

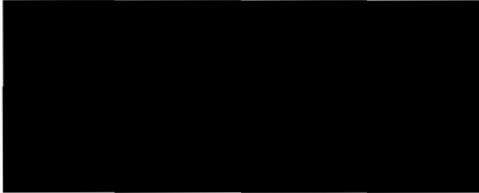
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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Services

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FILE: LIN 06 255 52276 Office: NEBRASKA SERVICE CENTER Date JUN 22 2009

IN RE: Petitioner:
Beneficiary:



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:



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 or reopen, 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 cook of Spanish/Portuguese cuisine. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL).¹ 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 1999 priority date of the visa petition based on the petitioner's financial forms. 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 18, 2008 denial, the primary 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [U.S. Citizenship and Immigration Service (USCIS)].

The current beneficiary was substituted for the original beneficiary, [REDACTED]. In its cover letter for the instant petition dated July 20, 2006, the petitioner stated that [REDACTED] had been unable to come to the United States and that the petitioner wanted to revoke the approved I-140 petition. Based on U.S. Citizenship and Immigration Services (USCIS) databases, a notice of revocation of the approved I-140 petition for [REDACTED] was sent to the petitioner on December 4, 2008.

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 October 4, 1999. The proffered wage as stated on the Form ETA 750 is \$10.57 an hour or \$21,985.60 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered.

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.²

On appeal, counsel submits W-2 Wage and Tax Statements for [REDACTED] for tax years 1999 to 2003. These documents indicate [REDACTED] was paid the following wages: \$21,179 in 1999; \$21,250 in 2000; \$19,479.17 in 2001; \$19,925 in 2002; and \$24,900 in 2003. The record contains the petitioner's IRS Forms 1120, U.S. Income Tax Return for A Corporation, for tax years 1999 to 2006. 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 a corporation. On the petition, the petitioner claimed to have been established on May 1, 1989,³ to have a gross annual income of more than \$1,000,000, and to currently employ fifteen workers.⁴ On the Form ETA 750B, signed by the beneficiary on August 30, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director only considered the petitioner's net income and net current assets. Counsel states that the beneficiary would be replacing [REDACTED], the petitioner's

² 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).

³ The petitioner also submitted a copy of the State of New Jersey Certificate of Authority that B & J Restaurant, Inc. doing business as Chateau of Spain had been given an effective tax date of April 15, 1989.

⁴ The petitioner did not identify its net annual income on the Form I-140.

employee whose Forms W-2 are submitted on appeal. Counsel states that no longer works for the petitioner. Counsel states that no additional monies to pay the beneficiary are needed.

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 (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, the petitioner has not established that it employed and paid the beneficiary during the relevant period of time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 1999 to 2006.

The AAO notes that the director analyzed the petitioner's ability to pay the proffered wage based on the petitioner's net income and what the director identified as the petitioner's net assets. In these proceedings, the AAO will provide a more complete explanation of how the director arrived at his conclusions with regard to the petitioner's ability to pay the proffered wage.

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 and wage expense 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*, 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$21,985.60 per year from the priority date:

- In 1999, the Form 1120 stated a net income⁵ of \$1,537.
- In 2000, the Form 1120 stated a net income of -\$3,235.
- In 2001, the Form 1120 stated a net income of -\$3,820.
- In 2002, the Form 1120 stated a net income of -\$104,082.
- In 2003, the Form 1120 stated a net income of -\$77,545.
- In 2004, the Form 1120 stated a net income of -\$26,041.
- In 2005, the Form 1120 stated a net income of \$87,531.
- In 2006, the Form 1120 stated a net income of -\$16,319.

