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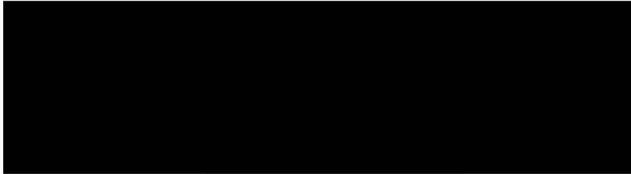
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090



U.S. Citizenship
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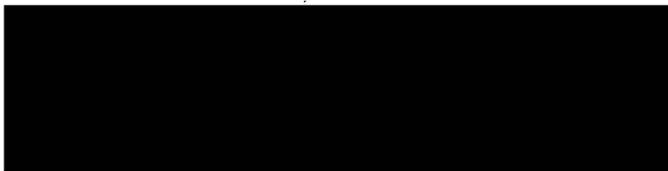
Office: TEXAS SERVICE CENTER Date:

NOV 18 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a woodworking shop. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(1)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1) as a cabinet maker.¹ As required by statute, an ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner failed to demonstrate a continuing ability to pay the proffered wage beginning on the priority date.

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 denial, the 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

¹ In the Form I-140, Immigrant Petition for alien Worker, the petitioner requested the visa preference classification for first preference, priority workers, i.e. "an alien of extraordinary ability" by checking box (a) in Part 2. However, the petition was accompanied by an ETA Form 750 Part A which requires only two years of experience. Accordingly, the director interpreted the "extraordinary ability" request as an inadvertent error and proceeded to adjudicate the petition as one seeking a third preference classification as a skilled worker. The petitioner has not objected to the director's use of discretion in this manner, and the AAO will consider the appeal as one pertaining to a request to classify the beneficiary pursuant to Section 203(b)(3)(A)(i) of the Act. That being said, the AAO notes that, even if the director's decision was withdrawn in this matter, the appeal could not be sustained for this reason. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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 ETA Form 750, 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 ETA Form 750, 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 ETA Form 750 was accepted on December 15, 2003. The proffered wage as stated on the ETA Form 750 is \$10.12 per hour (\$18,418.40 per year²).

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.³

The petitioner is a single member limited liability company. On the ETA Form 750, signed by the beneficiary on December 1, 2003, the beneficiary did not claim to have worked for the petitioner, although the petitioner has contradicted this statement in the record of proceeding.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

² The yearly proffered wage is calculated on a 35 hour work week. The director had erroneously calculated the yearly wage on a 40 hour/weekly basis.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

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. As set forth below, the petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date for each of the years for which tax returns were submitted.

IRS Wage and Tax Statements were submitted stating wage payments from the petitioner to beneficiary in the amounts of \$17,575.00 and \$13,147.50 for 2003 and 2004 respectively. The petitioner has submitted on appeal NYS-45-MN Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return statements, for the first and second quarters of 2005, listing the beneficiary as an employee. Those statements reported that the petitioner paid the beneficiary a total of \$2,800.00 for the first half of 2005. Therefore for years 2003, 2004 and 2005, the differences between wages paid to the beneficiary by the petitioner and the proffered wage of \$18,418.40 are \$843.40, \$5,271.90 and \$15,618.40 respectively.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that

even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on August 1, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2006 federal income tax return was the most recent return available.⁴ The petitioner’s Schedules C (Form 1040) stated its net income as detailed in the table below.

- In 2003, the petitioner stated net income⁵ of \$41,841.00.
- In 2004, the petitioner stated net income of \$9,264.00.
- In 2005, the petitioner stated net income of \$9,419.00.
- In 2006, the petitioner stated net income of \$27,581.00.

Therefore, for the year 2005, the petitioner did not establish that it had sufficient net income to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage. In 2003, 2004 and 2006, it appears that the petitioner could pay the proffered wage; however, due to the absence of the complete Forms 1040, the petitioner has not established its ability to pay the proffered wage for those years as well. *See infra*.

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. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁶ Since the petitioner did not submit an

⁴ According to a letter from the petitioner’s accountant, dated July 22, 2008, the petitioner’s estimated net income for 2007 is \$19,000.00, but there is no independent objective evidence in the record to substantiate this figure. Going on record without supporting documentary 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)).

⁵ Form 1040, Schedule C net profit (loss) Line 31 for 2003, 2004, 2005 and 2006.

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

audited financial statement or an annual report according to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the Schedules C (Form 1040) submitted by the petitioner, net current assets cannot be ascertained for any year. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Thus, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets from the priority date.

Counsel contends in her brief dated October 27, 2008, that because the limited liability company provides protection for the individual member against impositions of debt and liability incurred by the LLC, the petitioner is excused from complying with the director's request for the sole member's U.S. federal tax return Form 1040 for years 2004 through 2007, to which the produced Schedules C were appended.

