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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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Petitioner:

Beneficiary:

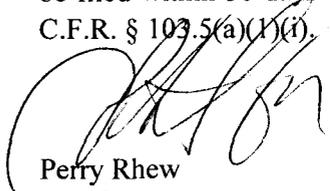
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a bi-lingual manager. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel submits additional evidence and contends that the petitioner's submission of selected state documents specified as audits of the petitioner's sales receipts should be accepted as proof of the ability to pay the proffered wage in lieu of federal tax returns, which counsel asserts under reported the petitioner's gross revenues from 2002 to 2005.

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 that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea*

House, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 27, 2001.¹ The proffered wage is stated as \$1,050 per week, which amounts to \$54,600 per year.

The visa preference petition was filed on January 3, 2007. Part 5 of the petition indicates that the petitioner was established in 1996, reports a gross annual income of \$282,000 and currently employs only four workers. Part B of the Form ETA 750, signed by the beneficiary on April 26, 2001, indicates that he has worked for the petitioner since 1996 as a bi-lingual manager.

In support of its continuing financial ability to pay the certified wage \$54,600 per year and in response to the director's request for additional evidence of its ability to pay, the petitioner provided a copy of an unaudited financial statement covering the petitioner's financial information as of September 30, 2000, accompanied by the accountants' letter from [REDACTED] indicating that the financial statement represented a compilation. A compilation is not reviewed or audited and is limited to the representation of management.² Thus, it is not probative of the petitioner's ability to pay the proffered 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statement that counsel submitted with the petition is not persuasive evidence. Further, its financial data only covered year-to-date September 30, 2000 and is not probative of the petitioner's ability to pay the proffered salary as of the priority date of April 27, 2001.

The petitioner also provided copies of the beneficiary's individual federal Form 1040, Individual Income Tax Return for 2005 and 2006, as well as copies of the beneficiary's Wage and Tax Statements (W-2s) for 2002, 2003, 2004, 2005, and 2006. It is noted that the petitioner did not provide any W-2 for 2001 that was issued to the beneficiary. Further, it is noted that one of the 2005 and the 2006 W-2s do not bear the same federal employer identification number (FEIN) as that appearing on the petitioner's federal tax returns that were subsequently provided on appeal. The petitioner's name is [REDACTED] The FEIN is [REDACTED] The other business, identified as [REDACTED], uses a FEIN [REDACTED] These wages represented on the corresponding W-2s issued by [REDACTED]

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.

² The statements show that the petitioner's current liabilities exceeded its current assets by \$33,763 and its net profit or (loss) year-to-date was \$(22,435).

³The regulation at 20 C.F.R. § 656.3(1) provides that an employer must possess a valid FEIN.

Inc. will not be considered as having been paid by the petitioning corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In this matter, the W-2s issued by the petitioning business show that it paid wages to the beneficiary in the following amounts:

Year	Wages Paid	Difference from Proffered Wage of \$54,600
2001	n/a	\$54,600
2002	\$23,400	\$31,200
2003	\$22,500	\$32,100
2004	\$53,657.68	\$942.32
2005	\$43,050	\$11,550

In response to the director's request for evidence issued on June 20, 2007, counsel's transmittal letter, dated September 11, 2007, states that it appeared that due to errors of the petitioner's prior accountants, the petitioner under reported its gross revenues for the last several years. Counsel states that the Illinois Dept. of Revenue had recalculated the petitioner's gross receipts and had issued a notice of liability to the petitioner. A letter additionally submitted from the petitioner's new accounting firm of [REDACTED] indicates that third party documents from a revenue audit conducted by the state of Illinois reflects sales revenue for [REDACTED] from the period ended 2002-2006. A copy of the Illinois Department of Revenue "Notice of Proposed Liability," dated August 8, 2007, indicates that additional liability of \$35,462 was due. Accompanying documents indicate that certain deductions on state sales tax returns were disallowed. Counsel asserts that the director should use the state's gross receipts figures of \$1,012,595 in 2002; \$1,841,825 in 2003; \$1,615,584 in 2004; and \$1,449,506 in 2005 to find that the petitioner has the ability to pay the proffered wage.

