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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: LIN 06 210 52837 Office: NEBRASKA SERVICE CENTER Date: **APR 12 2010**

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 Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, who subsequently reaffirmed his decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant which seeks to employ the beneficiary permanently in the United States as a cook as a substitute employee for a person petitioned for earlier. Substitution of beneficiaries was permitted by the United States Department of Labor (USDOL) when this petition was filed on July 10, 2006. USDOL had published an interim final rule, which limited the validity of an approved Form ETA 750, Parts A & B, Application for Alien Employment Certification, to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the United States District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, USDOL processed substitution requests pursuant to a May 4, 1995 USDOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). USDOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). USDOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of this Form I-140 predates the rule, substitution will be allowed for the present petition. A Form I-140 for a substituted beneficiary retains the same priority date as the original Form ETA 750.

As required by statute, the petition is accompanied by a Form ETA 750 approved by the USDOL. The director noted the petitioner had filed four and possibly more Forms I-140 for additional employees for the firm. The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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 priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 was accepted for processing on November 18, 2002 and listed the proffered wage as \$11.87 per hour based on a 35 hour workweek which equates to \$21,603 per year. The position requires two years experience in the job offered.

The petitioner is currently structured as an S corporation, was incorporated on March 26, 2002 and currently employs four to five persons. The firm's IRS Form 1120-A, U.S. Corporation Short-Form Income Tax Return and its IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, reflect it operates on a calendar year basis. The substitute Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on June 1, 2006, reflects that he had never been employed by the petitioner. It is noted that the original beneficiary who signed his Form ETA 750, Part B, on September 15, 2002 indicated that he had never been employed by the petitioner.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained valid for each year thereafter, until a beneficiary obtains lawful permanent resident status. 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 a job offer, United States Citizenship and Immigration Services (USCIS) requires the petitioner 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).

USCIS first examines whether the petitioner employed and paid the beneficiary during that period. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. As neither the original alien or the substituted beneficiary were employed by the petitioner during the requisite period, it has not established that it employed and paid the beneficiary the full proffered wage from the priority date of November 18, 2002 or subsequently.

If the petitioner does not establish it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS next examines the net income figures reflected on the petitioner's federal income tax returns 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 20, 2007 with the receipt by the director of the petitioner's submissions in response to his request for evidence. The petitioner's 2006 Form 1120S

was the latest income tax return submitted for consideration. The petitioner's IRS Form 1120-A and IRS Forms 1120S tax returns demonstrate its net income for the years of the requisite period below:¹

<u>Year</u>	<u>Net Income (\$)</u>
2002	25,296
2003	28,055
2004	26,964
2005	28,545
2006	27,650

On appeal, counsel states that the petitioner purchased a restaurant business known as [REDACTED] at the petitioner's current address on March 15, 2002 and continued to operate its business under that name. Counsel explains that the petitioner processed and obtained a labor certification for the beneficiary and filed a Form I-140 in his behalf. Counsel further states that the previous owner has filed three labor certifications and that among the three earlier visa petitions, only one cook entered the United States to work for the petitioner. Counsel indicates that two other persons petitioned for had not yet arrived in this country. Counsel asserts the petitioner has withdrawn these two visa petitions. Counsel submits a letter dated August 20, 2007 from [REDACTED] who states the previous owner filed three labor certifications and that one cook entered the United States and worked at the restaurant. He further states he has withdrawn the other two immigrant petitions and asserts that the beneficiaries have not arrived in this country as immigrants. The record contains another letter dated May 24, 2007 from [REDACTED] who states he wants to withdraw two Forms I-140 under application numbers SRC 06 213 52854 and EAC 06 106 52501. He indicates that the beneficiary of a Form I-140 under application number EAC 03 168 50590 immigrated to the United States, reported to the restaurant and was employed by the corporation from September 16, 2006 until January 2007.

USCIS records indicate that the petitioner has filed four Form I-140 visa petitions since its establishment in March 2002. The record reflects that the visa petitions were filed on May 12, 2003 (EAC 03 168 50590 which was approved with a priority date of April 24, 2001), March 1, 2006 (EAC 06 106 52501, pending), July 3, 2006 (SRC 06 213 52854, this petition) and on July 10, 2006 (LIN 06 210 52837, pending). The petitioner acknowledges responsibility for these petitions by briefly employing one of the beneficiaries whose petition was filed on May 12, 2003, using the labor certification initially submitted for the current beneficiary on a substitution basis and indicating in its

¹ The petitioner's 2002 submission was on an IRS Form 1120-A and the rest was on IRS Forms 1120S. When using the petitioner's IRS Form 1120-A, net income is the figure for taxable income before net operating loss and special deductions shown on line 24. When using IRS Form 1120S, net income is the figure for ordinary income shown on line 21 of the petitioner's IRS Forms 1120S unless additional income, credits, deductions or other adjustments from sources other than a trade or business are reported on the Schedule K section of the return. The petitioner reported no adjustments affecting net income on its Schedule K sections for tax years 2003 through 2006.

May 24, 2007 letter that it wants to withdraw the other two of the Forms I-140 which are shown as pending above. Since USCIS records reflect that the other two petitions are still pending, the petitioner is still obligated for these multiple sponsorships.

The petitioner needs to demonstrate its ability to pay the proffered wage for each Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Therefore, although it could be argued that net income for 2002 through 2006 was slightly over the proffered wage of \$21,603 per year during a period when only one Form I-140 was pending, the petitioner did not have sufficient net income to pay the proffered wage for each Form I-140 beneficiary during the requisite period and beyond.

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.² 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 record reflects that the petitioner filed an IRS Form 1120-A U.S. Corporation Short-Form Income Tax Return, for 2002 which does not contain a Schedule L. It is noted that the corporation is not required to complete Schedule L when it files IRS Forms I-1120S and the petitioner chose not to do so when it filed for 2003 through 2006 causing the Schedule L forms unavailable for analysis. Therefore, for the years 2002 through 2006, the record does not reflect the petition had sufficient net current assets to pay the proffered wage.

From the date the Form ETA 750 was accepted for processing by the USDOL, 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.

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

²According 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.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 been in business since 2002 and had been in business a short time when it filed its first labor certification. The petitioner had gross sales of \$162,344 in 2002, \$204,447 in 2003, \$214,458 in 2004, \$241,563 in 2005 and 273,338 in 2006. This, by itself, is not sufficient to establish its ability to pay the proffered wage. The restaurant employed four to five persons at the time the Form I-140 was filed. As stated above, USCIS records indicate that the petitioner has filed four Forms I-140 for essentially the same position since the petitioner's establishment in 2002. The petitioner needed to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary were to obtain permanent residence. It has not done so. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

Thus, assessing the totality of the circumstances in this case, it is concluded that 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.