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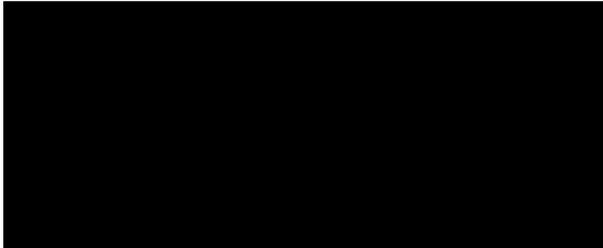
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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Services**

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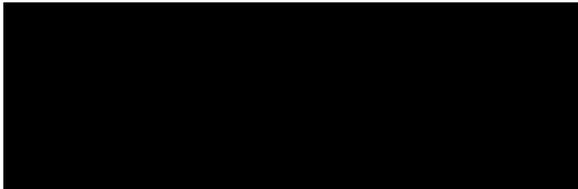
Date: APR 28 2010

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and pizza delivery business that seeks to employ the beneficiary permanently in the United States as a supervisor of food checkers and cashiers. The petition is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). 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 demonstrate the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL on the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 accepted for processing on November 30, 2004 lists the proffered wage as \$11.50 per hour based on a 40 hour workweek amounting to \$23,920 per year. The position requires two years experience in the job offered as a supervisor of food checkers and cashiers or in a related occupation of supervisor or work director in a restaurant or mall

The petitioner is structured as an S corporation, was established in 1997 and claims to have employed 28 workers in 2007. The firm's IRS Form 1120S, U.S. Corporation Income Tax Returns, reflect it operates on a calendar year basis.

A certified labor certification establishes a priority date for any immigrant petition later based on the ETA 750. 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 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 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).

USCIS first examines whether the petitioner employed and paid the beneficiary beginning on the priority date until the date the visa petition was filed. 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. On the Form ETA 750, Part B, (Statement of Qualifications of Alien), signed by the beneficiary on November 18, 2004, he indicated that he was employed by the petitioner from May 2001 until May 2002 as a "pizza driver" working 16 hours per week for 9 months during his school year and 40 hours per week for three months during the summer. The record contains a copy of the beneficiary's pay stub and paycheck dated October 26, 2007 showing the petitioner paid him for 80 hours of work for the pay period ending October 21, 2007. However, neither the petitioner nor the beneficiary claim he was employed by the business during the period after the labor certification was filed until the visa petition was submitted. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the priority date of November 30, 2004 until the Form I-140 was filed on June 29, 2007.

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 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 November 21, 2007 when he received the petitioner’s submissions in response to his request for evidence. As the petitioner’s 2007 federal income tax return was not yet due, its income tax return for 2006 was the most recent return available. The petitioner's IRS Form 1120S tax returns demonstrate its net income for the years of the requisite period below:¹

Year	Net Income (\$)
2004	-6,745
2005	22,575
2006	2,100

Therefore, for the years 2004 through 2006, the petitioner did not have sufficient net income to pay the proffered wage.

¹ 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. The petitioner reported no adjustments affecting net income on its Schedule K forms for tax years 2004 through 2006.

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 while 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 net current assets for the required period, as shown in the table below:

Year	Net Current Assets (\$)
2004	-14,825
2005	-10,011
2006	-24,557

For the years 2004 through 2006 the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, 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.

On appeal, counsel states the director failed to consider the discretionary nature of "Compensation of Officers" and the totality of the circumstances surrounding the petitioner's ability to pay the proffered wage. Counsel further states that in each of the years from the priority date to the present, the petitioner had gross revenues over \$700,000 annually, over \$120,000 in compensation to employees and discretionary compensation to officers of over \$39,000. Counsel requests that the director's determination be reversed and the petition be approved. Counsel submits a notarized statement from [REDACTED], dated February 7, 2008 who states that [REDACTED] is the sole owner and shareholder of the petitioning business and forwards [REDACTED] and his spouse's IRS Forms 1040, U.S. Individual Income Tax Returns, for 2004 through 2006 to for consideration. Counsel argues that the compensation for officers on the corporation's IRS Forms 1120S was \$40,800 for 2004, \$40,929 for 2005 and \$39,000 for 2006 and [REDACTED] could have reduced his compensation of officers each year to raise the business net income above the required wage and still had sufficient adjusted gross income remaining for himself and his family.

The record reflects that [REDACTED] holds 100% of the company's stock. As the sole shareholder of a corporation, he has the authority to allocate expenses of the corporation for business purposes, including the compensation of officers. Distributions and other payments by an S corporation to a

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.

corporate officer or shareholder must be treated as wages to the extent the amounts are reasonable compensation for services to the corporation by an employee. Therefore, the officer compensation of \$40,800 for 2004, \$40,929 for 2005 and \$39,000 for 2006 listed by counsel would only have been available for allocation by [REDACTED] if those amounts were allocated in those years to him or his spouse and not to other officers as wages. As indicated above, counsel submitted the IRS Forms 1040 for [REDACTED] and his spouse for 2004 through 2006 for consideration. These returns show that they earned wages and salaries each year but they do not specify the sources of that income nor the amounts earned. Counsel argues that [REDACTED] could have reduced his officer compensation each year and used those funds to compensate the beneficiary had he been employed from 2004 through 2006. Although the record shows the earnings of [REDACTED] and his spouse on their tax returns, the assertion that he could have forfeited his officer compensation for 2004 through 2006 is not established because his personal expenses during those years could have made his officer compensation unavailable for allocation. Unsupported assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.

The petitioner's tax returns show gross sales of \$585,433 in 2004, \$606,513 in 2005 and \$620,437 in 2006. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. On the Form I-140 filed on June 29, 2007, the petitioner claims to employ 28 workers and have gross annual income of \$779,739. However, there is no evidence in the record supporting these claims. Unsupported assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533,

534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner also 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. After considering the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is two years experience in the job offered as a supervisor of food checkers and cashiers or in a related occupation as a "Supervisor, Work Director, Restaurant/retail." See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The record reflects the beneficiary's statement on Form ETA 750 B that he was employed by the petitioner from May 2001 until May 2002 as a "pizza driver" working 16 hours per week for 9 months during his school year and 40 hours per week for three months during the summer. During this 2001 and 2002, he was not supervising food checkers and cashiers. Other jobs he held at other firms prior to November 30, 2004 included community advisor, "work director/quality assurance analyst" and "web spinner" the duties of which have not been shown to relate to the supervision of food checkers and cashiers closely enough to be deemed qualifying employment. Beyond the decision of the director, there is no evidence in the record of proceeding demonstrating that the beneficiary qualified to perform the duties of the proffered position prior to the filing of the labor certification. Therefore, the petition is denied for this additional reason.

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.