

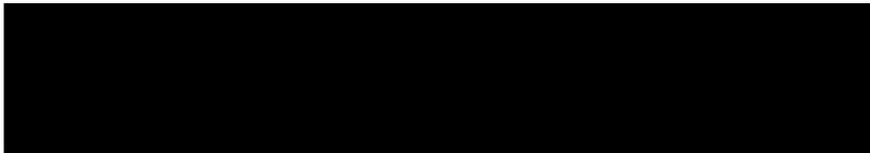
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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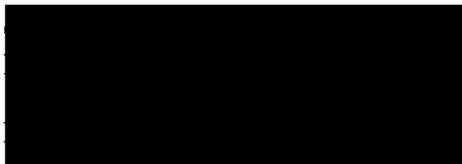
Date: **AUG 16 2010**

IN RE: Petitioner:  
Beneficiary:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 hotel. It seeks to employ the beneficiary permanently in the United States as a maid and housekeeping cleaner. 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).<sup>1</sup> 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 onwards. Therefore, the director denied the petition.

The record shows that the appeal is timely and makes a specific allegation of error in law or fact.<sup>2</sup> 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 August 1, 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 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(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.

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<sup>1</sup> The employer on the Form ETA 750 is listed as Euro Hospitality LLC d/b/a Cherotel Brazosport Hotel & Conference Center.

<sup>2</sup> Counsel in this matter has filed the Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner. Counsel also signed the Form I-290B, Notice of Appeal or Motion. However, counsel failed to list the petitioner as the party filing the appeal on the Form I-290B. Instead, counsel indicated that the beneficiary was filing the appeal. U.S. Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Nevertheless, the AAO in its discretion will accept this filing as there is evidence in the record noted herein that the petitioner consented to counsel's representation and to the filing of the appeal.

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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 3, 2002.<sup>3</sup> The proffered wage as stated on the Form ETA 750 is \$7.43 per hour (or \$15,454.80 per year). The Form ETA 750 states that the position requires a ninth grade education.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.<sup>4</sup>

The evidence in the record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$2,135,733, and to currently employ 35 workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on March 22, 2002, the beneficiary claimed to have worked for the petitioner from April 1995 until the date that she 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, 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).

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<sup>3</sup> United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner petitioned for a second beneficiary. That petition had a priority date of November 21, 2000 and it was approved on November 22, 2004. The beneficiary in that matter adjusted to lawful permanent residence on November 22, 2004. Thus, during 2002 through 2004, the petitioner had one additional sponsored worker for whom it must show an ability to pay.

<sup>4</sup> 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 this 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).

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. Here, the 2002 Form W-2, Wage and Tax Statement, in the record reflects that the petitioner paid the beneficiary \$13,394.10 in 2002, or \$2060.70 less than the proffered wage. The 2003 Form W-2 in the record reflects that the petitioner paid the beneficiary \$12,473.10 in 2003, or \$2,981.70 less than the proffered wage. The beneficiary's 2004 Form W-2 is not in the record.<sup>5</sup> The 2005, 2006 and 2007 Forms W-2 in the record reflect that the petitioner paid the beneficiary more than the proffered wage in these years.

Thus, the petitioner has demonstrated an ability to pay the proffered wage during 2005 through 2007 through the actual wages it paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service (INS), 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 the Service 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

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<sup>5</sup> The beneficiary's 2004 Form 1040, U.S. Individual Tax Return, is in the record. This document provides no information by which to identify the beneficiary's employer in 2004. Thus, it is not probative evidence of the petitioner's ability to pay the wage in 2004.

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on July 21, 2008 with the receipt by the director of the petitioner’s response to the request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due.<sup>6</sup> Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner has already shown an ability to pay the wage in 2005 through 2007. Thus, the 2005 and 2006 tax returns need not be analyzed here. The petitioner’s tax returns demonstrate its net income for 2002, 2003 and 2004, as shown in the table below.

- The 2002 Form 1120 states net income (loss) of -\$706,536.
- The 2003 Form 1120 states net income (loss) of -\$317,435.
- The 2004 Form 1120 states net income (loss) of -\$198,544.

The petitioner suffered a loss in 2002, 2003 and 2004. Thus, in 2002 through 2004, the petitioner did not have sufficient net income to pay the difference between the actual wages paid the beneficiary and the proffered wage. The petitioner also had pending in those years the petition of another full-time employee. The petitioner has also not shown that it had sufficient net income to pay the additional expense of this worker’s salary. Thus, the petitioner has not demonstrated that it

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<sup>6</sup> The petitioner was not required to submit its 2007 Form 1120, and that tax return is not in the record. The petitioner was also not required to submit the 2001 Form 1120, as 2002 is the priority date year in this matter. However, the 2001 Form 1120 is in the record. This office will consider the information on the 2001 return when analyzing the totality of the petitioner’s financial circumstances, later in this analysis.

had sufficient net income to pay the instant proffered wage or its other sponsored worker's wage in 2002 through 2004.<sup>7</sup>

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets, however, will not be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand. Its year-end current liabilities are shown on lines 16(d) through 18(d). If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2003 and 2004, as shown in the table below.

