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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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JUN 0 2 2010

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 07 189 51209

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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 beginning on the priority date of the visa petition. 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 February 13, 2008 denial, the primary 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)(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 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 January 30, 2002. The proffered wage as stated on the Form ETA 750 is $31,200.00 per year. The Form ETA 750 states that the position requires two years work experience.

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 upon appeal.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation. On the petition, the petitioner claimed to have been established on September 29, 1989. The petitioner claims to have 28 employees. According to the tax returns in the record, the petitioner's fiscal year is from September 1 until August 31. On the Form ETA 750B, signed by the beneficiary on February 17, 2006, the beneficiary claims to have been employed by the petitioner since July 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 Sonegawa*, 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.

The petitioner is obligated to show that it can pay the difference between the proffered wage ($31,200.00) and wages already paid in each year. The record of proceeding contains copies of IRS Forms W-2 that were issued by the petitioner to the beneficiary for 2002, 2003, and 2006 as shown in the table below.

- In 2002, the Form W-2 stated total wages of $6,300.00.
- In 2003, the Form W-2 stated total wages of $12,900.00.
- In 2004, the petitioner submitted a copy of the beneficiary's IRS Form 1040A.
- In 2005, the petitioner did not submit any evidence of wages paid to the beneficiary.
- In 2006, the Form W-2 stated total wages of $15,600.00.

The petitioner submitted a copy of the beneficiary's IRS Form 1040A, U.S. Individual Income Tax Return, for the 2004 tax year. The tax return indicates on line 2 that the beneficiary is married filing jointly, and on line 7, that the combined salaries and wages, tips, etc. is $26,000.00. Although the director designated the full amount from line 7 of the beneficiary's tax return as the beneficiary's wages received from the petitioner, it is impossible to determine the specific amount of earnings to be allocated to the beneficiary's wages for that year. Therefore, the director's determination with respect to this issue will be withdrawn. It is noted that the petitioner submitted as evidence copies of the beneficiary's wife's IRS Forms W-2 for the 2003 and 2006 tax years which demonstrates that she is also employed by the petitioner.

Therefore, the petitioner has failed to show that it can pay the difference between the proffered wage and wages already paid in 2002, 2003, 2004, 2005, and 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the designated period, then USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner 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." 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 January 28, 2008 with the receipt by the director of the response to the request for evidence. 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's tax returns demonstrate its net income for 2002, 2003, 2004, 2005, and 2006 (September 1 to August 31 fiscal years) as shown in the table below.

- In 2002 (September 1, 2002 to August 31, 2003), the Form 1120 stated net income of $71,064.00.
- In 2003 (September 1, 2003 to August 31, 2004), the Form 1120 stated net income of 19,100.00.
- In 2004 (September 1, 2004 to August 31, 2005), the Form 1120 stated net income of negative $141,643.00.
- In 2005 (September 1, 2005 to August 31, 2006), the Form 1120 stated net income of $255,479.00.
- In 2006 (September 1, 2006 to August 31, 2007), the Form 1120 stated net income of $65,192.00.

Therefore, for fiscal years 2003 and 2004, the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages actually paid to the beneficiary.

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.[1] A corporation's year-end current assets are shown

[1]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 demonstrate its end-of-year net current assets for 2003 and 2004, as shown in the table below.

- In 2003 (September 1, 2003 to August 31, 2004), the Form 1120 stated net current assets of negative $39,020.00.
- In 2004 (September 1, 2004 to August 31, 2005), the Form 1120 stated net current assets of negative $81,391.00.

The evidence demonstrates that for the years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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 asserts that the director incorrectly analyzed the petitioner's tax returns, and that the net income figures and profit and loss figures on the petitioner's tax returns do not correctly reflect the petitioner's financial ability to pay the proffered wage. Counsel further asserts that the director erred in failing to consider the totality of the circumstances.

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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

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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.

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 this matter, the totality of the circumstances does not establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation, the occurrence of any uncharacteristic business expenditures or losses in 2003 and 2004 or whether the beneficiary is replacing a former employee or outsourced services. The record does not establish that the petitioner had the ability to pay the proffered wage in 2003 and 2004, and no facts paralleling those in *Sonegawa* are present to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner failed to provide a copy of the beneficiary's IRS Form W-2 for the 2004 tax year, and his salary and wages for that year are not clearly discernable from his IRS Form 1040A, which he filed jointly with his spouse. The petitioner's tax returns demonstrate that from September 1, 2003 through August 31, 2004, its net income was $19,100.00 and its net current assets were negative $39,020.00. The petitioner's tax returns also demonstrate that from September 1, 2004 through August 31, 2005, its net income was negative $141,643.00 and its net current assets were negative $81,391.00. Although the petitioner submits evidence of non-recurring expenses in 2004-2005, this event does not address the petitioner's inability to establish an ability to pay the proffered wage in 2003-2004.

The record of proceeding contains photocopies of the petitioner's bank statements for 2004 and 2005 in support of its ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2) and which the petitioner did not submit, required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable, unavailable, or otherwise paints an inaccurate financial picture of the petitioner. Second, bank 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 bank statements somehow reflect additional available funds that may not have been reflected on its tax return. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

A second issue in the present matter is whether the petitioner has established that, on the priority date, the beneficiary has the qualifications set forth on its Form ETA 750. *See Matter of Wing's Tea House, supra.* According to the Form ETA 750, the position requires two years of experience as a specialty cook. In support of this claim, the petitioner submitted an untranslated letter dated October 22, 2003. The translation of the document did not comply with the terms of 8 C.F.R. § 103.2(b)(3):

> *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

The record of proceeding does not contain an official English translation of the document; and therefore, there is no evidence in the record to demonstrate that the beneficiary meets the qualifications set forth on the Form ETA 750. Similarly, the record does not establish that the beneficiary gained this experience while working for the petitioner before the priority date. Other than the representation on the Form ETA 750B, the record does not contain a letter describing the beneficiary's duties beginning in July 1999. Accordingly, it has not been established that the beneficiary has the requisite 2 years of experience. 8 C.F.R § 204.5(g)(1) and (l)(3)(ii)(A). The appeal will be dismissed 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.