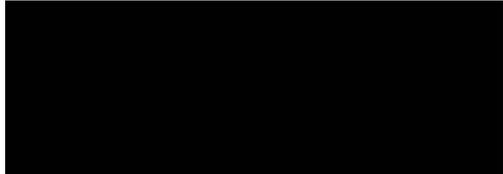
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File: EAC 05 113 53047 Office: VERMONT SERVICE CENTER Date: AUG 06 2009

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

Petition: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

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

The petitioner<sup>1</sup> is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition<sup>2</sup> is accompanied by a duplicate Form ETA 750, Application for Alien Employment Certification, certified by the U.S. 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 demonstrated that the appeal was properly filed, timely and made 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 denial dated January 16, 2007, 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.

Section 203(b)(3)(A)(iii) of 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 or seasonal nature for which qualified workers are unavailable.

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<sup>1</sup> According to the tax returns submitted by the petitioner, it is incorporated as Naz, Inc. trading and doing business as Neighbors Sports Bar Restaurant.

<sup>2</sup> Although the petition was filed in the "Other Worker" immigrant classification, the labor certification requires two years of employment experience in the offered job of cook. The director in his Request for Evidence (RFE) dated July 11, 2006, asked the petitioner if he wished to change the classification. The "Skilled Worker" requires at least two years training or experience. While not expressly requesting a change in classification from "Other Worker" to "Skilled Worker," the petitioner submitted in response to the RFE several employment references stating that the beneficiary has at least two years employment experience in the occupation or related occupation of cook.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of 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 October 18, 2001. The petitioner filed the Form I-140 on March 15, 2005, and the petitioner identified on that form is Neighbor's Restaurant, 262 D Cedar Lane, Vienna, Virginia. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2000,<sup>4</sup> 2001, 2002, 2003, 2004, and 2005;

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<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

<sup>4</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date but will be examined generally. Tax returns submitted for years prior to the priority date have little probative value in the determination of the

and, W-2 Wage and Tax Statements for 2000, 2001, 2002, 2003, 2004, and 2006 issued by the petitioner (none to the beneficiary) to its employees.

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 in 1983 and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$467,018.00 and \$605,923.00 respectively. On the Form ETA 750, signed by the beneficiary on August 27, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that that the director only looked at the petitioner's net income and net current assets to determine the petitioner's ability to pay the proffered wage.

According to counsel, the increase of the petitioner's gross profit in 2001 enabled the petitioner to hire the beneficiary for a full-time and permanent cook position "instead of 6 to 7 workers."

Counsel asserts that the petitioner's gross profit, wages paid to employees who filled the cook position, and depreciation expenses stated on the petitioner's tax returns, all demonstrate the petitioner's ability to pay the proffered wage.

Accompanying the appeal, counsel submits a legal brief.

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, 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 Sonogawa*, 12 I&N Dec. 612 (BIA 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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ability to pay from the priority date. However, we will consider the petitioner's 2000 federal income tax return generally. The 2000 tax return stated a loss of <\$34,858.00> for its net income.

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. 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 sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

Counsel asserts that the petitioner's depreciation expenses stated on the petitioner's tax returns demonstrates the petitioner's ability to pay the proffered wage. Counsel's statement is misplaced. 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 specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash; neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537. Therefore, the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income<sup>5</sup> of <\$91,721.00><sup>6</sup>.
- In 2002, the Form 1120 stated net income of <\$56,440.00>.
- In 2003, the Form 1120 stated net income of \$651.00.
- In 2004, the Form 1120 stated net income of <\$24,297.00>.
- In 2005, the Form 1120 stated net income of <\$36,085.00>.

Since the proffered wage is \$24,689.60 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001, 2002, 2003, 2004 and 2005.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

- The petitioner's net current assets during 2001, 2002, 2003, 2004 and 2005 were <\$81,650.00>, <\$24,545.00>, \$941.00, \$24,212.00, and \$6,256.00 respectively.

Based on the petitioner's net current assets for years, 2001, 2002, 2003, 2004 and 2005, it cannot demonstrate its ability to pay the proffered wage. Additionally, USCIS records show that the petitioner sponsored a second worker. The petitioner must demonstrate that it can pay the respective proffered wage for each worker from their respective priority dates until each obtains permanent residence.

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<sup>5</sup> Form 1120, Line 28 for 2001 to 2005.

<sup>6</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>8</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

As stated by counsel, the increase of the petitioner's gross profit in 2001 enabled the petitioner to hire the beneficiary for a full-time and permanent cook position "instead of 6 to 7 workers." In 2001, the Form 1120 stated a net income loss of <\$91,721.00>. Reliance on the petitioner's gross sales that exceeded the proffered wage is misplaced. Increased gross sales in this instance did not equate to a profit but actually in 2001 a substantial net income loss.

