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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:

[REDACTED]
LIN 07 152 51930

Office: NEBRASKA SERVICE CENTER

Date:

APR 07 2010

IN RE:

Petitioner:
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)

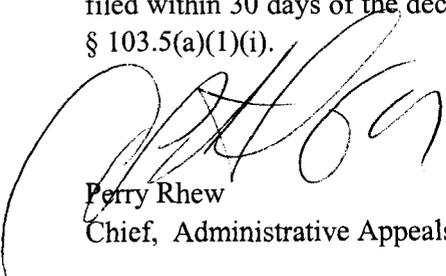
ON BEHALF OF PETITIONER:

[REDACTED]

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 employment based 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 coffee shop. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, an ETA Form 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director also concluded that the petitioner had not established that it had the ability to pay the proffered wage or that the beneficiary possessed the required experience as set forth on the labor certification. The director denied the petition on December 23, 2008.

On appeal, the petitioner, through counsel, submits an amended preference petition and evidence related to the petitioner's ability to pay the proffered wage. Counsel asserts that the designation of the wrong visa classification was a secretarial error and contends that the petitioner established its ability to pay the beneficiary's proposed wage offer.

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).

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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(1) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on May 2, 2007, indicates that the petitioner was established on July 26, 1999, employs twenty-eight workers and reported a gross annual income of over 3.1 million dollars. The petitioner sought visa classification (Part 2, paragraph e of I-140) of the beneficiary as a skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act. The Form ETA 750 submitted in support of this visa classification required only six months of experience in the job offered as a baker.

Citing 8 C.F.R. § 204.5(l), and as mentioned above, the director observed that the certified position described on the Form ETA 750 required six months of work experience. As the visa classification sought on the I-140 petition designated the skilled worker category (paragraph e), the I-140 petition was not approvable because it was not supported by the appropriate Form ETA 750. In order to be classified as a skilled worker, the Form ETA 750 must require at least two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required at least two years of training or experience. The director briefly noted in his denial that if the petitioner filed a motion or appeal, additional evidence would be required in support of the beneficiary's qualifying experience and the ability to pay the proffered wage for 2003, 2005, 2006, and 2007.¹

On appeal counsel offers an amended I-140 to reflect a request for the unskilled worker category designated on Part 2, paragraph "g" of the I-140. Counsel asserts that the error was merely clerical and that the petition should be approved as provided on appeal. The AAO does not concur. The regulation at 8 C.F.R. § 103.2(b)(8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of

¹ As stated on the ETA 750 with a priority date of November 14, 2003, the proffered wage is \$11.00 per hour, which amounts to \$22,880 per year. The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

ineligibility in the record.” It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee, select the proper category, and submit the required documentation.

It is additionally noted that the issue of the beneficiary’s required experience was not addressed on appeal.² As indicated in the record, the instant beneficiary was requested to be a substitution for the original beneficiary specified on the ETA 750. Part B of the ETA 750, signed by the substituted beneficiary on April 13, 2007, lists one prior job. The beneficiary states that he worked as a baker from December 2000 to October 2004 for:

[REDACTED]

An undated employment verification letter was submitted in support of the beneficiary’s claimed experience. However, it is from [REDACTED]. This letter, signed by [REDACTED],” states that the beneficiary worked as a baker from September 28, 2000 to September 28, 2002. Given the inconsistencies

² The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

as to the identity of the previous employer and the dates of employment as listed on the ETA 750 and the information indicated by the employment verification letter, it may not be concluded that the petitioner established that the beneficiary possessed the requisite experience as set forth in the labor certification. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). *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.)

