

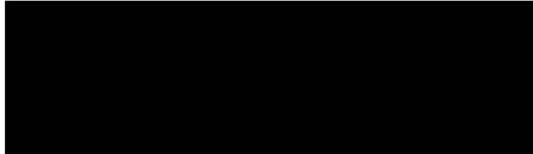


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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: OCT 01 2009
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, 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. The appeal will be dismissed.

The petitioner is a restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a cook. 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 and 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 April 11, 2008 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

¹ The petitioner identified itself as a restaurant and as Hanover Restaurant on the I-140 petition. It submitted tax returns to the record for Amos Management L.L.C. with the same Employer Identification Number (EIN) as [REDACTED]. It also submitted one Form 1065 tax return for [REDACTED] with an EIN of [REDACTED]. The AAO consulted the state of New York corporation database to ascertain the corporate identity of Hanover Restaurant. The state of New York corporation database does not list assumed names for limited liability partnerships. The database indicates that Amos Management LLC is inactive, having been dissolved on February 6, 2006, while Rutger LLC is still active. See http://appsext8.dos.state.ny.us/corp_public. (Available as of September 16, 2009.) This date of dissolution would indicate that the petitioner, filing the I-140 petition on January 29, 2007, did so after its dissolution.

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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.²

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 On appeal, counsel submits a statement. With the petition, the petitioner submitted its Forms 1065, U.S. Return for Partnership Income, for tax years 2001 to 2004, and in response to the director's RFE dated January 14, 2008, Forms 1065 for both Amos Management LLC and Rutger LLC. On appeal, counsel resubmits the petitioner's Forms 1065 for

² In the I-140 petition, the petitioner identified the category for which the petition was filed as "G. Any other worker" (requiring less than two years of training or experience). However, the ETA Form 750, Part A, indicates work experience requirements of two years. Thus, the two documents vary with regard to the category classification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Thus, for purposes of these proceedings, the AAO utilizes the ETA Form 750 classification of skilled worker. Further, the petitioner's classification of the petition as "any other worker" is a basis for denial of the petition.

³ 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).

tax years 2001 to 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner included its salaries and other experience in its tax returns under Cost of Goods, line three, Schedule A of the tax return. Counsel notes that the beneficiary worked "off the books" while working at the restaurant because he did not have a social security number. Counsel asserts that the petition should be approved for humanitarian reasons.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.⁴ On the petition, the petitioner claimed to have been established in December 3, 2000, to have a gross annual income of \$850,729, a net annual income of \$354,354, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based either on the calendar year, or on the tax year beginning on April 1, and ending December 31, of the same year.⁵ On the Form ETA 750, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 the instant petition, the petitioner has not established clearly in the record the relationship between itself and either Amos Management LLC or Rutger LLC. If the petitioner is Amos Management LLC, doing business as Hanover Restaurant, the record indicates that the petitioner was dissolved

⁴ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

⁵ The record is not clear that the petitioner operates its business year round, based on this tax return statement.

prior to the filing of the instant petition. If this is the case, the petitioner's ability to pay the proffered wage is moot, and the petitioner is frivolous, with no legal merit. Although the state of New York corporate database indicates that Rutger LLC, for which the petitioner submitted a 2005 Form 1065 is in active status, the petitioner has not claimed that its corporate identity is Rutger LLC., or that a successor in interest status exists between Amos Management LLC and Rutger LLC.⁶ Without establishing the petitioner's actual corporate identity and the corresponding tax returns, the AAO cannot determine whether the petitioner's job offer is realistic. Thus, the petition must be denied.⁷

For illustrative purposes, and to correct some financial or tax figures utilized by the director, the AAO will examine the Amos Management LLC tax returns in these proceedings.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on appeal counsel states that the beneficiary has worked for the petitioner "off the books", and that the petitioner's salaries and other expenses were included in the Cost of Goods" section of the tax return. However, the petitioner has not provided any evidence, such as Forms 1099-MISC, or pay stubs to further substantiate any current or previous employment of the beneficiary. Thus, the petitioner has to establish its ability to pay the entire proffered wage of \$39, 291.20 as of the 2001 priority year and continuing.

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.

⁶ The AAO notes that the record contains no evidence that the petitioner qualifies as a successor-in-interest. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Moreover, the petitioner must establish the financial ability of the predecessor enterprise 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).

⁷ If the petitioner wishes to purpose this matter further, it has to submit evidence such as a statement of fictitious business name for Hanover Restaurant, as well as clarify which tax returns should be reviewed to determine the petitioner's ability to pay the proffered wage.

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.

The record before the director closed on February 22, 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 is the most recent return available; however the petitioner did not submit a 2006 tax return for Amos Management LLC. Although the director identified a tax return as the petitioner's 2006 tax return, the document in question is a 2005 tax return for a distinct partnership, Rutgers L.L.C. This partnership has the EIN of [REDACTED], the final digit varying from the petitioner's EIN. It also has the same partners as the petitioner. The petitioner provided no explanation for why the Rutgers LLC 2005 tax return was submitted to the record. The director's comments on this tax return will be withdrawn. The AAO will not examine this tax return any further in these proceedings. . The Amos Management LLC's tax returns stated its net income as detailed in the table below.

In 2001, the petitioner's Form 1065 stated net income of -\$2,487.⁸

In 2002, the petitioner's Form 1065 stated net income of \$2,178.

In 2003, the petitioner's Form 1065 stated net income of -\$38,912.

In 2004, the petitioner's Form 1065 stated net income of -\$1,857.

In 2005, the petitioner's Form 1065 stated net income of \$56,223.

Therefore, for the years 2001 to 2004, the petitioner did not establish that it had sufficient net income to pay the proffered wage. The petitioner did establish it had sufficient net income in tax year 2005 to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ A partnership's year-end current

⁸ For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K for tax year 2001, 2002, and 2005 have relevant entries for additional income and, therefore, the net income for these years is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K. The remaining years in question, 2003 and 2004 have no such additional income or deductions, and the petitioner's net income in these years is found on line 22 in the respective tax return.

⁹ 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

assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 stated its net current assets as detailed in the table below.

In 2001, the petitioner's Form 1065 stated net current assets of -\$39,525.

In 2002, the petitioner's Form 1065 stated net current assets of -\$39,328.

In 2003, the petitioner's Form 1065 stated net current assets of -\$101,937.

In 2004, the petitioner's Form 1065 stated net current assets of -\$90,143.

Therefore, for the years 2001 to 2004, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 9089 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, except for 2005.

Counsel's assertions on appeal with regard to granting the petition on humanitarian reasons cannot be concluded to outweigh the fact that the record contains no financial documentation to establish that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

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

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, the record contains no evidence beyond the petitioner's tax returns to further assess the petitioner's totality of circumstances. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.