

identifying de
prevent disclosure
invasion of personal privacy

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

PUBLIC COPY

B6



FILE: [REDACTED]
LIN 07 075 50042

Office: NEBRASKA SERVICE CENTER

Date:
OCT 26 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head 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).¹ 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.

¹ It appears that the original employer on the ETA 750 was Ranch *1 of Mineola Incorporated. On March 8, 2006, the petitioner informed DOL of the following:

We write in regard to the Application for Alien Employment Certification filed on behalf of [the beneficiary] by our prior restaurant, Ranch *1 of Mineola, of which I was owner. Ranch *1 of Mineola has ceased operations. A new entity, Garden Grill of Herricks, Inc., has been established, and I am owner. The restaurant will be opening in the near future, as soon as renovations are complete.

The EIN of Garden Grill of Herricks, Inc. is: _____ and [a] copy of Form SS-4 is provided.

The new establishment is 1 ½ miles from the former Ranch *1 of Mineola location. Employees of the former restaurant are offered the opportunity to return to work at Garden Grill of Herricks, Inc., and will be contacted as it is difficult finding qualified workers. Due to the caliber of her skills and the difficulty in finding a qualified head cook, the offer of employment under the same terms and salary remains for [the beneficiary].

The DOL approved the change in employer and certified the labor certification on September 26, 2006.

The AAO notes the New York Department of State, Division of Corporations, Entity Information website at http://appext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION? (accessed on October 20, 2009) shows that the entity, Ranch *1 of Mineola Incorporated, is still active and has not ceased operations.

As set forth in the director's January 17, 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 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$616.15 per week (35 hour week) or \$32,039.80 per year. The Form ETA 750 states that the position requires two years of experience in the job offered as a head cook. The Form ETA 750 also requires that the beneficiary have references and/or letter of experience.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

² 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

The evidence in the record of proceeding shows that the petitioner is structured as a corporation (It is unclear whether the petitioner is structured as a "C" corporation or an "S" corporation as no tax returns were submitted for the petitioner.). On the petition, the petitioner, Garden Grill of Herricks, Inc., claimed to have been established on June 17, 2005.³ On the Form ETA 750B, signed by the beneficiary on March 14, 2001, the beneficiary did not claim to have worked for the petitioner, Garden Grill of Herricks, Inc., or for the original petitioner on the Form ETA 750, Ranch *1 of Mineola Incorporated.

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 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date or April 30, 2001.⁴

newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ Ranch *1 of Mineola Incorporated, the original petitioner on the Form ETA 750, was incorporated on May 7, 1996. According to the petitioner, Garden Grill of Herricks, Inc., Ranch *1 of Mineola Incorporated ceased operations in 2006. However, the AAO notes that the New York Department of State website shows that Ranch *1 of Mineola Incorporated is still active. *See* footnote 1.

⁴ The petitioner has submitted the 2003 and 2004 Forms W-2, issued by Ranch *1 of Mineola on behalf of the beneficiary, showing that the beneficiary was employed by Ranch *1 of Mineola in those years. The wages paid to the beneficiary by Ranch *1 of Mineola in 2003 and 2004 were \$22,063.75 and \$7,600, respectively.

The petitioner has also submitted payroll records for the beneficiary for July 20, 2007, August 3, 2007, and August 17, 2007. The payroll records show that the beneficiary was compensated at the proffered rate of \$616.15 during those three pay periods.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

The petitioner has not submitted any tax returns for Ranch *1 of Mineola from the priority date of April 30, 2001 through June 17, 2005 when the petitioner was established. The petitioner did submit the 2003 and 2004 Forms W-2, issued by Ranch *1 of Mineola on behalf of the beneficiary, showing wages paid to the beneficiary of \$22,063.75 and \$7,600, respectively. However, as Ranch *1 of Mineola did not pay the beneficiary the entire proffered wage and since the petitioner did not submit any tax returns for Ranch *1 of Mineola, the AAO is unable to determine if Ranch *1 of Mineola had sufficient funds to pay the difference of \$9,976.05 between the proffered wage of \$32,039.80 and the actual wages paid to the beneficiary of \$22,063.75 in 2003. The AAO is also unable to determine if Ranch *1 of Mineola had sufficient funds to pay the difference of \$24,439.80 between the proffered wage of \$32,039.80 and the actual wages paid to the beneficiary of \$7,600 in 2004. Therefore, the petitioner has not established Ranch *1 of Mineola's ability to pay the proffered wage from the priority date and continuing until the petitioner was established in 2005.

In addition, the petitioner has not submitted tax returns from the time it was established to the present. Although the petitioner did submit copies of its payroll records for three pay periods in 2007 showing that it paid the beneficiary the proffered wage during those three pay periods, the AAO will not assume that the petitioner paid the beneficiary the proffered wage for the entire year. Therefore, the petitioner has not established its ability to pay the proffered wage of \$32,039.80 from the time it was established and continuing to the present.

Therefore, from the date the Form ETA 750 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 through any other manner.

On appeal, counsel asserts:

That petitioner, initially as Ranch *1 of Mineola at the time of the April 30, 2001 filing of the Application for Employment Certification on behalf of beneficiary, was successfully doing business, and could afford to pay the proffered salary of \$616.15 to the beneficiary. However, petitioner submits that after September 11, 2001, due to a significant decrease in business for the restaurant industry, petitioner's establishment too experienced a significant decrease in business.

Counsel is mistaken. The petitioner has not submitted any evidence with the exception of two Forms W-2, issued by Ranch *1 of Mineola, and copies of three payroll records for 2007 for itself, that establishes either its or Ranch *1 of Mineola's ability to pay the proffered wage. In addition, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability

to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

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 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 petitioner has submitted no probative evidence that either it or Ranch *1 of Mineola had sufficient funds to pay the proffered wage. The Form I-140 indicates the petitioner was incorporated on June 17, 2005. The evidence submitted is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.