The regulation at 8 C.F.R. § 204.5(j)(3)(ii) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide full copies of its tax returns.⁷ Full copies of the tax returns would authenticate the Schedules C submitted as the petitioner's tax returns filed in the ordinary course of business, and comply with the regulation. The regulation at 8 C.F.R. § 204.5(g)(2) details the regulatory prescribed evidence to be copies of federal tax returns, not portions of federal tax returns. Furthermore, the full Forms 1040 would reveal whether the sole member is greatly reliant on the "net profit" as income for himself and his dependents, if any. Consequently, these documents are essential in this matter to the petitioner establishing that it has the ability to pay the proffered wage. 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).

The petitioner's failure to submit these tax documents cannot be excused. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Counsel states that the petitioner has submitted sufficient evidence, i.e. Schedules C (Form 1040), wage payments,⁸ bank statements, and cost of labor figures from Schedules C, to show it has the ability to pay the proffered wage

one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ The director also requested the tax returns of the owners' of the petitioner, but since the single member limited liability company is a separate legal entity, the Forms 1040 for the years stated are sufficient.

⁸ The petitioner submitted W-2 statements stating wage payments to the beneficiary during the two

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. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee as is stated here or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

There is a paucity of information in the record concerning the petitioner's business organization and finances. There is no information in the record concerning the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses that would account for its depressed net income in 2005. No State of New York limited liability company registration statement or operating agreement identifying the petitioner was submitted. The petition did not disclose when the limited liability company was established, or its current number of employees. According to NYS-45-MN Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return Statements, for 2005, 2006 and 2007, the petitioner had a minimum of two and a maximum of eight employees during this time period and it is not clear if any of the employees were employed full time.

Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline, or as in this case deficit in any year. The AAO notes for the period for which Schedule C Statements were submitted the petitioner's gross receipts have declined each year in 2003-\$464,744.00; in 2004-\$366,403.00; in

years he was employed by it in 2003 and 2004, NYS-45-MN Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return statements, for 2005, 2006 and 2007, and Forms 941, Employer's Quarterly Federal Tax Returns, for the first two quarters of 2008.

2005-\$322,879.00 and in 2006-\$293,590.00. From the financial evidence presented, the petitioner's finances are in a sustained downturn.

The petitioner contends he intends to replace an existing worker with the beneficiary "after he [the beneficiary] receives his work permit." The record does not, however, name this worker, state his/her wages or compensation if he/she is an independent contractor, verify his/her full-time employment, or provide evidence that the petitioner will replace him/her with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position that will be replaced. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.⁹

According to counsel, once the beneficiary is employed, the beneficiary "will replace outside [an] contractor who [sic whose] wages [sic compensation] were reflected in documents presented herewith." However, the petitioner has not specifically identified the contractor, presented proof of wages actually paid on Form MISC-1099, identify the projects on which he/she worked, or provided evidence that he/she worked in the same capacity as the proffered position. Counsel states on appeal that the Schedules C and IRS Forms 940/941 are sufficient proof of the expense but other than general categories of expense, wages and cost of labor, wages, tip and compensation, noted on those documents, the petitioner has failed to document the payments or the contractor. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability.

Counsel asserts that since the priority date is December 15, 2003, the petitioner should be responsible for paying a prorated portion of the proffered wage corresponding to the remaining days of 2003 from December 15th. If this were the rule, then the petitioner's yearly net income would also have to be prorated which would eliminate the presumed benefits of proration. Since USCIS is attempting to analyze the petitioner's ability to pay over a given period of time, it would not be logical to measure income earned over a different and longer period of time against the wages earned for the shorter period of time.

⁹ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

The petitioner submitted copies of the business' bank statements. However, USCIS will not consider those statements as evidence of the prior petitioner's ability to pay the proffered wage, as the petitioner's Schedules C should have included those amounts under gross receipts and expenses. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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 a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

According to counsel, the bank statements submitted demonstrate a monthly cash flow average of \$60,000.00 per month. In a generally accepted accounting principles (GAAP) based cash flow statement the sources of cash are disclosed. The general categories are cash received from operations, and, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the audited balance sheet and income statement, present an analysis of the financial health of a business. Documentary evidence, such as a detailed business plan and audited cash flow statements can demonstrate the petitioner's overall financial position. See <http://www.planware.org/cashflowforecast.htm> accessed November 2, 2009. However audited financial statements and a business plan were not submitted. The bank statements without substantiation do not demonstrate the cash flow of the petitioner.

Counsel contends that the cost of labor and wages figures stated on the Schedules C (Form 1040) for 2003, 2004, 2005 and 2006 show the petitioner's payment of wages paid to its employees, and compensation to the independent contractors. No 1099-MISC Form statements, invoices, or cancelled checks were introduced into evidence to show payments to independent contracts. There is no independent objective evidence of independent contractors' payments other than the totals on the schedules submitted. Further, the suggestion that wage expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages are payroll expenses in those tax returns. Wages paid to employees are not discretionary expenditures. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel refers to decisions issued by the AAO concerning business bank accounts, consulting fees paid to outside contractors, a case in which the petitioner proved that the beneficiary would replace other employees and independent contractors, and an examination of the financial circumstances of the petitioner. The petitioner does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The cases cited are not precedent decisions.

Based upon the evidence submitted, the petitioner did not establish that it had the continuing 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.