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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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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **NOV 18 2009**
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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 or reopen, 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas service station. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, an 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 demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner has had the continuing ability to pay the proffered wage.¹

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). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, at 1002 n. 9.

In this case, the AAO concurs with the denial of the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage. Additionally, the petition will be denied based on the petitioner's failure to establish that the beneficiary acquired the requisite two years of work experience as set forth on the ETA 750 and on the basis that the petitioner is not an entity in good standing in the state of Maryland. According to public records, its existence was terminated by the state and it forfeited its status as an entity in good standing on October 3, 2008.² Therefore, the job offer is no longer considered *bona fide*.

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 or seasonal nature, for which qualified workers are not available in the United States.

¹ 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.

² *See* http://sdatcert3.resiusa.org/UCC-Charter/DisplayEntity_b.aspx? (Accessed 11/0709).

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

(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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on May 20, 2002.³ The proffered wage is stated as \$18.79 per hour, which amounts to \$39,083.20 per year.

The beneficiary signed Part B of the Form ETA 750 on May 13, 2002, indicating that he was unemployed from December 1999 to the present (date of signing). There is no indication on Part B of the ETA 750 that he had worked for the petitioner. However, on the biographic information Form G-325A, signed by the beneficiary on June 20, 2007 and submitted in connection with his application for permanent residence or to adjust status (Form I-1485), he claims that he has been working for the petitioner from June 2001 to the present (date of signing). Various Wage and Tax Statements (W-2s) submitted by the petitioner also suggest that

³ 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.

the petitioner has employed him since at least 2002. Such inconsistencies undercut the reliability of other claims of employment experience as set forth on the ETA 750. Moreover, the undated employment verification letter signed by [REDACTED] of Jalandhar, India fails to specify whether the beneficiary's employment was full-time or part-time. The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). We find that the record does not resolve the inconsistencies noted above and does not sufficiently support the petitioner's claim that the beneficiary has two full-time years of employment in the job offered or two full-time years of employment as a manager in any commercial enterprise.⁴

It is noted that the record indicates that the gas station known as [REDACTED] the entity listed on the labor certification, was owned by [REDACTED]. The business was sold to the petitioning corporation for \$492,000 as of March 8, 2006, according to [REDACTED] 2006 federal tax return and other documentation contained in the record. Therefore the petitioning corporation is the successor-in-interest to [REDACTED]. This status requires documentary evidence that a petitioner has assumed all of the rights, duties, and obligations of the predecessor company. In order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor enterprise had the ability to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In this case, the ability to pay the proffered wage would be shown by [REDACTED] from 2002 to March 8, 2006 and by the petitioner for the remainder of the relevant period of time.

The financial documentation submitted to the record by [REDACTED] consisted of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002, 2003, 2004, 2005, and 2006. The tax returns contain the following information:

	2002	2003	2004	2005
Net Income ⁵	\$ 39,592	\$ 84,843	\$ 34,175	\$32,314

⁴ *See also Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

⁵ Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (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

Current Assets	\$ 88,234	\$ 105,991	\$ 103,348	\$152,691
Current Liabilities	\$ 24,011	\$ 26,794	\$ 6,182	\$ 2,024
Net Current Assets	\$ 64,223	\$ 79,197	\$ 97,166	\$150,667
Year	2006			
Net Income	\$102,655			
Current Assets	\$ -0-			
Current Liabilities	\$ -0-			
Net Current Assets	\$ n/a			

As illustrated in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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.

As noted above, the petitioner also provided copies of W-2s issued to the beneficiary by [REDACTED] as well as an internal payroll record reflecting that the petitioner paid the beneficiary compensation in the amount of \$9,168.54 year-to-date as of September 4, 2007. Although the hourly rate is shown to be \$19.23, which exceeds the proffered wage, from the W-2 statement either the beneficiary was not compensated at this hourly rate during the preceding eight months or he was not employed full-time at the gas station. Monthly full-time compensation at the rate of the proffered wage would have resulted in a salary of approximately \$26,055.44 for eight months. The petitioner failed to provide an audited financial statement for 2007 required to

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 (2002-2003) line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the predecessor-in-interest had additional deductions shown on Schedule K for 2002-2006, the petitioner's net income is found on Schedule K of its tax return.