With respect to its ability to pay the proffered wage of \$22,880 per year, beginning as of the priority date,³ the petitioner provided to the underlying record and on appeal, copies of its 2003, 2004, 2005, 2006, and 2007 Form(s) 1120S, US Income Tax Return for an S Corporation. They indicate that the petitioner's fiscal year is a standard calendar year. The returns contain the following information:

Year	2003	2004	2005
Net Income ⁴	-\$ 61,426	\$ 55,285	-\$ 29,157
Current Assets	\$ 82,678	\$185,809	\$105,135
Current Liabilities	\$189,302	\$197,121	\$198,154
Net Current Assets	-\$106,624	-\$ 11,312	-\$ 93,019

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.

⁴Where an S Corporation's income is exclusively from a trade or business, U.S. 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. 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 (2003); line 17e (2004-2005); line 18 (2006-2007)) of Schedule K. *See Instructions for Form 1120S*, 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, credits, etc.). Here, the petitioner's net income is reflected in Schedule K, line 23 in 2003; 17e in 2004 and 2005; and line 18 in 2006 and 2007 of Schedule K.

Year	2006	2007
Net Income	\$121,768	\$244,167
Current Assets	\$262,557	\$284,177
Current Liabilities	\$196,424	\$246,280
Net Current Assets	\$ 66,133	\$ 37,897

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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.⁶

The petitioner also submitted copies of selected bank statements. 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 provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds

⁵ 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.

⁶ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

that would not be reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L.

With respect to counsel's statement that the beneficiary is supposed to replace a worker who has not yet departed the petitioner's employment, it is noted that in general, wages already paid to others are not available to prove the ability to pay the wage proffered the beneficiary as of the priority date of the petition, which in this case was November 14, 2003, and continuing to the present. Moreover, there is no sworn, notarized statement that the three Wage and Tax Statements (W-2s) represent the same individual that was the original beneficiary. Two of the W-2s contain a different name and social security number than the third one. It is also noted that in 2003, this person was paid approximately \$7,000 than the proposed wage offer of the beneficiary. The record has not credibly documented the position, duty, and commencement of employment and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not replace her. 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. *See Matter of Ho*, 19 I&N Dec. 582, at 591-592. The assertions of counsel are not persuasive in this respect. 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)).

It is additionally noted that the petitioner has sponsored multiple beneficiaries on preference petitions. Therefore, the petitioner must show that it has had sufficient continuing income to pay all of the respective certified wages as of individual priority date established for each petition. Although the record preliminarily indicates that the petitioner could cover the proffered wage of the instant beneficiary through either net income or net current assets in 2004, 2006 and 2007, the current record does not contain sufficient information with regard to the other sponsored beneficiaries during these years to offer this as a final conclusion as to these years.

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. Here, the record does not indicate that the petitioner has employed the beneficiary.

If a petitioner does not establish that it has 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 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).

As set forth above, in 2003 and 2005, the petitioner's respective net income of -\$61,426 in 2003 and -\$29,157 in 2005 were each insufficient to cover the proffered wage in either year. Similarly, the petitioner's net current assets of -\$106,624 in 2003 and -\$93,019 were each insufficient to cover the proffered wage of \$22,880 in either year.⁷ As noted above, as the petitioner sponsored other workers, we are unable to determine in 2004, 2006, and 2007 whether the petitioner can pay the wages of all its sponsored workers. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its *continuing* ability to pay the certified wage as of the priority date. In this matter, the petitioner has not established its continuing ability to pay.

Based on a review of the underlying record and the argument submitted on appeal, it may not be concluded that the certified position required at least two years of experience or training in order to approve the petition for the skilled worker visa classification initially sought by the petitioner. Additionally, as indicated by the director, the petitioner failed to demonstrate that the beneficiary possessed the requisite work experience and that the petitioner had the continuing financial ability to pay the certified salary.

⁷ *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), may sometimes be applicable where other circumstances are present. In *Sonogawa*, the appeal was sustained where the facts supported 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 *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unlike the *Sonogawa* petitioner, this petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonogawa* are applicable. Although the petitioner's gross sales have increased during the relevant period, it has also reflected increased expenses, and its net income and net current assets were all reflected as losses in the year of the priority date, as well as in 2005. 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 *Sonogawa*.

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.