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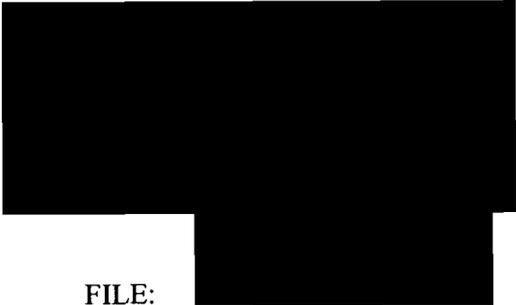
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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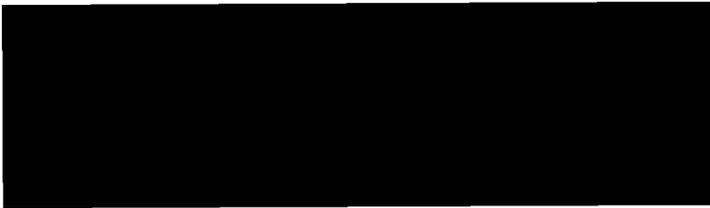
IN RE:

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 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 29, 2009 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.

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 labor certification application 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 the labor certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the petitioner initially submitted a Form ETA 750, Application for Alien Employment Certification, which was accepted for processing on November 2, 2001. The petitioner subsequently filed an ETA Form 9089, Application for Permanent Employment Certification, but was allowed to

retain the filing date from the original Form ETA 750. The proffered wage as stated on the ETA Form 9089 is \$13.00 per hour (\$23,660.00 per year based on a 35 hour work week). The ETA Form 9089 states that the position requires four years (48 months) of experience in the job offered.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on July 5, 2007³ and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on July 1, 2007, 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 a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, 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

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 This appears to be an error, as the petitioner's date of incorporation is listed as July 26, 2000 by the Department of Commerce and Consumer Affairs of Hawaii as well as on the petitioner's tax returns.

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 the instant case, the petitioner has submitted copies of pay stubs which show that, as of January 16, 2009, the petitioner has been paying the beneficiary the proffered wage of \$13.00 per hour. Therefore, the petitioner has established its ability to pay the proffered wage for that period in 2009 during which the proffered wage was paid. The record also contains a copy of the Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary for the year 2008. The Form W-2 shows that the petitioner paid the beneficiary \$19,435.00 in 2008. Because this amount is less than the proffered wage, the petitioner must establish its ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary, which is \$4,225.00. The petitioner has not established that it employed and paid the beneficiary from 2001 to 2007. Therefore, the petitioner must establish its ability to pay the full proffered wage for those years.

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). 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.

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 years 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net income⁴ of -\$3,734.00.
- In 2002, the Form 1120S stated net income⁵ of \$7,762.00.
- In 2003, the Form 1120S stated net income⁶ of \$3,822.00.
- In 2004, the Form 1120S stated net income⁷ of \$10,958.00.
- In 2005, the Form 1120S stated net income⁸ of \$31,428.00.
- In 2006, the Form 1120S stated net income⁹ of \$16,043.00.
- In 2007, the Form 1120S stated net income¹⁰ of \$16,458.00.
- In 2008, the Form 1120S stated net income¹¹ of \$10,562.00.

⁴ 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 23 (for returns from the years 1997 through 2003), line 17e (for returns from the years 2004 and 2005), or line 18 (for returns from the years 2006 through 2008) of Schedule K. *See* Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 23, 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’s tax return for 2001 had additional adjustments shown on its Schedule K, the petitioner’s net income is found on Schedule K of its tax return for 2001.

⁵ As listed on Line 23 of Schedule K. *See* footnote 4, above.

⁶ As listed on Line 23 of Schedule K. *See* footnote 4, above.

⁷ As listed on Line 17e of Schedule K. *See* footnote 4, above.

⁸ As listed on Line 17e of Schedule K. *See* footnote 4, above.

⁹ As listed on Line 18 of Schedule K. *See* footnote 4, above.