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.

establish that it could cover the difference of \$16,886.90 during this period of time. Additionally, the petitioner failed to submit an audited financial statement, federal tax return or an annual report showing that it could cover the deficit resulting from a comparison of the actual wages paid to the beneficiary and the proffered wage in 2006. The 2006 W-2 issued by the petitioner to the beneficiary for 2006 indicates that he was paid \$14,266.49 by the petitioner. Based on approximately ten months of employment, this represents a difference of -\$18,302.81 between the proffered wage (\$32,569.30 for ten months) and the actual wages of \$14,266.49 paid to the beneficiary. He was paid \$3,036.51 by [REDACTED]. The other W-2s reflect the following wages paid by [REDACTED] to the beneficiary:

Year	Amount of Wages	Difference from Proffered Wage of \$39,083.20
2002	\$ 9,932.76	-\$29,150.44
2003	\$12,838.53	-\$26,244.67
2004	\$10,634.28	-\$28,448.92
2005	\$11,469.26	-\$27,613.94
2006	\$ 3,036.51	-\$ 3,477.35 ⁷

The director denied the petition on August 9, 2007. He concluded that although [REDACTED] had demonstrated its ability to pay the proffered wage in 2002 through 2005, the petitioner had failed to demonstrate its ability to pay the proffered wage as of March 8, 2006 and failed to establish that it continues to have such ability.

On appeal, the petitioner, through counsel, asserts that the petitioner's 2006 federal tax return was not submitted because it was not available as shown by a copy of the Internal Revenue Service (IRS) application for an extension of time. Counsel additionally submits a copy of a bank letter, dated August 23, 2007, addressed to the petitioner indicating that it has a line of credit for \$25,000 as of March 2006.

Counsel's assertions are not persuasive. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Further, the fact that the petitioner filed an extension of time with the IRS pertinent to its 2006 federal tax return does not exempt the petitioner from demonstrating its ability to pay the proffered wage in 2006. The regulation at 8 C.F.R. 204.5(g)(2) permits a petitioner to submit such documentation as an audited financial statement if it elects not to submit a federal tax

⁷This calculation based on approximately two months of the proffered wage, or \$6,513.86 because the business was sold on March 8, 2006.

return. 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)).

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 alien 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.

Although as indicated above, either net income or net current assets suggest that it could cover the difference(s) between the wages paid to the beneficiary and the proffered wage of -\$29,150.44 in 2002; -\$26,244.67 in 2003; -\$28,448.92 in 2004; and -\$27,613.94 in 2005, it must be noted that the asset sale and purchase agreement includes three other alien beneficiaries that had been sponsored by [REDACTED] USCIS electronic records indicate that their respective I-140s were approved in 2003, 2004 and 2006. Without information as to whether these approvals were based on the same figures appearing in [REDACTED]'s tax returns, it is unclear if the financial information could support the beneficiary's additional salary requirements. 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. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of The Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that each job offer was realistic as of the respective 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).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as

an alternative to federal tax returns, but they must show that a petitioner has sufficient net income to pay the proffered wage. It is also noted that 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. *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 noted that in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past 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 *Sonegawa* 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.

Unlike the *Sonegawa* petitioner, this petitioner was established only two and one-half years before it filed the I-140. It bought the business on March 8, 2006, a year before it filed the I-140. It has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonegawa* are applicable. As noted above, it was terminated by the state as a forfeited entity and is no longer in good standing in the state where it is located. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

As noted above, even if [REDACTED] ability to pay the proffered wage was established by its federal income tax returns, the petitioner failed to establish that it had the ability to pay the full proffered wage in 2006 and failed to demonstrate that its ability to pay the full proffered wage in the first eight months of 2007 based on the year-to-date wages reflected on its payroll record contained in the record. The petitioner failed to provide an audited financial statement for 2007 that would have established that it could cover the difference of \$16,886.90 during this period of time. Further, the petitioner failed to provide an audited financial statement, federal tax return or an annual report for 2006 showing that it could cover the deficit of -\$18,302.81 resulting from a comparison of the actual wages paid to the beneficiary of \$14,266.49 and the proffered wage of \$32,569.30 (calculated for approximately ten months).

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its *continuing* ability to pay the proffered wage as of the priority date. The petitioner has also failed to demonstrate that the beneficiary had two years of employment experience in the job offered or in the related occupation as required by the ETA 750. Finally, the job offer is no longer considered as *bona fide* because the petitioner's status as an entity in good standing was forfeited by the state of Maryland on October 32, 2008. 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.