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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



U.S. Citizenship
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Services

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Office: NEBRASKA SERVICE CENTER

Date: **MAR 12 2010**

IN RE:

Petitioner:
Beneficiary:

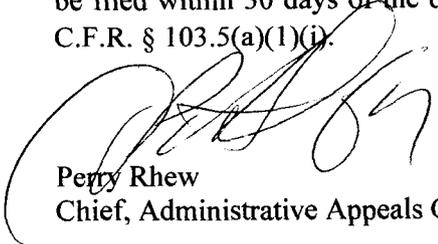
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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, 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, 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 beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence contends that the petitioner has demonstrated its ability to pay the proffered wage.

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)(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 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 ETA Form 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d). Here, the ETA Form 750 was accepted

for processing on April 26, 2001.¹ The proffered wage as stated on the ETA Form 750 is \$14.00 per hour or \$29,120 per year. Part B of the ETA Form 750, signed by the beneficiary on April 24, 2001, does not indicate that the beneficiary has worked for the petitioner. On appeal, counsel submits a payroll record suggesting payment of wages to the beneficiary in 2007. As of December 2007, the record indicates that the petitioner had paid \$6,292 in wages to the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on May 24, 2007, it is claimed that the petitioner was established on June 17, 1992, claims an annual gross income of over \$1,037,125, an annual net income of \$714,433 and currently employs fifteen workers.

In support of its continuing financial ability to pay the certified wage of \$29,120 per year, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, 2004, 2005, and 2006. The returns reflect that its fiscal year runs from October 1st to September 30, of the following year. Thus the tax returns cover a period of time from October 1, 2001 to September 30, 2007. They contain the following information:

Year	2001	2002	2003
Net Income ²	\$ 45,921	\$ 8,729	-\$ 97,464
Current Assets	\$ 96,114	\$ 105,019	\$107,264
Current Liabilities	\$195,189	\$ 433,012	\$150,046
Net Current Assets	-\$ 99,075	-\$327,993	-\$ 42,782
	2004	2005	2006 ³

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.

²Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 (2001, 2002, 2003), line 17e (2004, 2005), and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 23 of Schedule K in 2001, 2002 and 2003, line 17e in 2004 and 2005, and on line 18 in 2006.

Net Income	\$ 24,067	-\$ 12,572	\$ 332
Current Assets	\$ 134,242	\$ 145,852	\$153,319
Current Liabilities	\$ 160,866	\$ 186,836	\$161,017
Net Current Assets	-\$ 26,624	-\$ 40,984	- \$ 7,698

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. 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. A petitioner's total assets and total liabilities as set forth on Schedule L of a corporate tax return are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and would not, therefore, become funds available to pay the proffered wage.

The director denied the petition on December 15, 2007, determining that the petitioner had not demonstrated its continuing ability to pay the proffered wage. The director noted that the petitioner had been requested to provide evidence of proof of wages paid if it employed the

³In 2006, the petitioner submitted a second tax return for "[REDACTED]" with a tax identification number of [REDACTED] which is different than the petitioner's identification number. We note that the ETA 750 was originally filed by [REDACTED] and the name was amended prior to certification. It is unclear whether this represents a successorship or name change. The petitioner must resolve this issue in any further filings. A successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage as of the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁴According 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.

beneficiary. A response was received on September 17, 2007. With the response to the director's request for evidence, a handwritten note stated that the beneficiary is currently self-employed.⁵

On appeal, as noted above, counsel submits a copy of a payroll record suggesting that the petitioner employed the beneficiary in 2007. Specifically, counsel states "the Petitioner/Employer already has the beneficiary/employee on the payroll for more than adequate amount to satisfy the prevailing wage." Based on the documentation previously submitted, this employment must have commenced after September 17, 2007, however the priority date is in 2001. Counsel also provided a copy of the petitioner's 2006 tax return as set forth above. Counsel asserts that the director erred in his decision because the beneficiary is already on the petitioner's payroll. Citing no legal authority, counsel asserts that the figures on the tax returns were taken out of context.

Counsel's assertions are not persuasive. In determining the petitioner's ability to pay the 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. As noted above, the record suggests that sometime after September 17, 2007, the petitioner employed the beneficiary. His year-to-date wages were reported as \$6,292 at the rate of the proffered wage of \$14.00 per hour.

⁵ On a G-325A biographic form, dated May 15, 2007 and signed by the beneficiary, that was submitted in connection with his application for permanent resident status, he states that he had been self-employed since October 2000 and described his occupation as "sales." On Part B of the ETA 750, signed by the beneficiary on April 24, 2001, the beneficiary claims that he has been an unemployed cook from February 1998 to the present (date of signing). It is unclear why he described himself as unemployed from February 1998 forward and subsequently claimed that he was working in sales as of October 2000, however it is noted that 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).

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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).

Referring to the fiscal year as stated on the tax return, on the tax return for 2001, which began October 1, 2001, the petitioner's net income of \$45,921 was sufficient to cover the proffered salary of \$29,120 and demonstrate the petitioner's ability to pay in the fiscal year covered by the tax return. However it is noted that the petitioner failed to provide a tax return or audited financial statement or other persuasive financial documentation that covered the priority date of April 26, 2001 through October 1, 2001 and therefore failed to demonstrate the ability to pay during this period.

In 2002, neither the petitioner's net income of \$8,729 nor its net current assets of -\$327,993 was sufficient to pay the proposed wage offer of \$29,120 or demonstrate the petitioner's ability to pay in this year.

Similarly, in 2003, neither the petitioner's net income of -\$97,464, nor its -42,782 in net current assets was sufficient to cover the proffered wage or establish the petitioner's ability to pay in this year.

In 2004, the petitioner's net income of \$24,067 was not enough to cover the proffered salary. Nor was the -\$26,624 sufficient to pay the proffered wage or establish the petitioner's ability to pay in this year.

In 2005, neither the petitioner's -\$12,572 in net income nor its net current assets of -\$40,984 was sufficient to pay the beneficiary's proposed wage offer of \$29,120 or establish the petitioner's ability to pay in this year.

In 2006, neither the petitioner's \$332 in reported net income, nor its -\$7,698 in net current assets was sufficient to cover the proffered wage or establish the petitioner's ability to pay during the period covered by this tax return. Consideration of wages paid to the beneficiary will not be made for this period, as the petitioner failed to provide specific evidence that reflects the date of his employment and receipt of wages in 2007. As noted above, the fiscal year ended on September 30, 2007 and the petitioner disclaimed employment of the beneficiary on its response to the director's request for evidence.

Except for the fiscal year period covered by the 2001 tax return, the petitioner failed to establish its continuing ability to pay the proffered wage of \$29,120 per year to the beneficiary. Although the petitioner may have started to employ and pay the proffered wage to the beneficiary after September 30, 2007, the priority date on the labor certification submitted in support of this petition was April 26, 2001. The fact that the petitioner is currently paying the proffered wage does not outweigh the petitioner's obligation to demonstrate its continuing ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2). The petitioner must establish that the job offer was realistic as of the respective 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).

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) 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 and outstanding reputation as a couturiere.

In this case, based on the documentation provided, it may not be concluded that it represents the kind of framework of profitability such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonogawa*.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is August 16, 2005. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for those years, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent periods of time.

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 and submitted on appeal, 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.