

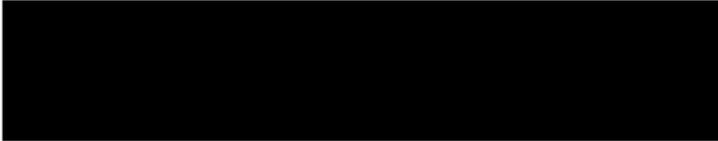


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FILE: LIN 07 245 56717 Office: NEBRASKA SERVICE CENTER Date: NOV 02 2009

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

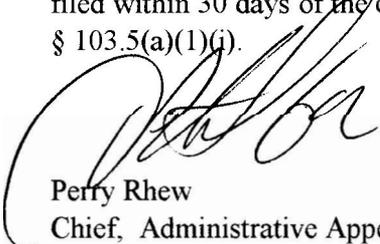
PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 staffing health care employment agency. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, an Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director also determined that the petitioner had failed to establish that it had the ability to pay the proffered wage or that the beneficiary had the required work experience or training by the time of the priority date, and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence relating to the petitioner's ability to pay the proffered wage, and resubmits the same evidence related to the beneficiary's 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).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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(l) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on August 27, 2007, indicates that the petitioner was established in 1994 and currently employs twenty workers. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act. The Form 750 submitted in support of this visa classification required six months of training as a caregiver or healthcare related courses, as well as three years of work experience in the job offered as a caregiver.

Citing 8 C.F.R. § 204.5(l)(2), and as mentioned above, the director observed that the certified position described on the Form ETA 750 required six months of training and three years of experience. As the visa classification sought on the I-140 petition designated the unskilled worker category (paragraph g), the I-140 petition was not approvable because it was not supported by the appropriate Form ETA 750. In order to be classified as an unskilled worker, the Form ETA 750 must require less than two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required less than two years of training or experience. Counsel does not address this issue on appeal.

The AAO concurs with the director's conclusion in this regard. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification.

The director noted additional grounds for denial in his decision. With respect to the petitioner's ability to pay the proffered wage, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [United States Citizenship and Immigration Services (USCIS)].

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage. It must also demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the Form 750 is the initial receipt in the DOL's employment service system.¹ See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 750 was accepted for processing on April 30, 2001. The proffered wage as set forth on the Form ETA 750 is \$17.63 per hour, which amounts to \$36,670.40 per year.

In support of its ability to pay the proffered wage, the petitioner provided copies of its 2006 and 2007 Form 1120S, U.S. Income Tax Return for an S Corporation and additionally provided copies of its 2001, 2002, 2003, 2004 and 2005 Form(s) 1120S on appeal. They indicate that the petitioner files its returns on a standard calendar year basis. The returns contain the following information:

Year	2001	2002	2003	2004
Net Income ²	-\$ 2,291	-\$67,372	\$66,755	\$26,361

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

² Where an S Corporation's income is exclusively from a trade or business, USCIS considers net

Current Assets	-\$12,254	-\$30,768	\$16,844	-\$20,517
Current Liabilities	\$ 4,820	\$ -0-	\$81,650	\$ -0-
Net Current Assets	-\$17,074	-\$ 30,768	-\$64,806	-\$20,517

Year	2005	2006	2007
Net Income	\$42,369	\$ 9,480	-\$14,372
Current Assets	-\$ 15,416	\$ 7,391	\$20,241
Current Liabilities	\$ -0-	\$ -0-	\$ 1,041
Net Current Assets	-\$ 15,416	\$ 7,391	\$19,200

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also submitted copies of its bank statements for first seven months of 2008. On appeal, it provided copies of the Wage and Tax Statements (W-2s) that it has issued to the beneficiary. They reflect the following wages paid:

Year	W-2 Amount	Difference from the Proffered Wage of \$36,670.40
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income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. 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, 2002, 2003,); line 17e (2004, 2005); line 18 (2006, 2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 23 in 2001, 2002, and 2003, on line 17e in 2004 and 2005, and on line 18 in 2006 and 2007).

³ 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.

2001	\$ 4,767	-\$31,903.40
2002	\$ 4,398	-\$32,272.40
2003	\$13,704	-\$22,966.40
2004	\$22,266	-\$14,404.40
2005	\$17,178	-\$19,492.40
2006	\$16,464	-\$20,206.40
2007	\$17,398	-\$19,272.40
2008	\$ 8,100.10	-\$28,570.30

The director declined to accept the petitioner’s bank statements evidence of its continuing ability to pay the proffered wage consistent with the requirements of 8 C.F.R. 204.5(g)(2). We concur. The petitioner’s bank statements submitted that cover a selected period during 2008 do not overcome the evidence reflected on the petitioner’s tax returns and do not demonstrate a petitioner’s continuing ability to pay the proffered wage. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay. While this regulation allows additional material “in appropriate cases,” it has not been demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner’s financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner’s ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner’s net current assets for a given period.

