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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



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Services**

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: JAN 06 2010

IN RE:

Petitioner:  
Beneficiary:

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

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a dry cleaner. It seeks to permanently employ the beneficiary in the United States as an alteration tailor. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup> The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

The petition was filed on May 14, 2007. The director denied the petition on January 26, 2009. The decision states that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On February 20, 2009, the petitioner filed a motion to reopen and reconsider the decision. On April 16, 2009, the director affirmed the denial of the petition. The petitioner filed a second motion to reopen and reconsider the petition on May 14, 2009. On July 10, 2009, the director again affirmed the denial of the petition. On August 7, 2009, the petitioner appealed the decision to the AAO. As with the original decision, at issue on appeal is whether the petitioner has the ability to pay the proffered wage.

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.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

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<sup>1</sup>Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup>The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

In order to obtain classification in the requested employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

*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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the October 25, 2004 priority date, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).

The proffered wage stated on the labor certification is \$11.71 per hour (\$21,312.20 per year, based on a 35-hour work week). The labor certification states that the position requires two years of experience in the job offered. On the petition, the petitioner claimed to have been established in 1987, to have a gross annual income of \$342,906.00, and to employ one worker. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, the beneficiary did not claim to have worked for the petitioner. Counsel's appeal brief states that the beneficiary initiated employment with the petitioner in January 2008, following the issuance of her Employment Authorization Document. The record contains the beneficiary's Form W-2, Wage and Tax Statement, for 2008. The document states that the petitioner paid the beneficiary a wage of \$19,740.00 in 2008, which is \$1,572.20 less than the proffered wage.

Accordingly, the petitioner has not established that it paid the beneficiary an amount equal to or greater than the proffered wage for 2004 through 2008. The petitioner must therefore establish its ability to pay the beneficiary the full proffered wage for 2004, 2005, 2006 and 2007, and the \$1,572.20 difference between the actual wage paid and the proffered wage for 2008.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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. 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 wage expense is misplaced. Showing that the petitioner's gross sales 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*, 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 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 accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.<sup>3</sup>

<u>Year</u>	<u>Net Income (\$)</u>
2004	17,846.00
2005	15,372.00
2006	80,315.00
2007	33,271.00
2008	33,445.00

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage.

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 are not 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>4</sup> If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its net current assets, as shown in the table below.<sup>5</sup>

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<sup>3</sup>For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18 (2006 to present) or Line 17e (2004 and 2005). When the two numbers differ, the number reported on Schedule K is used for net income.

<sup>4</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>5</sup>On Form 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

<u>Year</u>	<u>Net Current Assets (\$)</u>
2004	2,589.00
2005	1,948.00

For the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, except for 2006, 2007 and 2008, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

In addition to the preceding analysis, 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 (Reg. Comm'r 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.

In the instant case, the petitioner claims to have been in business since 1987 and to employ one worker. The petitioner's 2008 tax return shows gross sales of \$223,287.00. This is not sufficient to establish the petitioner's ability to pay the proffered wage based on the overall magnitude of its operations. In addition, the petitioner has not established a record of the historical growth of the petitioner's business, the occurrence of any uncharacteristic business expenditures or losses, or evidence of the petitioner's reputation within its industry.

Counsel argues on appeal is that the beneficiary is replacing an outsourced service. Where the petitioner has been paying an employee, subcontractor or outside service that will be replaced by the beneficiary upon the initiation of the offered employment, USCIS may accept that the expenses will

be available to pay the beneficiary's salary, and may count those funds toward the payment of the proffered wage.

Counsel argues that, for 2004 and 2005, the petitioner's outside tailoring expenses would have been performed by the beneficiary. Counsel claims that these expenses, when added to the petitioner's net income, exceed the \$21,312.20 proffered wage for 2004 and 2005.

In support of this claim, counsel submits the following evidence of the petitioner's outsourced tailoring expenses in 2004 and 2005:

- Copies of the petitioner's cancelled checks payable to [REDACTED] for 2004 and 2005.
- The petitioner's 2004 and 2005 tax returns, which state that the petitioner incurred "outside laundry & tailoring costs" of \$55,281.00 in 2004 and \$53,234.00 in 2005.
- Affidavits of the president of the petitioner and the president of [REDACTED] each dated July 24, 2009, and each almost identically worded, testifying that 30% of the money paid to [REDACTED] in 2004 and 2005 was for tailoring services. The affidavits claim that the petitioner's outsourced cleaning expenses totaled \$16,584.30 in 2004 and \$15,970.20 in 2005. The petitioner's president's affidavit also testifies that "since [the beneficiary's] employment we have not contracted out any tailoring services." As is discussed below, this is a misleading statement.