The petitioner has established that it had sufficient net income only in tax year 2005 to pay the proffered wage of \$21,985.60. It did not have sufficient net income to pay the proffered wage of \$21,985.60 in tax years 1999 through 2004, or in tax year 2006.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that 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

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

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.⁶

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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 reflect the following information for the tax years 1999 to 2006

- The petitioner's net current assets during 1999 were \$1,487.
- The petitioner's net current assets during 2000 were -\$4,817.
- The petitioner's net current assets during 2001 were \$9,425.
- The petitioner's net current assets during 2002 were -\$28,227.
- The petitioner's net current assets during 2003 were \$12,943.
- The petitioner's net current assets during 2004 were \$53,333.
- The petitioner's net current assets during 2005 were \$90,986.
- The petitioner's net current assets during 2006 were \$42,288.

The petitioner, thus, has established its ability to pay the beneficiary's proffered wage in tax years 2004, and 2006 based on its net current assets.⁸ However, for tax years 1999 to 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

Counsel asserts that the petitioner can establish its continuing ability to pay the proffered wage from the priority date, because the beneficiary will be replacing another employee. However, counsel provides no further evidence that [REDACTED], the employee whose W-2 Forms were submitted to the record on appeal, performed the same job duties as the beneficiary would perform, namely, those of a cook of Spanish and Portuguese cuisine. Finally, even if [REDACTED]'s W-2 Forms submitted to the record on appeal were considered as evidence of the petitioner's ability to support a new employee performing similar cooking job duties, [REDACTED] documented wages were only equal or greater than the proffered wage of \$21,985 in tax year 2003, when [REDACTED] earned \$24,900.

⁶ The director in his decision imprecisely referred to the petitioner's net current assets as its current assets.

⁷ 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.

⁸ The petitioner already established its ability to pay the proffered wage based on its net income in 2005.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL and until the beneficiary obtains lawful permanent residency.

As stated previously 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). *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 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.

Upon review of the record, the AAO notes that the petitioner appears to have been in business since 1989, and its tax forms indicate wages and salaries routinely paid to its employees. The AAO also notes, however, that the petitioner, unlike the petitioner in *Sonogawa*, has had only one profitable year with sufficient net income to pay the proffered wage in 2005,⁹ and had both insufficient net income and net current assets to pay the proffered wage during tax years 1999, 2000, to 2003.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1999 was an uncharacteristically unprofitable year for the petitioner. Rather the record reflects a much more complicated pattern of profitability than *Sonogawa's* petitioner.

The AAO also notes that USCIS databases indicate that the petitioner filed eight I-140 Forms during tax years 1999 to 2006.¹⁰ However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)

⁹ The petitioner documented positive net income in tax year 1999, but its net income of \$1,537 is not sufficient to establish the petitioner's ability to pay the proffered wage.

(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

The USCIS database indicates that four of the petitioner's I-140 petitions filed respectively in 2000, 2001, and 2002 were approved. However, as stated previously, the petitioner had negative or insufficient net income and negative net current assets during these three years. Thus, the petitioner could not have paid both the beneficiary's proffered wage, or any other beneficiaries' proffered wages during this period based on its net income or net current assets.¹¹ Thus, the petitioner cannot establish its ability to pay the proffered wages of all beneficiaries with pending I-140 petitions.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 1999 priority date, or during tax years 2000, 2001, 2002 and 2003. Thus, the petitioner has not established its ability to pay the proffered wage as of the 1999 priority date and onward. As stated previously, counsel's assertions on appeal that the beneficiary will replace another employee are not sufficient to establish the petitioner's ability to pay the proffered wage during the 1999 priority year and during tax years 2000 to 2004. Finally the petitioner has not established its ability to pay the proffered wages of all beneficiaries for whom I-140 petitions were filed during the relevant period of time in question. Thus, the petitioner has not established its ability to pay the proffered wage.

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.

¹⁰ The USCIS database indicates a total of fourteen I-140 petitions filed from September 1997 to December 12, 2008. Eight of these petitions were filed during the period of time examined during these proceedings, namely, 1999 to 2006.

¹¹ Based on this analysis, the AAO questions whether these four petitions (EAC 0110552819, EAC 0210250562, EAC 0101251798, and EAC 0123150561) were approved in error.