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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: LIN 06 208 51916 Office: NEBRASKA SERVICE CENTER

Date: OCT 29 2009

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting company. It seeks to employ the beneficiary permanently in the United States as a commercial painter. 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. 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 May 11, 2007 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 June 27, 2002. The proffered wage as stated on the Form ETA 750 is \$20.94 per hour (\$43,555.20 per year). The Form ETA 750 states that the position requires two years of prior work experience in the proffered position, or two years as a painter helper.

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.¹ With the initial petition, the petitioner submitted the first page of its 2002 IRS Form 1120S, U.S. Income Tax Return for an S Corporation. In response to two RFEs from the director, the petitioner submitted copies of its Form 1120S for tax years 2003 to 2005² and copies of the beneficiary's W-2 Wage and Tax Statements for tax years 2001³ to 2005. The beneficiary's W-2 Forms indicate the following wages: \$26,382.02 in 2002; \$25,018.02 in 2003; \$32,437.77 in 2004; and \$26,123.40 in 2005. Counsel did not submit any evidence on appeal. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On August 13, 2009, the AAO issued a Notice of Intent to Deny (NOID) to the petitioner. The AAO states that while it viewed certain factors⁴ found in the record as indicative of the scale of the

¹ 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).

² In the RFE dated December 13, 2006, the director requested further evidence such as tax returns or audited financial statements to establish the petitioner's ability to pay the difference between the beneficiary's wages, also to be documented, and the proffered wage but only for the years 2003 to 2005. The director did not refer to the petitioner's 2002 incomplete Form 1120S.

³ Since the priority date for the instant petition is 2002, the AAO will not consider the beneficiary's W-2 Form for 2001 in its examination of the petition.

⁴ In a footnote, the AAO in its NOID noted that the petitioner paid its officers varying amounts of compensation during the relevant period of time, but that the record was not clear as to how many officers are compensated and the record did not establish that any officer would be willing to forego compensation to pay the difference between the beneficiary's actual wages and the proffered wages. Further, the AAO noted that the petitioner's gross receipts in tax years 2002, 2004 and 2005 were over \$3,000,000, while the petitioner's 2003 tax return indicated over \$2,000,000 in gross receipts. The AAO did not consider the petitioner's gross receipts as the determining factor in the petitioner's ability to pay the proffered wage; however, the AAO did note that, in tax years 2003 to 2005, the petitioner's salaries and wages (indicated on line eight, page one of the tax returns) and the petitioner's cost of labor (identified on page two of the tax returns) establish that the petitioner paid over \$1,000,000 each year in combined salary and labor expenses, and that USCIS databases

petitioner's business operations, without analyzing the petitioner's complete tax returns for tax year 2002, and without further explanation of the petitioner's significant losses in tax years 2003 and 2004, it was not possible to evaluate whether the petitioner had established its business viability and its continuing ability to pay the proffered wage.

Although the director stated in his decision that the submission of the petitioner's complete tax return for the 2002 priority year would not have affected the petitioner's ability to pay the proffered wage,⁵ the AAO in its NOID determined that the record was not complete without the petitioner's entire tax return for the 2002 priority year. The AAO requested that the petitioner submit its 2002 tax return, with accompanying schedules, and provide an explanation for its significant losses in tax years 2003 and 2004.

Further the AAO requested clarification of the discrepancy between the I-140 petition and the state of Virginia database with regard to the petitioner's incorporation,⁶ and the actual number of corporate officers and their compensation during the pertinent period of time. The AAO stated that it would deny the instant petition if this evidence was not received.

The petitioner submitted no response to the NOID. The copy of the NOID sent to the petitioner was returned to the AAO as "undeliverable." The AAO contacted the petitioner's attorney and was told that counsel had sent certified letters to both the petitioner and the beneficiary with no response.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on April 23, 1989, to have a gross annual income of \$3,000,000 to \$5,000,000, a net annual income of \$1,000,000 to \$3,000,000, and to currently employ 30 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 28, 2002, the beneficiary claimed to have worked for the petitioner from July 1999 to the date he signed the ETA Form 750B.

indicated that the petitioner had only submitted the instant I-140 petition, and that there were no other beneficiaries of pending petitions.

⁵ The AAO also noted that the director in his second RFE requested further evidence such as tax returns or audited financial statements to establish the petitioner's ability to pay the difference between the beneficiary's wages, also to be documented, and the proffered wage but only for the years 2003 to 2005. The director did not refer to the petitioner's 2002 incomplete Form 1120S.

⁶ Although the petitioner indicates on the I-140 petition that it was established on April 23, 1989, the state of Virginia State Corporation database indicates that the date of certification of the petitioner's incorporation was April 13, 1983. See <http://ssc.virginia.gov/clk/bussrch.aspx> in "Clerk's Information System" link (available as of June 29, 2009). There is no evidence in the record as to why the petitioner utilized the date of April 23, 1989 on the I-140 petition as the date it was established.

