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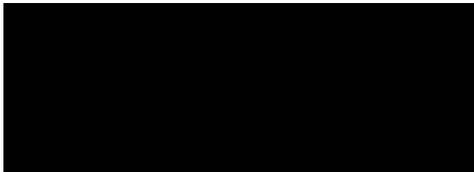


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

**U.S. Citizenship
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Services**

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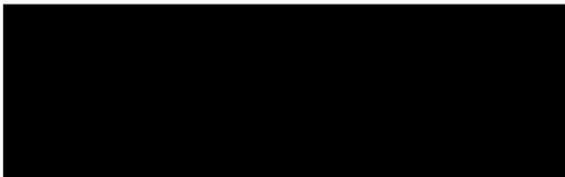
Office: NEBRASKA SERVICE CENTER

Date NOV 02 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:



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).

Perry Rhew
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.¹ The appeal will be dismissed.

The petitioner is a travel agent and tour operator. It seeks to employ the beneficiary permanently in the United States as a secretary. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 4, 2007 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

¹ The petitioner filed an appeal and a motion to reopen. The record of proceeding also contains a subsequently filed I-140 petition on behalf of the beneficiary. All evidence submitted with all of these filings will be considered.

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 16, 2001. The proffered wage as stated on the Form ETA 750 is \$15.35 per hour for the regular 40-hour work week (\$31,928 per year). The Form ETA 750 states that the position requires two years of 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.² Relevant evidence in the record includes the beneficiary's tax returns, a statement from the petitioner's accountant, the petitioner's bank statements, and the petitioner's tax returns. 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 1995 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. According to the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary has not worked for the petitioner.

Instead of a brief on appeal, counsel submitted a letter titled "Motion to Reopen and Reconsider the Nebraska Service Center's Director's Decision." In that document, counsel asserts that the director erred in not considering the overall circumstances of the petitioner and by neglecting the accountant's report submitted in response to the Request for Evidence ("RFE"), which stated that the petitioner operated at a loss on paper to avoid certain tax obligations and that the events of September 11, 2001 had an adverse effect on international travel, thus impacting the petitioner's business. Similarly, on the appeal form, counsel stated that "[a] brief, and evidence in support of the petitioner's ability to pay the proffered wage to the beneficiary, will be submitted to [the AAO] office within 30 days." To date, nothing else has been received by this office, so the case will be decided on the record as it is currently constituted.

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

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).

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. The petitioner presented no evidence of the beneficiary's employment during the relevant time period. The beneficiary did not list on the Form ETA 750 that the petitioner employed her.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on May 24, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s RFE. The petitioner did not submit its 2006 federal income tax return.³ Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001, 2004, and 2005, as shown in the table below.⁴

- In 2001, the Form 1120S stated net income (loss)⁵ of -\$7,818.
- In 2004, the Form 1120S stated net income of \$976.
- In 2005, the Form 1120S stated net income (loss) of -\$9,973.

³ It is unclear based on the petitioner’s response whether the 2006 Form 1120S was available at that time.

⁴ In response to the RFE, counsel stated that the petitioner requested copies of its Form 1120S from the IRS for 2002 and 2003, but that the IRS was unable to provide those copies in time for them to be submitted with the petitioner’s response. We note that the petitioner did not provide these Form 1120S returns with its materials on appeal so that this information is still lacking in the record.

⁵ 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 (2001-2003) and line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 26, 2009) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K in all of the years at issue, the petitioner’s net income is found on Schedule K of its tax return.

Therefore, for the years 2001, 2004, and 2005, the petitioner did not have sufficient net income to pay the proffered wage. The record lacks evidence for the years 2002 and 2003.

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.⁶ 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 2001, 2004, and 2005, as shown in the table below.

- In 2001, the Form 1120S stated net current assets (liabilities) of -\$11,179.
- In 2004, the Form 1120S stated net current assets (liabilities) of -\$124.
- In 2005, the Form 1120S stated net current assets of \$3,087.

Therefore, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage for the years 2001, 2004, or 2005. As noted above, the petitioner failed to submit its 2002 and 2003 tax returns, so that the AAO is unable to evaluate its net current assets for these years. The petitioner did not submit any other regulatory prescribed evidence for these years.

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.

In response to the RFE, the petitioner submitted a letter dated May 25, 2007 from [REDACTED] the petitioner's accountant, which stated that she reviewed the petitioner's tax records and bank statements to determine that the petitioner is capable of paying the prevailing wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. [REDACTED] letter, which is not accompanied by a report, states that she reviewed the petitioner's documents, as opposed to conducting an audit. This letter from [REDACTED] is not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1, and accountants only

⁶ 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.

express limited assurances in reviews. [REDACTED] states that she reviewed the petitioner's tax returns and bank statements in concluding that the payroll obligations have been met.⁷ [REDACTED] does not explain the basis of her conclusion that the petitioner "is able to fulfill it's obligation to pay the wage promised" while noting that the tax returns "indicate that [the petitioner] was operating at a loss." The tax returns have already been considered. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Also, [REDACTED] did not explain how the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L, used in determining the petitioner's net current assets.

[REDACTED] also stated that the events of September 11, 2001 impacted the petitioner's sales "for a short time" and that those events should be taken into consideration. The record of proceeding contains no evidence specifically connecting any decline in the petitioner's business to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. We also note that the tax return from 2001 showed gross receipts at three times the rate of 2004 and 2005 even though [REDACTED] stated that the decline was short lived. Of course, we are unable to compare the petitioner's financial situation in 2001 to that in 2002 or 2003 as the petitioner did not submit financial records from those years.

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

⁷ As several of the tax returns reflect that the petitioner paid nothing in salaries, it is unclear that the petitioner has any payroll obligations.

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, however, the petitioner did not provide evidence of an "off year" or unusual circumstance or expense. Instead, the evidence presented shows that the petitioner has gross receipts that dropped from \$563,059 in 2001 to less than \$215,000 in 2004 and 2005, and wages paid between \$16,000 to \$19,000 that were characterized as "temporary labor" on the separate page of "other deductions" attached to the Form 1120S in 2004 and 2005. In addition, the petitioner's tax returns do not reflect payment of any full-time employee's salaries in 2004 or 2005 or any payment of officer's compensation in 2001, 2004, or 2005. The evidence submitted contains no information about the reputation enjoyed by the petitioner or evidence that shows that it had just one uncharacteristic year such as in *Sonegawa*. Further, as noted above, the petitioner failed to submit any evidence in accord with 8 C.F.R. § 204.5(g)(2) to demonstrate its ability to pay for the years 2002 or 2003.

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.⁸

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁸ We note that the beneficiary is also the beneficiary of an approved petition filed by another employer. As the beneficiary has an approved petition filed by a different employer, it is unclear as to whether the beneficiary intends to accept employment with the instant petitioner although this does not form the basis for denial of the instant petition.