

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

B6

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:
Beneficiary:



JUL 19 2010

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

The petitioner is a digital automotive precision instrument business. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 from the priority date of the visa petition onwards. 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 April 4, 2008 denial, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(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 petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 26, 2004. The proffered wage as stated on that form is \$625 per week (or \$32,500 annually). The Form ETA 750 also states that the position

requires eight years of grade school, four years of high school, and two years of experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner stated that it was established in 2001 and that it has 5 employees. 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 March 19, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Here, the petitioner stated through counsel in reply to the request for evidence (RFE) that it cannot document that it paid the beneficiary in 2004 and 2005 because it paid him in cash. The petitioner also indicated that it paid the beneficiary more than the proffered wage in those years. 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)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner also submitted copies of checks drawn on its checking account that are made out to the beneficiary during 2006 and following that the petitioner indicated were paychecks issued to the beneficiary. The AAO cannot accept these as proof of wages paid to the beneficiary without further

¹ 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). Here, the record 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).

evidence, such as evidence that the checks were actually deposited into some account held by the beneficiary. This office does note incidentally that these checks indicate that the petitioner paid \$15,468.30 to the beneficiary in 2006, or \$17,031.70 less than the proffered wage; \$35,996 in 2007, which is more than the proffered wage; and \$28,500 in 2008, or \$4,000 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the relevant 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. [REDACTED] 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 not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

In [REDACTED], 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). Thus, this office rejects any suggestion made in these proceedings that USCIS should consider the petitioner’s depreciation amounts as funds available to pay the wage.

The record before the director closed on January 31, 2008 with the receipt of the petitioner’s submissions in response to the RFE. As of that date, the petitioner’s 2007 federal income tax return was not yet due. The petitioner’s tax returns demonstrate its net income for 2004 through 2006, as shown in the table below:

- The 2004 Form 1120S states net income² of \$6,368.
- The 2005 Form 1120S states net income of \$2,914.
- The 2006 Form 1120S states net income of \$7,728.

During the years 2004 through 2006, the petitioner did not have sufficient net income to pay the proffered wage of \$32,500. Also, even if the petitioner were able to properly document its claim that it paid the beneficiary \$15,468.30 in 2006, it did not have sufficient net income to cover the balance of the wage or \$17,031.70 in that year.

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.³ A corporation’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

² 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 (2004-2005) and line 18 (2006) of the Schedule K. *See* Instructions for Form 1120S, 2009, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 8, 2010) (which indicate that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Here, the petitioner did not have additional income and other adjustments shown on its Schedule K for 2004, 2005 and 2006. Thus, the petitioner’s net income is found on page one, line 21 of the return in those years.

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's tax returns reflect its end-of-year net current assets for 2004 through 2006, as follows:

- The 2004 Form 1120S states net current assets of \$0.⁴
- The 2005 Form 1120S states net current assets of \$0.
- The 2006 Form 1120S states net current assets of \$0.

Thus, for the years 2004 through 2006, the petitioner did not have sufficient net current assets to pay the wage.

The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may also 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 (BIA 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 not able to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the petitioner indicated on the petition that it incorporated in 2001 and has 5 employees. It has not established its historical growth since incorporating. Its gross sales or receipts have not steadily increased, but have remained consistent, as follows: \$167,668 in 2004; \$165,272 in 2005; and \$166,874 in 2006. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the

⁴ The petitioner's 2004, 2005 and 2006 Forms 1120S, Schedules L in the record are blank.

totality of the circumstances in this individual case, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage.

On appeal, counsel suggested that if the petitioner shows that it paid the wage for a portion of the relevant period, it has established its continuing ability to pay the proffered wage. This is not correct. The petitioner must demonstrate the continuing ability to pay the wage from the March 26, 2004 priority date onwards.

Any assertion made in these proceedings that the AAO should consider the petitioner's various bank statements and evidence of its certificate of deposit submitted into the record as evidence of its ability to pay the wage is misplaced.⁵ First, bank checking account statements and certificates of deposits are not among the three types of evidence, enumerated at 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. This regulation does allow additional evidentiary material "in appropriate cases." However, contrary to counsel's assertions that a plain reading of that regulation would require USCIS to consider these bank statements in the instant case, before USCIS will consider the petitioner's checking account statements or certificates of deposit, the petitioner must demonstrate why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner. The petitioner has not done so in this case. Second, bank statements and certificates of deposit 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 or in its certificate of deposit somehow denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income, which this office duly considered when reviewing the petitioner's tax returns.

This office also notes that the petitioner could have completed the Schedule L on its tax return each year and listed its year-end available cash on line 1 and other current assets on lines 2 through 6 as well as its current liabilities on lines 16 through 18 of that schedule. If it had, the AAO would have considered the petitioner's available cash, held in bank accounts or elsewhere, when reviewing the

⁵ On appeal, the petitioner indicated through counsel that it had submitted documentation from two bank accounts into the record. The petitioner also provided the respective account numbers on these two accounts. The record reflects that one of these accounts is the petitioner's business checking account, while the other is actually the account number associated with a certificate of deposit issued in the petitioner's name. The record indicates that the bank issued this certificate of deposit on October 31, 2007 and its maturity date was March 31, 2008. Note too that the petitioner did not submit each page of its checking account statements. It provided only page one of its statements. Thus, this office has no record of the petitioner's daily balances, which may or may not reflect that the petitioner used all or almost all the funds in its account each month in the running of its business. This office would underscore as well that the ending balances listed on page one of its statements in the record do not reflect that this account had sufficient funds available to cover the full wage of \$32,500 throughout the relevant period. For example, on December 31, 2005, the ending balance in the petitioner's business checking account was \$10,269.25 and on March 31, 2008, its ending balance was \$7,557.83.

petitioner's Schedules L and analyzing its net current assets. However, the petitioner chose not to complete the Schedule L each year of the relevant period. The AAO will not now consider the cash available at the end of the petitioner's fiscal year as indicated on its bank statements without having any information regarding the petitioner's liabilities, at that time, against which to balance its cash assets.

The petitioner also submitted unaudited financial statements prepared by Roman and Associates Accountants as evidence of its ability to pay the wage.⁶ However, the AAO will not rely on unaudited financial statements as evidence of the petitioner's ability to pay the wage. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence submitted does not establish that the petitioner has had the continuing ability to pay the proffered wage from the priority date onwards. Therefore, the appeal must be dismissed.

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.

⁶ The AAO notes that the January 19, 2008 letter on [REDACTED], Tampa, Florida letterhead stationery in the record is signed by [REDACTED] Accountant. The State of Florida online database of various professionals licensed in Florida, such as Certified Public Accountants, indicates that there is no Certified Public Accountant licensed to practice in Florida by the name [REDACTED]

[REDACTED] accessed July 9, 2010.