- The 2002 Form 1120 reflects net current assets (liabilities) of -\$149,961.
- The 2003 Form 1120 reflects net current assets (liabilities) of -\$16,646.
- The 2004 Form 1120 reflects net current assets of \$8,799.

In 2002 and 2003, the petitioner had negative net current assets. Thus, it has not shown an ability to pay the difference of any wage that it may have paid the beneficiary during those years and the proffered wage using its net current assets. It also has not shown the ability to pay out of its net current assets the added expense of one additional full-time salary in 2002 through 2003, the salary of its other sponsored worker whose petition was pending during those years.

The petitioner has not documented that it paid the beneficiary in 2004 and its \$8,799 in net current assets in that year is not sufficient to cover the full proffered wage. It is also not sufficient to

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<sup>7</sup> The petitioner did not inform this office or the director that it had filed an additional petition, nor did it state what the proffered wage was in that proceeding. Nothing in the record states what the proffered wage was in that other proceeding.

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

cover the added expense of the salary of its other sponsored worker whose petition was pending in that year.

Thus, the petitioner has not shown an ability to pay the wage using its net current assets during the years 2002 through 2004.

In sum, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date forward through an examination of wages paid to the beneficiary, or its net income or net current assets. It has shown the ability to pay the instant wage in 2005, 2006 and 2007 only.

On appeal, counsel suggested that language in the May 4, 2004 USCIS Interoffice Memorandum written by [REDACTED] supports the finding that if the petitioner demonstrates an ability to pay the wage during one year in the relevant period it has demonstrated an ability to pay the wage from the priority date onwards. See Interoffice Memo. from [REDACTED] Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). Counsel is not correct. First, USCIS memoranda merely articulate internal guidelines for USCIS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Also, as noted previously, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate the ability to pay the proffered wage each year from the priority date year until the beneficiary obtains lawful permanent residence. Counsel may not interpret the May 4, 2004 Yates' memorandum as granting the petitioner the right to sidestep this regulatory requirement if it shows an ability to pay the wage in only one year of the relevant period. The AAO must examine whether the petitioner has shown an ability to pay the proffered wage from the priority date onwards, and dismiss the appeal if it has not. Moreover, the Yates' memo indicates that the petitioner is required to submit only one of the three regulatory prescribed forms of evidence, (tax returns, annual reports and audited financial statements), for each year in the relevant period. It does not state, as counsel suggested, that a petitioner is required to submit only one of these documents for only one year in the relevant period to establish an ability to pay the wage from the priority date onwards.

In addition, counsel asserted that the AAO should consider the petitioner's various bank statements, (money market account statements and credit union account statements), submitted into the record as evidence of its ability to pay the wage. This assertion is misplaced. First, such account statements are not among the three types of evidence, enumerated at 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 evidentiary material "in appropriate cases," here counsel and the petitioner have not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Second, such account statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's account statements somehow denote additional available

funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

On appeal, counsel and the petitioner also suggested that if the petitioner is able to show that it consistently met its payroll obligations during the relevant period of analysis, then it has demonstrated an ability to pay the instant wage from the priority date onwards. This is incorrect. The petitioner must show that it had funds available to pay the proffered wage and the added expense of the salary of its other sponsored worker's wage, each year from the priority date year onwards. *See* 8 C.F.R. § 204.5(g)(2).

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, as stated by counsel on appeal. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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.

Here, the record indicates that the petitioner was incorporated in 1993 and that it currently has 35 employees. The petitioner did not establish its historical growth since incorporating. Its gross receipts have not steadily increased, but have fluctuated as follows: \$2,168,596 in 2001; \$1,790,947 in 2002; \$1,255,338 in 2003; \$1,315,849 in 2004; \$1,909,043 in 2005; and \$2,135,733 in 2006. The total salaries and wages that it paid its employees have fluctuated too, as follows: \$211,648 in 2001; \$171,180 in 2002; \$132,178 in 2003; \$151,111 in 2004; \$162,999 in 2005; and \$96,868 in 2006. Further, the petitioner has not established the occurrence of any uncharacteristic business expenditures or losses, or whether the beneficiary will be replacing a former employee or an outsourced service. Also, the petitioner has the added expense of the salary of one other sponsored worker during 2002, 2003 and 2004 for which it did not show an ability to pay. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner

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has not shown that it had the continuing ability to pay the proffered wage from the priority date onwards or its other sponsored worker's wages during 2002 through 2004.

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.