¹⁰ Ordinary income as listed on page 1, line 21. Schedule K was not included.

¹¹ Ordinary income as listed on page 1, line 21.

Therefore, for the years 2001 through 2004 and the years 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner had sufficient net income to pay the proffered wage in 2005 and had sufficient net income to pay the difference between the proffered wage and wages actually paid to the beneficiary in 2008.

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.¹² 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 for the years 2001 through 2004 and the years 2006 and 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$7,336.00.
- In 2002, the Form 1120S stated net current assets of \$2,971.00.
- In 2003, the Form 1120S stated net current assets of \$9,604.00.
- In 2004, the Form 1120S stated net current assets of \$25,577.00.
- In 2006, the Form 1120S stated net current assets of \$3,292.00.
- Schedule L was not included with the copy of the petitioner's 2007 Form 1120S.

Therefore, for the years 2001, 2002, 2003, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

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.

In addition to the above 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. 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

¹²According 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.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Counsel asserts on appeal that the "*Sonegawa* exception" applies to the petitioner. Specifically, counsel notes that the petitioner faced "unusual circumstances" which affected its net income for a number of years. First, counsel notes that the petitioner's business was impacted by the terrorist attacks of September 11, 2001. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. 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)).

Counsel also states that the petitioner, a restaurant specializing in grilled meats prepared in the "yakiniiku" style, was negatively impacted by "mad cow" disease and the resulting effect on the U.S. beef industry. Counsel has submitted a report entitled "Mad Cow Disease and U.S. Beef trade" which explains that, as a result of "mad cow" disease, many countries banned or restricted imports of U.S. beef and cattle products. However, counsel has not provided any evidence of how a ban on U.S. beef imports by foreign countries would impact the petitioner's business. Although counsel states that Korean and Japanese people in Hawaii "ate much less beef during the mid 2000s," no evidence is provided to document this statement. As noted above, 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. at 165.

In addition counsel notes that, like the petitioner in *Matter of Sonegawa*, the petitioner in the instant case has had a number of famous customers. It is true that, in *Sonegawa*, the petitioner's clients included Miss Universe, movie actresses, and society matrons. However, this was merely one aspect of the case in *Sonegawa*. As noted above, in addition to having famous clientele, the petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. The petitioner in *Sonegawa* faced an uncharacteristically unprofitable within a

framework of successful years. In the instant case, although the petitioner has provided evidence that it has had a number of well-known customers, it has failed to provide evidence of a pattern of profitable or successful years. Nor has it established that it has a sound business reputation. Further, as discussed above, no evidence has been provided to show that the terrorist attacks of September 11, 2001 and/or "mad cow" disease significantly and directly impacted the petitioner's business. 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.

Counsel also states that the petitioner had a continuous increase in its gross receipts and that its low net income resulted from additional advertising and marketing expenses which were necessary to counteract the effects of the terrorist attacks of September 11, 2001 as well as "mad cow" disease. While it is true that the petitioner's gross receipts increased from 2001 to 2008, the increase was not steady. Further, an increase in gross receipts alone is insufficient to establish the petitioner's ability to pay the proffered wage. With respect to advertising costs, it is noted that advertising expenses are a normal and expected cost of doing business. There is nothing to suggest that funds used for advertising expenses would be available to pay the proffered wage. Further, it is noted that, even if the amounts spent for advertising were added back to the petitioner's net income for the years in which it failed to show its ability to pay the proffered wage (2001, 2002, 2003, 2006, and 2007), the petitioner's net income would still have been insufficient to pay the proffered wage in all but one year (2007).

Finally, on appeal, counsel has submitted copies of the petitioner bank statements from 2007. Counsel states that these bank statements establish the petitioner's ability to pay the proffered wage in 2007. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets. In addition, even if the petitioner's bank statements were accepted as evidence of its ability to pay the proffered wage in 2007, this would still leave unchanged the fact that the evidence also fails to establish the petitioner's ability to pay the proffered wage in 2001, 2002, 2003, and 2006.

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.