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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

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[Redacted]

File: [Redacted] Office: TEXAS SERVICE CENTER Date: JUN 09 2009  
SRC 07 231 51173

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, Texas 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 is accompanied by a 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 June 5, 2008, an 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.

Beyond the decision of the director, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker using the same priority date. Therefore, an additional issue in this case is whether or not the petitioner has the ability to pay wages for all sponsored workers at the priority date.

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

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<sup>1</sup> The petitioner listed on Form I-140 is Sal's Anthony Restaurant. The petitioner submitted tax returns for Corso Restaurant, Inc. However, the petitioner also submitted a certificate that Corso Restaurant, Inc., does business under an assumed name of "Sal Anthony's S.P.Q.R."

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).

The Form ETA 750 was accepted on August 9, 2004. The petitioner filed the Form I-140 on July 27, 2007, and the petitioner identified on that form is Sal Anthony's Restaurant (FEIN [REDACTED] [REDACTED]<sup>2</sup> 133 Mulberry Street, New York, New York. The proffered wage as stated on the Form ETA 750 is \$15.12 per hour<sup>3</sup> (\$27,518.40 per year).<sup>4</sup> 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>5</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; a letter from counsel dated April 21, 2008; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2005, and 2006; the beneficiary's U.S. Internal Revenue Service (IRS) Form 1040A tax return for 2004; a

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<sup>2</sup> 55 Irving Place Restaurant Corp. is identified as FEIN [REDACTED] on the beneficiary's Wage and Tax Statement in the record and the petitioner has stated the same federal employer identification number on the petition. However, the tax returns submitted in the record for the petitioner identified Corso Restaurant Inc.'s FEIN as [REDACTED]. If this matter is pursued, this issue must be determined.

<sup>3</sup> The wage rate is based upon a 35 hour work week (1,820 hours per year).

<sup>4</sup> Counsel (as well as the director in his decision) has stated in her letter dated April 21, 2008, that the proffered wage is \$31,449.00. Based upon a 40 hour week (the labor certification requires a 35 hour work week) the proffered wage would be \$31,449.60.

<sup>5</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).

W-2 Wage and Tax Statement for 2004 issued by 55 Irving Place Restaurant Corp.<sup>6</sup> to the beneficiary in the amount of \$24,312.50; and, documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the tax return submitted, the petitioner stated it was established in 1979. The petitioner's fiscal year begins on June 1<sup>st</sup> and ends on May 31<sup>st</sup> of each year. On the Form ETA 750, signed by the beneficiary on July 29, 2004, the beneficiary did claim to have worked for the petitioner. He did not list a start date, but only stated on the form his employment term as "present" (i.e. July 29, 2004 which is the date the beneficiary signed the form).

On appeal, counsel asserts that the director erred by "looking at a straight line-item view of the tax returns" and U.S. Citizenship and Immigration Services' manner of adjudicating such petitions was too limited and deprives a "valid" business from hiring workers unless it can demonstrate that it can pay a proffered wage. Counsel stated that she would submit a legal brief/additional evidence within 30 days of filing the appeal, but none has been submitted.

Counsel contends the petitioner has been in existence for years and has a solid financial history and has many employees, and by implication has the ability to pay the proffered wage for these reasons. However, the petitioner did not state on the I-140 petition filed the date the petitioner was established, the number of employees it currently employs, its annual net income, its gross annual income or submit its 2004 federal tax return (for the year of the priority date).

Counsel states it can pay the wage of a cook, and that the petitioner has previously received approvals on similar petitions.

The director's decision does not indicate whether he reviewed the prior approvals of the other immigrant or nonimmigrant petitions. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). USCIS or any agency is not required to treat acknowledged errors as binding precedent.

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<sup>6</sup> If 55 Irving Place Restaurant Corp. (FEIN [REDACTED]) is a separate corporation, which it appears to be, then the wages paid to the beneficiary in 2004 cannot be considered as compensation paid by the petitioner to the beneficiary. We note that according to the records of New York State, the company (i.e. 55 Irving Place Restaurant Corp.) is inactive. Further, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." If this matter is pursued, this issue must be determined.

*Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6<sup>th</sup> Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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, 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.

Counsel submitted one W-2 Wage and Tax statement from 55 Irving Place Restaurant Corp. to the beneficiary for year 2004 in the amount of \$24,312.50. Counsel has not explained why another company employed and paid the beneficiary, or why another company's wage payment is evidence 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 as noted above. Assuming for the sake of argument, even if we accept the wage payment, since the proffered wage is \$27,518.40 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$3,205.90, in 2004. The petitioner has not submitted its federal tax return for 2004, or any other regulatory prescribed financial evidence for that year.

Further, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically

covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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.

In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537. Therefore the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

The petitioner's submitted the tax returns for Corso, Inc. (FEIN [REDACTED])<sup>7</sup> that demonstrate the following financial information concerning the petitioner's ability to pay:

In 2005, the Form 1120 (Line 28) stated net income of <\$39,355.00>.<sup>8</sup>

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<sup>7</sup> See footnote number one, herein. However, the petitioner listed on the Form I-140 has a FEIN of [REDACTED]. According to 20 C.F.R. § 656.17 (5)(i) "the term "Employer" means an entity with the same Federal Employer Identification Number (FEIN)."

- In 2006, the Form 1120 (Line 28) stated net income of <\$107,359.00>.

Since the proffered wage is \$27,518.40 per year, the petitioner did not have sufficient net income to pay the proffered wage and the proffered wage for years 2004,<sup>9</sup> 2005 and 2006.

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>10</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 for 2005 and 2006 were <\$153,822.00>, and <\$101,428.00> respectively.

Based on the petitioner's net current assets for years 2005, and 2006, it has not demonstrated its ability to pay the proffered wage. As stated above, the petitioner failed to submit its 2004 tax return despite the August 9, 2004 priority date, which would require such evidence.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net income, or net current assets, or to pay the proffered wage.

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<sup>8</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>9</sup> The petitioner must prove its ability to pay the proffered wage from the priority date in 2004. The director by his Request for Evidence (RFE) dated March 17, 2008, requested the petitioner's 2004 tax return, but none was submitted.

<sup>10</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 the statement of 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>11</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.

Counsel contends the petitioner has been in existence for years and has a solid financial history with many employees, and by implication, has the ability to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), 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. These 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. His 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.

The petitioner submitted two federal tax returns for 2005 and 2006 that stated increasing net income losses. In 2005, the Form 1120 stated a net income loss of <\$39,355.00>, and in 2006, a loss of <\$107,359.00>. Net current assets stated in the tax returns for 2005 and 2006 are <\$153,822.00>, and <\$101,428.00> respectively. No explanation is found in the record for these yearly losses. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2005 and 2006 was an uncharacteristically unprofitable period for the petitioner.

We note that the counsel has not submitted any financial evidence for 2004 other than the beneficiary's tax return for 2004, which is not relevant or sufficient evidence of the petitioner's ability to pay the proffered wage. The director requested the petitioner's 2004 federal tax return but it was not submitted. The regulation states that the petitioner shall submit additional evidence as the director, in his discretion may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

USCIS electronic database records show that the petitioner filed an I-140 petition on behalf of one other beneficiary on July 27, 2007. Although the evidence in the instant case indicated financial

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<sup>11</sup> 8 C.F.R. § 204.5(g)(2).

resources of the petitioner substantially less than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. The petitioner must demonstrate the petitioner's ability to pay the total amount required to pay the wages offered to all the beneficiaries sponsored by the petitioner. The record in the instant case contains no information about wages offered or paid to the other potential beneficiary of an I-140 petition filed by the petitioner. The record in the instant petition fails to establish the ability of the petitioner to pay the proffered wage to either the instant beneficiary, or any additional beneficiary.

Additionally, the relationship, if any, between Corso Restaurant, Inc. doing business under an assumed name of "Sal Anthony's S.P.Q.R.," or Sal Anthony's Restaurant and 55 Irving Place Restaurant Corp. has not been demonstrated. According to the federal employer identification numbers introduced into evidence, the petitioner and Corso Restaurant, Inc. are two corporations.

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.