



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
LIN 07 096 50335

Office: NEBRASKA SERVICE CENTER

Date:  
AUG 12 2009

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:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook of Mexican food. 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 2001 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 January 28, 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, 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 \$16.09 per hour (\$33,467.20 per year). The Form ETA 750 states that the position requires two years of prior work experience.

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>1</sup> On appeal, counsel submits a letter dated February 29, 2008 written by [REDACTED], the petitioner's accountant. [REDACTED] states that the petitioner's ordinary income figures do not reflect an accurate cash flow or reflect the petitioner's ability to pay the proffered wage. [REDACTED] identifies the following items on the petitioner's tax returns, as necessary adjustments to the petitioner's ordinary income to ore clearly reflect the petitioner's ability to pay the proffered wage: depreciation, rent paid to owner, and debt service. Based on the addition of such figures to the petitioner's ordinary income, [REDACTED] identifies the petitioner's adjusted ordinary income for tax years 2001 to 2006 as follows: \$49,537 in 2001; \$39,773 in 2002; \$53,076 in 2003; \$5,878 in 2004; \$79,861 in 2005; and \$84,946 in 2006.

Other relevant evidence in the record includes the petitioner's IRS Forms 1120S, Income Tax return for an S Corporation, for tax years 2001 to 2006. The record also contains a letter dated September 8, 2007 from [REDACTED], the petitioner's president. [REDACTED] stated that the wage he offered the beneficiary was \$16.09 and that he paid the beneficiary in cash until recently when the petitioner started paying the beneficiary by check. [REDACTED] stated that the petitioner has existed for over three decades and he pays the staff on a regular basis. He notes that Line 8, of the petitioner's tax returns, shows salaries of at least \$124,000 from 2001 to the present. [REDACTED] notes that since he employed the beneficiary in March 2000, he has seen the enormous contribution the beneficiary had made to the petitioner's growth, and that he hopes the beneficiary will get rewarded for his hard work and dedication. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in May 1, 1977,<sup>2</sup> to have a gross annual income of \$657,813, a net annual income of \$411,054, and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 6, 2001, the beneficiary claimed he had worked for the petitioner since March 2000.

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<sup>1</sup> 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).

<sup>2</sup> The petitioner's Forms 1120S indicate a date of incorporation as an S Corporation of July 5, 1989.

On appeal, counsel asserts that based on the statements of the petitioner's accountants and its owner with regard to the petitioner's overall business viability, the petitioner has established its ability to pay the proffered wage.

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 Sonogawa*, 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. In the instant case, although [REDACTED] states that the petitioner employed the beneficiary in 2000, the record contains no further evidence, such as Forms 1099-MISC, W-2 Forms or copies of checks, to establish that the petitioner has paid the beneficiary a salary equal to or greater than the proffered wage. The petitioner also has not established that it paid any wages to the beneficiary in the relevant period of time. Therefore the petitioner has to establish its ability to pay the entire proffered wage as of the 2001 priority date and subsequently.<sup>3</sup>

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. Contrary to the petitioner's accountant's assertions, USCIS does not consider items such as depreciation, debt service, or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). 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*

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<sup>3</sup> In his September 8, 2007 letter, [REDACTED] stated that he paid the beneficiary in cash until "recently" when he started paying the beneficiary by check. The record contains no copies of any checks paid to the beneficiary in 2007 or documentation of any cash payments as of the 2001 priority date and onward. Even if the petitioner established that it paid the beneficiary by check in 2007, this evidence would not be sufficient to establish the petitioner's claimed cash compensation as of the 2001 priority date.

*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.

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 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 (emphasis added).

The record before the director closed on September 10, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 to 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>4</sup> of \$10,877
- In 2002, the Form 1120S stated net income of \$1,045.
- In 2003, the Form 1120S stated net income of \$1,813.
- In 2004, the Form 1120S stated net income of -\$26,027
- In 2005, the Form 1120S stated net income of \$5,641.
- In 2006, the Form 1120S stated net income of \$1,854.

Therefore, for the years 2001 to 2006, the petitioner did not have sufficient net income to pay the proffered wage.

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.<sup>5</sup> 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. The petitioner's tax returns demonstrate its end-of-year net current assets for \$37,467.20, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$6,989.
- In 2002, the Form 1120S stated net current assets of -\$8,816.
- In 2003, the Form 1120S stated net current assets of -\$8,955.
- In 2004, the Form 1120S stated net current assets of -\$31,392.
- In 2005, the Form 1120S stated net current assets of -\$50,116.
- In 2006, the Form 1120S stated net current assets of -\$22,553.<sup>6</sup>

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<sup>4</sup> 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) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, 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. The AAO notes that in tax years 2001 to 2004, and in 2006, the petitioner in the instant petition has additional deductions, or adjustments that reduced the petitioner's actual net income in those years. In tax year 2005, the petitioner had additional income that raised the petitioner's actual net income in that year.

<sup>5</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>6</sup> The director miscalculated the petitioner's current liabilities, as identified in items 16 to 18,

Therefore, for the years 2001 to 2006, the petitioner did not have sufficient net current assets 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 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.

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 (BIA 1967). 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, the petitioner's business longevity is a factor to be given weight in these proceedings. However, the record contains a discrepancy with regard to whether the petitioner was established in July 5, 1989 as indicated on the petitioner's tax returns, or earlier in 1977 as indicated on the I-140 petition. At the later date, the petitioner would have been in business for twenty years, while the 1979 date of establishment would indicate 30 years of business.<sup>7</sup> The record reflects very little additional evidence with regard to the claimed number of employees and their wages. While

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Schedule K. These items total \$60,393 and when subtracted from the petitioner's current assets of \$37,840, the petitioner's resulting net current assets are -\$22,553.

<sup>7</sup> If the petitioner wants to clarify the date it started business operations, it should submit evidentiary documentation such as state of New York statements of certification, articles of incorporation, evidence of prior establishment as a sole proprietor, or any other relevant evidence.

██████████ correctly notes the level of annual salaries paid, the AAO notes that the petitioner claims ten employees with an annual total of \$100,000 in wages, but provides no further evidence as to how the petitioner could pay a proffered wage that equals one third of the petitioner's claimed total wages. The petitioner also does not further establish the petitioner's claimed growth while utilizing the beneficiary's services as a cook, the reputation of the petitioner within the community, and other relevant factors. In sum, the record does not contain sufficient additional evidence to outweigh the evidence provided by the petitioner's tax returns. 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.