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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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APR 22 2010

FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

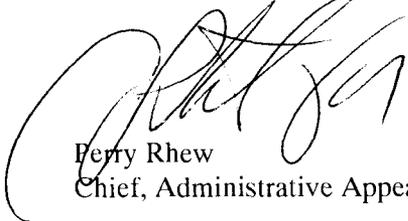
PETITION: Immigrant petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 clothing manufacturing business. It seeks to employ the beneficiary permanently in the United States as a sewing machine operator. 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 from the priority date of the visa petition onwards. 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 April 22, 2008 denial, at issue in this case is whether 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)(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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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 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 as certified by the DOL and submitted with the 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$24,000 per year. The Form ETA 750 states that the position requires three months of experience in an unspecified occupation related to the proffered job of sewing machine operator.

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 on appeal.¹

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1928 and to currently employ 70 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 March 21, 2001, the beneficiary claimed to have worked for the petitioner from 1999 until the date that he signed that form.

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 at any time during the relevant period of analysis. The copy of the petitioner’s 2002 payroll register in the record does show that the petitioner paid the beneficiary the following amounts during 2002: \$358.32 + \$407.20 + \$333.60 + \$324.85 + \$379.60 + \$347.32, or a total of \$2,150.89, or \$21,849.11 less than the proffered wage in 2002.² The 2003 Form W-2, Wage and Tax Statement, in the record shows that the petitioner paid

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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 The analysis in the notice of decision appears to estimate the actual wage paid the beneficiary in 2002 as follows: If the beneficiary had worked for the petitioner each pay period in 2002 and if he was paid each pay period at approximately the same rate as the amount reflected in the six pay periods listed in the payroll register, then the petitioner “may have paid” the beneficiary

the beneficiary \$21,203.20, or \$2,796.80 less than the proffered wage in 2003.³ The 2004 Form W-2 shows that the petitioner paid the beneficiary \$18,476.69, or \$5,523.31 less than the proffered wage in 2004. The 2005 Form W-2 shows that the petitioner paid the beneficiary \$10,329.66, or \$13,670.34 less than the proffered wage in 2005. The petitioner's 2006 yearly earnings report indicates that it paid the beneficiary \$17,948.45, or \$6,051.55 less than the proffered wage in 2006.⁴ The 2007 Form W-2, Wage and Tax Statement, shows that the petitioner paid the beneficiary \$22,016.23, or \$1,983.77 less than the proffered wage in 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient, contrary to counsel's assertions made on appeal.

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

approximately \$18,644 in 2002. This point in the notice of decision is withdrawn. USCIS will consider only the amounts which the petitioner documents that it paid to the beneficiary during the relevant period of analysis.

³ The copy of the 2003 Form W-2 in the record has a mark through the digit 1 in: \$21,203.20 in one box on that form. The mark causes the digit 1 to appear to be the digit 4. However, the entries on the rest of that form make clear that the petitioner paid the beneficiary \$21,203.20 that year, not \$24,203.20. The notice of decision indicated that the beneficiary was paid more than the proffered wage or \$24,203.20 in 2003. The AAO withdraws this point in that decision.

⁴ It is unclear why the petitioner did not submit the beneficiary's Forms W-2 for 2001 or 2006.

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 a preliminary matter, the AAO would underscore that in the request for evidence (RFE) dated December 20, 2007, the director requested that the petitioner submit its “latest annual report, [its] U.S. tax returns for 2001 through 2006, or audited financial statements for 2001 through 2007.” The petitioner did not provide this evidence with its reply to the RFE.⁵ On appeal, the petitioner also failed to provide this documentation for any year other than 2006, for which it supplied its completed tax return.⁶

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner did not provide its tax returns, annual reports or audited financial statements for each year in the relevant period of analysis. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner’s failure to submit this evidence cannot be excused. The failure to submit requested evidence that precludes a

⁵ The petitioner did submit, in response to the RFE, a copy of the draft, not yet completed version of its 2005 tax return and 2006 tax return. These documents are not one of the three acceptable, required documents listed in the RFE, and required by the regulation at 8 C.F.R. § 204.5(g)(2). These draft tax returns do not accurately reflect the petitioner’s financial position in 2005 and 2006, and these documents are not probative in this matter.

⁶ This office notes that when, as in the present matter, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept such evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Information from the 2006 tax return submitted on appeal will be listed in this analysis. However, the AAO would underscore that even if that return had shown the petitioner’s ability to pay the wage in 2006, the information would not have been relied on by this office.

material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The appeal must be dismissed on this basis.

