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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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FILE: [Redacted] SRC 07 257 50828

Office: TEXAS SERVICE CENTER

Date: FEB 02 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

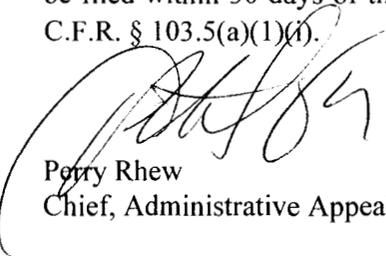
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider 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 golf course. It seeks to employ the beneficiary permanently in the United States as a greenskeeper (“gardener-triplex operator”). As required by statute, an ETA Form 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

On appeal, counsel contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to 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 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, the day the Form ETA 750 was accepted for processing by any office within DOL’s employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing’s Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 750 was accepted for processing on

February 25, 2002.¹ The proffered wage is stated as \$11.51 per hour, which amounts to \$23,940.80 per year.² On Part B of the Form ETA 750, initially signed by the beneficiary on February 21, 2002, and subsequently signed on September 15, 2003, the beneficiary claims that he has been employed full-time by the petitioner since February 1992.³

The I-140, Immigrant Petition for Alien Worker was filed on August 20, 2007. Part 5 of the petition indicates that the petitioner was established on August 22, 1969, employs 38 workers, declares a gross annual income of \$3,326,141, and a net annual income of \$189,818.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although in some circumstances, other factors 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).

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

²As noted by counsel, the director miscalculated the annual proffered wage as \$39,978 per year. The director also misstated the petitioner's net income in 2002 and 2005 through 2007, and while correctly presenting the petitioner's net current assets as losses, misstated the figures for 2003, 2004, 2005, and 2007.

³The beneficiary's statement as to the commencement of his employment in 1992 with the petitioner is inconsistent with the last date of arrival in the United States, which is stated as March 16, 1999, on Part 3 of the I-140, Immigrant Petition for Alien Worker. No explanation for this discrepancy has been offered. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In support of its continuing financial ability to pay the certified wage of \$23,940.80 per year, and the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2002, 2003, 2004, 2005, 2006, and 2007.⁴ The returns indicate that the petitioner's fiscal year is a standard calendar year. The returns contain the following information:

Year	2002	2003	2004	2005
Net Income	\$ 6,540	-\$133,941	-\$100,975	\$ 85,266
Current Assets	\$480,463	\$563,097	\$388,974	\$412,478
Current Liabilities	\$489,727	\$751,767	\$585,521	\$552,583
Net Current Assets	-\$ 9,264	-\$188,670	-\$196,547	-\$140,105
Year	2006	2007		
Net Income	\$109,874	\$38,866		
Current Assets	\$525,799	\$439,526		
Current Liabilities	\$714,038	\$722,251		
Net Current Assets	-\$188,239	-\$282,725		

As shown in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner additionally submitted copies of unaudited financial statements, consisting of compilations, for the years, 2002 through 2007.

The director denied the petition on September 24, 2008, noting that the petitioner had failed to

⁴ For a C corporation, the petitioner's Form 1120 corporate tax returns indicate that net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 26 of page 1 of the corporate tax return(s). Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

demonstrate its continuing ability to pay the proffered wage through either its net income or net current assets.

The AAO issued a notice of intent to deny the petition and dismiss the appeal on October 29, 2009. The AAO determined that the record of proceedings did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date. However, as noted above, the AAO recognized that the employment of payment of wages to the beneficiary may also be considered in reviewing a petitioner's ability to pay a certified wage and offered the petitioner an opportunity to provide evidence of wages paid to the beneficiary during the period from 2002 onward. Pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioner establish its continuing ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence, the AAO also instructed the petitioner to provide copies of federal tax returns, *audited* financial statements, or annual reports (based on audited financials) as of the priority date to the present. The petitioner was advised that while the record contained copies of federal tax returns for 2002 through 2007 and unaudited financial statements covering the same period, it should submit evidence for 2008 and 2009.

In response to the AAO's notice of intent to deny, counsel resubmitted copies of the 2002 to 2007 compiled financial statements and copies of the 2002 to 2007 tax returns that were provided to the underlying record of proceedings. Counsel mistakenly refers to the compilations as audited financial statements. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited "compiled" financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient, standing alone, to demonstrate the ability to pay the proffered wage.⁵

A copy of the beneficiary's Wage and Tax Statement (W-2) for 2007 was provided. It shows that the petitioner paid the beneficiary \$23,959.95 in 2007. Although requested, no other evidence of wages paid to the beneficiary was provided despite the indication on Form ETA 750B that the petitioner has employed the beneficiary since 1992. Further, the petitioner failed to provide any evidence of its ability to pay the proffered wage in 2008 or 2009. The failure to submit requested evidence which precludes a material line of inquiry shall be grounds for

⁵It is observed that like the federal tax returns, current liabilities exceeded current assets in each of the years from 2002 through 2007 and net income exceeded the proffered wage in only three of the years from 2002 through 2007.

denying the application or petition. 8 C.F.R. § 103.2(b)(14).

In response to the notice of intent to deny, counsel asserts that the petitioner collectively employs 176 workers at three locations and that since the petitioner employs over 100 workers, the financial statements should be accepted.⁶ Relying on *Matter of Sonogawa*, counsel also claims that the director should have approved the petition based on the petitioner's reasonable expectations of future profit, longevity and historical growth.

We do not find counsel's assertions to be persuasive. It is noted that the petitioner claims that it has 38 employees on Part 5 of the Form I-140, not 175. Without evidence, counsel's undocumented claims as to the number of the petitioner's employees do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592.

As a general matter, in order to determine a petitioner's ability to pay a proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted above, although the record suggests that the petitioner has employed the beneficiary for an extended period of time, only a record of wages paid in 2007 has been provided, with no explanation for the absence of W-2 statements for prior years.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.

⁶ The regulation at 8 C.F.R. § 204.5(g)(2) provides in pertinent part that where "a prospective United States employer employees 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added).

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).

In this case, as shown above, while the petitioner's net income of \$85,266 in 2005; \$109,874 in 2006; and \$38,886 in 2007 may have been sufficient to pay the proffered wage in those respective years, neither its net income of \$6,540 in 2002; its -\$133,941 in net income in 2003, nor its net income of -\$100,975 in 2004, was enough to cover the certified wage offer of \$23,940.80 in any of those years. Additionally, its net current assets of -\$9,264, -\$188,670 and -\$196,547, respectively, for 2002, 2003, and 2004 were also insufficient to cover the proffered wage. Except for 2007, no other evidence of wages paid to the beneficiary was provided.

As indicated above, *Matter of Sonogawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, although the corporate petitioner is a long-term business, its net current assets have all been reported as losses in each of the years from 2002 to 2007, it failed to show a profit until 2005, three years after 2002 priority date, and no other reputational factors or evidence of a framework of successful or profitable years was presented that was sufficient to overcome the evidence contained in the record. Moreover, as noted above, the petitioner failed to submit any financial documentation for 2008 or 2009, or proof of prior wages paid despite the beneficiary's stated history of employment.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.