Counsel asserts that wages paid to prior employees who filled the cook position demonstrate the petitioner's ability to pay the proffered wage. Counsel submits 23 Wage and Tax Statements (W-2) paid by the petitioner to 23 individuals in 2000 and 2001. Counsel in his legal brief asserts that the petitioner employed an individual with the initials V.C. "mainly" to fill the cook position "with several workers" and they all together received "salary/wages" in the total amount of \$26,818.00. An examination of the record shows that counsel submitted V.C.'s Wage and Tax Statement (W-2) showing wages paid by the petitioner in the amount of \$12,600.00 for 2000. There is no evidence of any other wage payments totaling \$26,818.00. Further, since the priority date is October 18, 2001, the petitioner's wage/salary expense in 2000 has slight probative value in this matter.

Further, the record does not name these "several workers," state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position V.C. and these other workers held involves the same duties as those set forth in the Form ETA 750 for the offered position. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). If any employee performed other kinds of work, then the beneficiary could not have replaced him or her. According to counsel, V.C. and these other workers left the business sometime in 2001 and the number of non-officers in the business was reduced from 16 to seven in 2001.

Counsel states for 2002 that V.C. returned to the business as a cook along with another cook, M.R. as well as nine other workers bringing the total employee workforce to 16. V.C. and M.R. were hired to perform the position of cook that counsel has previously contended could be filled by the beneficiary. It appears from the record that the offered position could be and was filled. As V.C. returned to employment, counsel cannot assert those wages would be available to pay the beneficiary's wages.

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<sup>8</sup> 8 C.F.R. § 204.5(g)(2).

In 2003, counsel states that the numbers of workers in the business increased by four to 20. In 2003, V.C. continued in his employment and was paid \$15,600.00. M.R. left that year (there was no W-2 statement submitted) and another cook, A.K., was hired and paid \$1,920.00. According to counsel in years 2004, 2005, 2006 and 2007, V.C. stayed in the cook position and worked full or part-time until he left in 2007, and A.K. worked as a cook until he left in 2006. The work force was reduced in 2004, and after that the payroll either increased or decreased depending on the number of employees.

Even if we considered the wages paid to others on a replacement worker theory, the wages paid to the specified workers would be deficient to show that the petitioner could pay the beneficiary's proffered wage, or the wages of the second sponsored worker.

Counsel stated that the business' gross profits increased for each year in 2000, 2001, 2002, 2003, 2004, and decreased in 2005.

Counsel contends, with the permanent employment of the beneficiary as cook its business income will increase primarily by replacing existing workers. The assertions of the petitioner do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in this instance, no detail or documentation beyond counsel's contention that the beneficiary could replace many workers has been provided to explain how the beneficiary's employment as a cook will significantly increase the petitioner's profits. Proof of ability to pay begins on the priority date, October 18, 2001, that is when petitioner's Application for Alien Employment Certification was accepted for processing by DOL. The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. The hypothesis of potential undocumented future income cannot be concluded to outweigh the evidence presented in the corporate tax returns.

It is clear from the evidence presented that the petitioner's gross profits increased from 2000 to 2005, without the employment of the beneficiary. Since the petitioner was able to hire at least three individuals as cooks from 2001 to 2007, there is no evidence that the loss of the beneficiary as a cook would cause a hardship to the petitioner's business.

As already stated, counsel asserts that that the director only looked at the petitioner's net income and net current assets to determine the petitioner's ability to pay the proffered wage. In considering the totality of the circumstances, the petitioner has not demonstrated *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) should apply. Further, *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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

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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.

Unusual circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, 2003, 2004 and 2005 was an uncharacteristically unprofitable period for the petitioner. For that five year period from the priority date, the petitioner suffered losses in all but one year (i.e. 2003 in which the profit was minimal). In 2001: <\$91,721.00>; in 2002: <\$56,440.00>; in 2003: \$651.00; in 2004: <\$24,297.00>; and in 2005: <\$36,085.00>. As already stated, the petitioner's net current assets during 2001, 2002, 2003, 2003, 2004 and 2005 were \$<\$81,650.00>, <\$24,545.00>, \$941.00, \$24,212.00, and \$6,256.00 respectively. No explanation is found in the record of proceeding to explain the loss incurred by the petitioner for the five year period other than counsel's assertion that "most ... businesses have a tendency to try to minimize net income/taxable income for tax purposes." Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). No unusual circumstances exist in this case akin to the facts and holding of *Sonegawa*.

Counsel asserts that officer compensation stated on the tax returns submitted shows the potential for future profitability and by implication the petitioner's ability to pay the proffered wage. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). We note here that the compensation received by the officer(s) during the five year period varied but no substantiation was submitted to show the potential for future profitability. Further, there is no statement in the record from any officer offering to relinquish officer compensation to pay the proffered wage.

The evidence submitted fails to establish that the petitioner has 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.