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 Sonegawa*, 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 established that it did not pay the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2002 or subsequently. The petitioner thus has to establish its ability to pay the difference between the beneficiary's wages and the proffered wage of \$43,555.20 in tax years 2002 to 2005. This difference is \$16,173.18 in 2002; \$23,537.18 in 2003; \$11,117.43 in 2004; and \$17,431.80 in 2005.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS 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 record before the director closed on March 8, 2007 with the receipt by the director of the petitioner’s submission in response to the director’s second request for evidence. As of that date, the petitioner’s 2006 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax returns demonstrate its net income⁷ for tax years 2003 to 2005, as shown in the table below.

⁷Where an S corporation’s income is exclusively from a trade or business, 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 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 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, or credits. The AAO notes that in tax year 2002, the petitioner did not submit a complete Form 1120S. Therefore the record does not establish whether the petitioner had additional income, deductions, credits or other deductions in tax year 2002 that would have altered the net income indicated on page 1, line 21. In tax years 2003, 2004, and 2005, the petitioner submitted the Form 1120S with Schedules K. These documents establish that the petitioner had additional deductions in 2003 and additional income in 2004 and 2005 that reduced the petitioner’s actual net income in these years. Therefore for 2002, the petitioner cannot establish its actual net income and

- In 2002, based on the incomplete Form 1120S submission, the petitioner did not establish its actual net income.
- In 2003, the petitioner had a net income of -\$1,194,976.
- In 2004, the petitioner had a net income of -\$845,630.
- In 2005, the petitioner had a net income of \$163,436.

Therefore, for the years 2002 to 2004, the petitioner did not establish sufficient net income to pay the proffered wage. The petitioner did establish its ability to pay the proffered wage to the beneficiary in tax year 2005 based on its net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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 tax returns demonstrate its end-of-year net current assets for 2002 to 2004,¹⁰ as shown in the table below.

- In 2002, the petitioner did not submit Schedule L, and cannot establish its net current assets.
- In 2003, the Form 1120S stated net current assets of -\$857,523.
- In 2004, the Form 1120S stated net current assets of -\$1,047,988.

Therefore, for the years 2002 to 2004, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

for tax years 2003 to 2005, the petitioner's net income is found on lines 23, 17a, and 17a, respectively.

⁹According 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.

¹⁰ In 2002, the petitioner only submitted the first page of Form 1120S and did not submit its Schedule L. Therefore the AAO cannot examine the petitioner's net current assets in tax year 2002.

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 its net income or net current assets, with the exception of tax year 2005.

On appeal counsel asserts that the petitioner's business longevity, and ability to pay wages to its employees, and its ability to succeed are alternate ways of determining the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that the petitioner is a multi-million dollar company that has been in business since 1989 and that the wages paid to the beneficiary are substantial and indicative of the petitioner's ability to pay the proffered wage. Counsel also states that the petitioner has substantial assets and income, has been able to pay all its expenses and salaries, and has been able to grow as a company. Counsel finally notes that many multi-million dollar companies show substantial losses on paper, but are genuinely fiscally sound and able to meet all their expenses and operate successfully.

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 petition, the petitioner indicates it has been in business for at least twenty years,¹¹ and that it has 30 fulltime employees. The AAO notes that the petitioner has paid its officers varying

¹¹ As stated previously, although the petitioner indicates on the I-140 petition that it was established on April 23, 1989, the state of Virginia State Corporation database indicates that the date of certification of the petitioner's incorporation was April 13, 1983.

amounts of compensation¹² during the relevant period of time; however, as stated previously, the record is not clear as to how many officers are compensated, and whether any officer would be willing to forego compensation to pay the difference between the beneficiary's actual wages and the proffered wages.

The petitioner's gross receipts in tax years 2002, 2004 and 2005 are over \$3,000,000, while the petitioner's 2003 tax return indicates over \$2,000,000 in gross receipts. As stated in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the AAO does not consider the petitioner's gross receipts as the determining factor in the petitioner's ability to pay the proffered wage. However, the AAO does note that, in tax years 2003 to 2005,¹³ the petitioner's salaries and wages (indicated on line eight, page one of the tax returns) and the petitioner's cost of labor (identified on page two of the tax returns) establish that the petitioner paid over \$1,000,000 each year in combined salary and labor expenses. As previously stated, while the AAO views certain factors found in the record as indicative of the scale of the petitioner's business operations, without analyzing the petitioner's complete tax returns for tax years 2002 to 2005, it is not possible to evaluate whether the petitioner has established that its business viability and its continuing ability to pay the proffered wage. The AAO issued its NOID in an attempt to obtain sufficient evidence of the petitioner's totality of circumstances. Failure to respond to the NOID has left a record of proceedings that is not sufficient. Thus the petitioner has not established its ability to pay the difference between the beneficiary's actual wages and the proffered wage as of the priority date and onward.

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.

¹² Officer compensation was \$125,000 in 2002, \$101,250 in 2003, \$212,981 in 2004, and \$155,769 in 2004.

¹³ The petitioner did not submit the second page of its Form 1120S for tax year 2002. Therefore the AAO cannot determine the petitioner's labor costs for tax year 2002.