

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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**

B6



FILE: [REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

DEC 06 2010

IN RE: Petitioner: [REDACTED]
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:



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 \$630. 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a franchisee of Chevron Corporation.¹ It seeks to employ the beneficiary permanently in the United States as a management analyst. 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 (the 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 denial, the single issue in this case is whether or not 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

¹ Identified in the labor certification as "Dealers & Agents for Chevron Stations."

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 December 24, 2001. The proffered wage as stated on the Form ETA 750 is \$38.83 per hour (\$80,766.40 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

Accompanying the petition and labor certification, counsel submitted, *inter alia*, a letter from the petitioner dated May 17, 2006; partial and complete copies of the petitioner's federal income tax returns (Forms 1120 and 1120S) for 2001 through 2005; the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last quarter of 2005 that was accepted by the State of California; the petitioner's "organization chart" listing the petitioner's personnel and naming the beneficiary as a management consultant; a seller's permit issued to the petitioner by the State of California on February 20, 1998, as well as permits issued to other businesses;³ a Wage and Tax Statement (W-2) issued by the petitioner to the beneficiary for 2005 in the amount of \$20,700.00; copies of three pay statements issued by the petitioner to the beneficiary for the periods March 31, 2006, to May 5, 2006 showing a year-to-date salary payment of \$10,350.00; and the Chevron Corporation's promotional materials.

The evidence in the record of proceeding shows that the petitioner was established in 1996, was structured as a C corporation until 2003, made an S corporation tax election in 2004, and currently employs 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 October 31, 2001, the beneficiary did not claim to have worked for the petitioner.

The director issued on June 27, 2007, a request for evidence (RFE) to the petitioner. The director requested complete copies of the petitioner's 2002, 2003 and 2006 tax returns, its latest annual report or audited financial statements. The director also stated that the petitioner could submit additional evidence such as profit/loss statements, bank account records, and personnel records, and if the petitioner employed 100 workers or more, it could submit a statement from the petitioner's financial officer establishing its ability to pay the proffered wage.

Regarding the beneficiary, the director requested the beneficiary's Forms W-2 for 2002, 2003, 2004, and 2006 issued by the petitioner.

² 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).

³ There is no evidence in the record that other named businesses are in fact the petitioner.

In response, counsel submitted a letter including an explanatory statement from the petitioner dated September 14, 2007; a letter from the petitioner dated September 10, 2007; the petitioner's Forms 1120 for 2002, 2003 and Form 1120S for 2006; the beneficiary's W-2 statement for 2006 in the amount of \$27,600.00; copies of two pay statements issued by the petitioner to the beneficiary for the period August 20, 2007, to September 5, 2007 showing a year-to-date salary payment of \$9,550.00; and business licenses and certificates of occupancy for other business locations.

On appeal, counsel submitted a letter from an accountant dated March 6, 2008, discussing the petitioner's finances. The accountant stated that without interest expense or depreciation stated for 2003 and 2004, the petitioner would have reported a profit. Since these items are expenses on the petitioner's returns, they cannot also be assets. It would be duplicative of the petitioner's finances to include them with assets. *See infra*.

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 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 2005 and 2006, the petitioner paid the beneficiary \$20,700.00 and \$27,600.00 which is less than the proffered wage of \$80,766.40. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitan*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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 September 18, 2007, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns demonstrate its net income as shown in the table below.

Form 1120

- In 2001, the Form 1120 stated net income of \$115,545.00.

- In 2002, the Form 1120 stated net income of <\$676,708.00>.⁴
- In 2003, the Form 1120 stated net income of <\$464,993.00>.

Form 1120S

- In 2004, the Form 1120S stated net income⁵ of <\$1,212,431.00>.
- In 2005, the Form 1120S stated net income, Line 21, of \$283,986.00.
- In 2006, the Form 1120S stated net income of <\$467,279.00>.

Therefore, for the years 2002, 2003, 2004, and 2006, from an examination of wages paid to the beneficiary or net income, the petitioner did not have sufficient net income to pay the proffered wage.

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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁵ 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 17e (2004) and line 18 (2006) of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 17, 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 deductions and other adjustments shown on its Schedules K for 2004 and 2006, the petitioner's net income is found on Schedules K of its tax returns for those years. 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.

⁶ 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 salaries). *Id.* at 118.

Form 1120

- In 2001, a complete Form 1120 tax return was not submitted. No information is available.⁷
- In 2002, the Form 1120 stated net current assets of \$150,547.00.
- In 2003, the Form 1120 stated net current assets of <\$1,134,085.00>.

Form 1120S

- In 2004, the Form 1120S stated net current assets of <\$2,159,384.00>.
- In 2005, a complete Form 1120S tax return was not submitted.
- In 2006, the Form 1120S stated net current assets of \$332,459.00.

Therefore, for the years 2003 and 2004, from an examination of wages paid to the beneficiary, or net income, or net current assets, the petitioner did not have sufficient net current assets to pay the proffered wage.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker. The petition is identified in the records of the USCIS as [REDACTED]. There is no information in the record concerning the proffered wage reflected on the labor certification or the priority date of the additional petition. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. 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)). 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 from 2001 through 2006.

On appeal, counsel states that he will submit additional evidence to prove that the petitioner “had other assets and income that would have sufficiently given the ability to the employer to pay the proffered wages for the years 2003 and 2004.” As already stated, counsel submitted no additional evidence on appeal other than the accountant’s letter.

Petitioner asserts that the beneficiary played a vital role in the investment in three gas stations in 2003 and 2004,⁸ and because of the beneficiary’s knowledge of finance and management, the

⁷ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

⁸ In petitioner’s letter dated September 14, 2007, the petitioner indicates that these investments had to be subsequently sold because of high operating costs although the petitioner made a profit on the sales.

petitioner requires his full time and permanent employment in the future. Proof of ability to pay begins on the priority date, December 24, 2001, when the petitioner's labor certification was accepted for processing by the DOL. Presumably the petitioner is making the assertion that in the future the petitioner will either adjust its work forces' to accommodate the beneficiary in its employ, or adjust the work forces wages to meet the proffered wage. The assertions of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a management analyst will significantly increase the petitioner's profits. The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future.

The petitioner's and counsel's assertions cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner 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 Sonogawa*, 12 I&N Dec. 612. 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.

In the instant case, the petitioner was established in established in 1996 and employs 70 workers. Its gross receipts increased over the six year period from 2001 to 2006. In 2001 gross receipts were \$44,367,467.00, and in 2006 were \$90,081,838.00. Despite this increase, the petitioner's net income and net current assets were, on average, negative. Neither counsel nor the petitioner has contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided not in the ordinary course of business. The petitioner has not provided

evidence of a turn-around of the petitioner's business fortunes, or expectations of increased profitability.

Although the petitioner claims that a two-year period, 2003 and 2004, was difficult because it "incurred debt in 2003 and 2004 in order to make acquisitions of additional locations during those years," the petitioner failed to corroborate these claims with evidence or to describe specifically the acquisitions and the extent to which this debt was connected to these transactions. Finally, even reducing the petitioner's negative net current assets by the "accrued interest payable" listed in Statement 10 of the 2003 and 2004 tax returns, the petitioner would still have negative net current assets. Thus, assessing the totality of the circumstances in this individual case, it is concluded 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 beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.