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner’s net income or net current assets for a given year, then the petitioner’s ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner employed the beneficiary but paid substantially below the proffered wage as shown on the W-2s provided. Although as initially indicated, the petitioner’s net income of \$16,844 in 2003; \$26,361 in 2004; \$42,369 in 2005; and net current assets of \$19,200 in 2006 was sufficient to cover the difference(s) between the actual wages paid and the proffered wage, neither its net income nor net current assets was enough to cover this difference in 2001, 2002 or 2006.

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 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.

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).

It is further noted that USCIS electronic records indicate that the petitioner has filed at least thirteen petitions for foreign workers since 2000, at least two of which were pending during the same period as the instant petition before they were approved. The petitioner has not provided information relating to the wages paid or the proffered wage of other beneficiaries that it has sponsored. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. Otherwise an employer could file ten petitions with the same or similar priority dates and obtain approval of all ten based on the same financial data even though it could only pay one proffered salary. In this case, as set forth above, the tax returns suggest that either the petitioner's net income or net current assets was sufficient to cover the difference between the proffered wage and the actual wage paid to the instant beneficiary in 2003, 2004, 2005 and 2007. However, confirmation of this ability to pay cannot be made absent the submission of information relating to the other beneficiaries.

Moreover, as indicated above, neither the petitioner's net income nor its net current assets was enough to cover the difference between the actual wages paid to the beneficiary of \$4,767, \$4,398, and \$17,398 in 2001, 2002, and 2006, respectively, and the proffered wage of \$36,670.40. In 2001, each of the petitioner's net income of -\$2,291 and -\$17,074 in net current assets was insufficient to pay the -\$31,903.40 difference between actual wages paid and the proffered wage. In 2002, neither the petitioner's reported net income of -\$67,372 nor its net current assets of -\$30,768 was enough to cover the -\$32,272.40 difference between actual wages paid to the beneficiary and the proffered wage of \$36,670.40 per year. Similarly, in 2006, neither the petitioner's net income of \$9,480 nor its net current assets of \$7,391 was sufficient to cover the -\$20,206.40 difference between actual wages paid and the proffered salary. Additionally, the W-2 provided for 2008 indicates that the petitioner paid \$28,570.30 less than the proffered wage in that year. The petitioner has not demonstrated its continuing financial ability to pay the certified wage.

It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in Time and Look. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's

determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, it may not be concluded that petitioner's business operations have presented the kind of framework of profitability such as that discussed in *Sonegawa*. As noted above, except for 2003 and 2005, the petitioner's net income has never exceeded the proffered wage and its net current assets are represented by losses in every year except 2006 and 2007. The petitioner has not demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonegawa*.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 30, 2001. Demonstrating that the petitioner's ability to pay in selected years is insufficient as the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time and must demonstrate that the ability to pay encompasses all of its sponsored workers as of their respective priority dates. Therefore, based on the foregoing, the petitioner has failed to establish its continuing ability to pay the certified wage.

Relevant to the beneficiary's employment experience as a caregiver, the petitioner submitted two employment verification letters. One is undated and signed by [REDACTED]. She fails to give her address as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter states that the beneficiary worked for [REDACTED] as a full-time caregiver from July 1, 1979 to August 1, 1980. The other letter is dated August 6, 2007 and is from [REDACTED] of the University of San Tomas Hospital in the Philippines. He describes the beneficiary's duties and states that she worked for a patient of his, identified as [REDACTED]⁴ full-time from June 1, 1990 to July 1, 1991. It is noted that the beneficiary listed the name of a different doctor on Part B of the ETA 750 as being her employer from June 1990 to July 1991. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Even if considered for a third preference skilled worker visa category and as required by the terms of the ETA 750, the evidence must establish that the beneficiary had acquired six months of training and three years of work experience in the job offered as of the April 30, 2001, priority date. Even if considered credible, her employment verification letters affirm at most, two years of work experience in the job offered. It is noted that no other employment is listed by the beneficiary on Part B of the ETA 750. No verification of training as a caregiver or completion of healthcare related courses has been provided. Going on record without supporting documentary

⁴The beneficiary's maiden name is also [REDACTED]. It is unknown if [REDACTED] patient was a relative and if [REDACTED] is a relative.

evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established that the beneficiary obtained the requisite three years experience and six months of training as set forth on the ETA 750.

Based on a review of the underlying record and the evidence submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for an unskilled worker visa classification initially sought by the petitioner. Additionally, there was insufficient evidence to establish that the petitioner has the continuing ability to pay the proffered wage or that the beneficiary had obtained the requisite three years of experience and six months of training as set forth on the labor certification. Therefore, the appeal will be dismissed on these bases.

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.