Counsel's argument is illustrated in the chart below:

<u>Year</u>	<u>Expenses (\$)</u>	<u>Net Income (\$)</u>	<u>Total (\$)</u>
2004	16,584.30	17,846.00	34,430.30
2005	15,970.20	15,372.00	31,342.20

The record also contains a second affidavit of the petitioner's president, dated August 6, 2009. This affidavit contains detailed information about the petitioner's history. The affidavit states that, from 1987 to May 2006, the petitioner owned two locations: [REDACTED] and [REDACTED]. From 1999 until January 2006, the affidavit states that the petitioner employed a full-time tailor named [REDACTED] who received a salary of \$24,786.00 in 2004 and \$25,272.00 in 2005. This salary is corroborated by the employee's 2004 and 2005 Forms W-2. The affidavit states that [REDACTED] was employed at the [REDACTED] location, and that the [REDACTED] location did not have a tailor. According to the affidavit, all of the tailoring work for the [REDACTED] location was outsourced to [REDACTED]. The affidavit further states that [REDACTED] left the petitioner in January 2006, and that the affiant's spouse took over as tailor for the [REDACTED] location. The affidavit states that the petitioner sold its [REDACTED] location in May 2006.<sup>6</sup> The affidavit then states that the beneficiary replaced the affiant's spouse as the petitioner's tailor when she beneficiary received her Employment Authorization

<sup>6</sup>It appears that the funds from the sale of one of the [REDACTED] location in 2006, a one-time event, are what enabled the petitioner to establish its ability to pay the proffered wage for 2006, 2007 and 2008, despite having substantially less revenues during that period.

Document in January 2008.

The affidavit also contains a chart illustrating that the petitioner had not outsourced its tailoring services since 2006, approximately two years *prior* to the date that the beneficiary initiated employment with the petitioner. Therefore, the August 6, 2009 affidavit makes it clear that the petitioner's July 24, 2009 affidavit, which implies that the beneficiary replaced the petitioner's outsourced tailoring expenses, is misleading. According to the petitioner, the beneficiary did not replace any outsourced service when she initiated employment with the petitioner. Instead, the beneficiary allegedly replaced the petitioner's owner's spouse.

In summary, there are inconsistencies in the petitioner's explanation of its ability to pay the proffered wage. The petitioner's evolving explanations only raise more questions.<sup>7</sup> The petitioner has been granted several opportunities to establish its case, including: the initial petition; the RFE response; the initial motion to reopen and reconsider; the second motion to reopen and reconsider; and the instant appeal. In each case, the petitioner has failed to establish that it is more likely than not that it possesses the ability to pay the proffered wage to the beneficiary from the priority date until the issuance of the beneficiary's lawful permanent residence.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.<sup>8</sup>

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<sup>7</sup>For example, in its RFE response, the petitioner initially claimed that the beneficiary would handle over \$50,000 of its alleged outsourced laundry and tailoring costs, but later claimed that the beneficiary would replace only 30% of this amount. In addition, in its RFE response, petitioner argues that in 2004, "few of the employees were for alternations and tailoring," and that the beneficiary "would have replaced one of the employees working for alteration and tailoring." If the petitioner had several employees performing alteration and tailoring in 2004, it is unclear why it needed to outsource its tailoring services to [REDACTED]. Further, if the petitioner had sufficient tailoring work to keep several employees busy and still have to outsource overflow tailoring work, it is unclear why was it able to stop outsourcing its tailoring in 2006 with only the petitioner's president's spouse providing tailoring services. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

<sup>8</sup>The record also contains the petitioner's bank statements. Counsel's reliance on the balances in the petitioner's bank account is misplaced. Bank statements are not among the three types of evidence, enumerated in 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 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 or otherwise paints an inaccurate financial picture of the petitioner. Bank statements show the

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.

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amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income or the cash specified on the petitioner's tax return used in determining the petitioner's net current assets. Finally, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.