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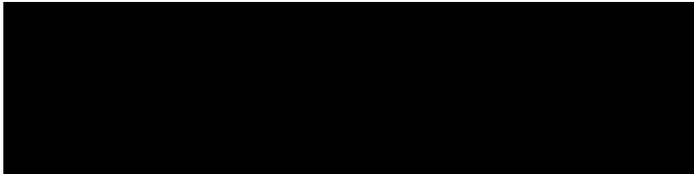


**U.S. Department of Homeland Security**  
U. S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS 2090  
Washington, DC 20529-2090

**U.S. Citizenship  
and Immigration  
Services**

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 05 2009

LIN-07-209-53068

IN RE:

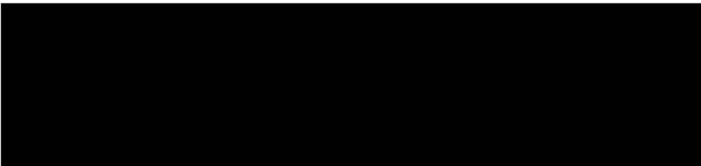
Petitioner:



Beneficiary:

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 Khew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition for the substituted beneficiary 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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a home health aide (caregiver). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's October 6, 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 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the DOL employment system. 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 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 November 30, 2004. The proffered wage as stated on the Form ETA 750 is \$1,523.58 per month (\$18,282.96 per year). The Form ETA 750 states that the position requires high school completion but no experience is required.

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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is a corporation. On the petition, the petitioner claimed to have been established in 2003, and to currently employ 4 workers. The petitioner did not provide any information about its gross annual income and net annual income on the form. On the Form ETA 750, the beneficiary claimed to have worked for the petitioner since June 2004.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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, although the beneficiary claimed to have worked for the petitioner since 2004, the petitioner submitted the beneficiary's W-2 form for 2007 and three pay stubs for 2008. The W-2 form shows that the petitioner paid the beneficiary \$11,320.00 in 2007. The pay stubs show that the beneficiary was paid \$700.00 for each semi-month period from July 1 to July 15, from July 16 to July 31 and from August 1 to August 15, 2008, respectively and as of August 15, the year-to-date amount paid to the beneficiary in 2008 is \$9,100.00. The record does not contain any other documentary evidence of the beneficiary's compensation from the petitioner in 2008, such as W-2 forms. The record has demonstrated that the petitioner employed and paid the beneficiary the partial proffered wage in these two years, however, the petitioner is still obligated to demonstrate that it could pay the difference of \$6,962.96 in 2007 and \$9,182.96 in 2008 between wages actually paid to the beneficiary and the proffered wage, and the full proffered wage in 2004 to 2006 with its net income or its net current assets.

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<sup>1</sup> 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). However, counsel did not submit any additional evidence, nor did counsel submit a brief to the AAO within 30 days as indicated on the Form I-290B. Therefore, the AAO will adjudicate the instant appeal based on evidence already submitted in the record only.

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. 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. On appeal counsel argues that the petitioner's depreciable, depletable and intangible assets should be relied on in determining its ability to pay the proffered wage. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. On appeal counsel cites a case decided by the Administrative Appeals Unit as a precedent decision to support her assertion. 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). Moreover, USCIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F.3rd 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's Form 1120-A, U.S. Corporation Short-Form Income Tax Return, for 2004 and Form 1120, U.S. Corporation Income Tax Return, for 2005 through 2007. The petitioner's tax returns for 2004 through 2007 demonstrate the following financial information

concerning the petitioner's ability to pay the proffered wage of \$18,282.96 per year from the year of the priority date:

- In 2004, the Form 1120-A stated a net income<sup>2</sup> of \$8,463.
  - In 2005, the Form 1120 stated a net income<sup>3</sup> of \$(8,199).
  - In 2006, the Form 1120 stated a net income of \$(2,672).
- In 2007, the Form 1120 stated a net income of \$(4,130).

Therefore, for the years 2004 through 2006, the petitioner did not have sufficient net income to pay the beneficiary the full proffered wage, and for the year 2007, the petitioner did not have sufficient net income to pay the difference of \$6,962.96 between wages actually paid to the beneficiary and 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Part III Balance Sheets per Books, lines 1 through 6 and its year-end current liabilities are shown on Part III lines 13 and 14 if the corporation files its tax return on Form 1120-A or the year-end current assets are shown on Schedule L, lines 1 through 6 and the year-end current liabilities are shown on lines 16 through 18 if the corporation files its tax return on Form 1120. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2004 were \$(38,597).
- The petitioner's net current assets during 2005 were \$(32,122).
- The petitioner's net current assets during 2006 were \$(29,598).
- The petitioner's net current assets during 2007 were \$(38,890).

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions on Line 24 of the Form 1120-A.

<sup>3</sup> Taxable income before net operating loss deduction and special deductions on Line 28 of the Form 1120.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2004 through 2007, the petitioner had sufficient net current assets to pay the beneficiary either the full proffered wage or the differences between wages actually paid to the beneficiary and the proffered wage in each of these years.

The record contains statements of the petitioner's bank account. Counsel's reliance on the balance in the petitioner's bank account 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

On appeal, counsel's argument concerning the petitioner's longevity and hiring new employees, however, cannot be overlooked. 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. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

*Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In the present case, the petitioner had been in business for four years at the time the Form ETA 750 was filed. The petitioner had \$270,000 in gross receipts at most (2006) and paid out \$24,266 at most (2005) in wages and salaries each year although it claimed to have four employees on the form. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has the ability to pay the proffered wage.

Furthermore, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004 through 2007 were uncharacteristically unprofitable years for the petitioner.

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's October 6, 2008 decision that the petitioner failed to demonstrate that it could pay the proffered wages from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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.