The record before the director closed on February 11, 2008 with the receipt of the petitioner's submissions in response to the RFE. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner failed to provide its 2001, 2002, 2003 or 2004 tax return. A copy of the 2005 and 2006 tax returns marked "draft" and "return not complete" were submitted in response to the RFE. As noted previously, however, they are not copies of the actual tax returns filed by the petitioner and are not probative in this matter.⁷ On appeal, the petitioner submitted a copy of its actual 2006 tax filing. No other tax returns were provided. The AAO does not rely on this document, which the petitioner failed to provide in response to the RFE, but merely notes here that the petitioner's 2006 tax return reflects its net income for 2006, as:

- In 2006, the Form 1120S stated net income (loss)⁸ of -\$51,276.⁹

Thus, for the years 2001 through 2005, the petitioner did not submit completed tax returns such that this office might analyze whether it had sufficient net income to pay the proffered wage or the difference between the actual wage that it paid the beneficiary, if any, and the proffered wage in those years. For the year 2006, the petitioner did not have sufficient net income to pay the difference between the actual wage it paid the beneficiary and the proffered wage or \$6,051.55.

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.¹⁰ A corporation's year-end current assets are shown

⁷ Information from these draft versions of the petitioner's tax returns were relied upon in the notice of decision. The AAO withdraws those points in that decision.

⁸ Where 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 (2001-2003) line 17e (2004-2005) and line 18 (2006) of the Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 1, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income and other adjustments shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its tax return.

⁹ The AAO notes incidentally that the petitioner's 2005 "draft" tax return in the record shows a net income of \$4,495.

¹⁰ 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

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 reflect its end-of-year net current assets for 2006, as:

- In 2006, the Form 1120S stated net current assets (liabilities) of -\$694,045.¹¹

Thus, for the years 2001 through 2005, the petitioner did not provide its completed tax returns that the AAO might analyze whether it had sufficient net current assets to pay the proffered wage, or sufficient net current assets to pay the difference between the actual wages paid, if any, and the proffered wage. In the year 2006, the petitioner did not have sufficient net current assets to pay the difference between the wages it paid the beneficiary and the proffered wage or \$6,051.55.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel indicated that the petitioner should only have to show an ability to pay the wage during the most recent tax year. Counsel asserted that it is a violation of the Equal Protection Clause of the U.S. Constitution that an employment-based petitioner must show the ability to pay the wage from the priority date onwards whereas a sponsor in a family-based petition need only demonstrate an ability to support the beneficiary of a petition during the most recent tax year. Counsel's claim is not correct. USCIS must apply the laws and regulations applicable to employment-based petitions in this matter. A petitioner filing for an unskilled or other worker must show the ability to pay the proffered wage from the priority date onwards. *See* 8 C.F.R. § 204.5(g)(2). As noted previously, the filing of a labor certification establishes a priority date for any immigrant petition later based on that labor certification. Therefore, 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 from the priority date onwards 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). Moreover, this office would underscore that the petitioner did not demonstrate an ability to pay the proffered wage in any year in the relevant period, including 2007, the most recent year for which the petitioner provided evidence.

On appeal, the petitioner's owner and counsel also made the following assertions for which they did not provide any supporting documentary evidence. The petitioner's president stated in his letter dated March 13, 2008 that the petitioner has had five year back-to-back contracts with the U.S. Air Force to produce its dress coats. However, in 2003, these contracts were reduced by 50%, according to the petitioner's owner, which prompted the petitioner to have to borrow money and to take a loss. Then, in 2006, dress uniform contracts were increased to prompt the petitioner to produce at a faster

salaries). *Id.* at 118.

¹¹ The AAO notes incidentally that the petitioner's 2005 "draft" tax return in the record shows net current assets (liabilities) of: -\$649,987.

rate than ever. The petitioner's owner also indicated that the petitioner would be producing dress uniforms for both the U.S. Army and U.S. Air Force and that both of these entities are currently replacing their dress uniforms. Counsel asserted that the petitioner is only one of three companies that produce U.S. military dress uniforms. He indicated that the petitioner experienced a slow down in production during the relevant period of analysis because the U.S. government cut back in issuing dress military uniforms, but that the petitioner currently has a new five year contract guaranteed by the U.S. government. Again, counsel and the petitioner's owner provided no documentation to support these various assertions. 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)). Unsupported assertions are not evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner and counsel's assertions made on appeal do not outweigh the evidence presented in the petitioner's Yearly Earnings Report, its Payroll Register and the Forms W-2 it issued to the beneficiary, as submitted by the petitioner, which fail to show that the petitioner had the ability to pay the proffered wage from the priority date onwards.¹²

USCIS may also 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

¹² As previously noted, the AAO does not rely on the information in the draft copy of the petitioner's 2005 tax return or its completed 2006 tax return submitted for the first time on appeal. This office only notes here that that information on those documents did not support the finding that the petitioner had the ability to pay the wage in 2005 or 2006. Also, as noted in the director's decision, the AAO cannot rely on the petitioner's unaudited financial statements for 2003 or 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.

Here, the petitioner stated that it incorporated in 1928 and has 70 employees. Despite the petitioner's longevity, it has not established its historical growth since incorporating. It did not provide its completed tax returns for each year of the relevant period in compliance with the regulation at 8 C.F.R. § 204.5(g)(2). Also, the petitioner did not submit other evidence that might be used to examine whether its gross sales or receipts steadily increased from one year to the next during the relevant period of analysis. Further, the petitioner has not established with documentary evidence the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry. The petitioner has not established whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, the AAO finds 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 from the priority date onwards. The appeal must be dismissed on this basis.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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.