At the outset, it is noted that the entity referred to in the accountants' letter is [REDACTED]. The name of the entity referred to on the state revenue documents is [REDACTED]. As set forth above, the petitioning corporation is [REDACTED]. It is not clear from these submissions from the Illinois Department of Revenue refers to the corporate petitioner rather than another corporate entity. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further questions are raised on appeal as to whether any of the documentation from Illinois Department of Revenue is relevant to this corporate petitioner. On appeal, counsel states that she is once again submitting documentation from the Illinois Department of Revenue relevant

to the petitioner's gross sales receipts. Counsel also submits copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, 2003, 2004, and 2005. (Petitioner's Exhibit B). It is noted that the copy of the 2003 corporate tax return was signed on June 22, 2004 and the copy of the 2004 tax return was signed on June 11, 2005. None of the petitioner's federal corporate returns were prepared by the accounting firm that underreported gross sales. The 2004 and 2005 tax return(s) were prepared by the accounting firm of [REDACTED]. Further, the Notice of Proposed Liability submitted on appeal (Petitioner's Exhibit A) refers to [REDACTED], at a different address than the petitioner's location. Additionally, a copy of an employer's contribution and wage report in the name of [REDACTED] is provided (Petitioner's Exhibit A), which shows that it uses a FEIN that is different from the petitioner's and from [REDACTED] as discussed above. The FEIN of [REDACTED] is [REDACTED].

Finally, the copy of the reconciliation of gross receipts/sales report generated by the Illinois Department of Revenue reflects that no federal income tax return was filed in 2003 or 2004. If this document purportedly refers to the petitioning corporation, then it raises a question as to why the petitioner has submitted copies of its tax returns for 2003 and 2004 that were appropriately signed and dated, yet the reconciliation of gross receipts/sales document indicates that state of Illinois has no record that they were filed. The AAO does not find that counsel's assertions that the state of Illinois documentation relating to gross receipts, standing alone, is persuasive as to the ability to pay the proffered wage. Further, even if accepted, the record does not establish that any of the Illinois Department of Revenue documentation clearly referred to the petitioner, [REDACTED]. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner's federal tax returns submitted on appeal indicate that its fiscal year is a standard calendar year. The returns contain the following information:

Year	2001	2002	2003	2004
Net Income ⁴	\$ 7,766	\$ 3,662	\$ 6,665	\$ 3,668

⁴ The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). U.S. Citizenship and Immigration Services (USCIS) uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax

Current Assets	\$141,175	\$ 121,718	\$138,435	\$133,117
Current Liabilities	\$143,881	\$ 121,006	\$128,779	\$118,538
Net Current Assets	-\$ 2,706	\$ 712	-\$ 9,656	\$ 14,579

Year	2005
Net Income	\$ 2,792
Current Assets	\$108,173
Current Liabilities	\$ 90,425
Net Current Assets	\$ 17,748

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. 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.⁶

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

return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

⁵ 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.

⁶ A petitioner's total assets and total liabilities 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 will not, therefore, become funds available to pay the proffered wage.

considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the alien 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports (supported by audited financial statements) as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income to pay the proffered wage. It is also noted that 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); *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

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.

Similarly, depreciation or other expenses will not be added back to a petitioner's 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).

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967), may sometimes be applicable where other circumstances are present. In *Sonogawa*, the appeal was sustained where the facts supported a petitioner’s reasonable expectations of increasing business and increasing profits despite evidence of past 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, 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).

Unlike the *Sonogawa* petitioner, this petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonogawa* are applicable. As shown on the corporate tax returns, the petitioner’s gross sales and receipts have declined from \$527,995 in 2001 to \$160,480 in 2005. Further, its net income has never exceeded \$7,766 in any of the relevant years. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Although in 2004 and 2005, the petitioner’s net income of \$3,668 and its net current assets of \$17,748, respectively, was sufficient to cover the difference between the beneficiary’s actual wages and the proffered wage in those years, the petitioner failed to demonstrate its ability to pay the certified wage offer in 2001, 2002, and 2003.

As set forth above, in 2001, the petitioner's net income of \$7,766 was not enough to cover the proffered wage. Its net current assets of -\$2,706 was also not sufficient to cover the certified salary. The petitioner provided no evidence of compensation paid to the beneficiary. The petitioner did not establish its ability to pay the certified salary in this year.

In 2002, neither the petitioner's net income of \$3,662, nor its net current assets of \$712 was sufficient to cover the \$31,200 shortfall between the actual wages paid to the beneficiary and the proffered wage of \$54,600. The petitioner failed to establish its ability to pay the proffered wage in this year.

Similarly, in 2003, neither its net income of \$6,665, nor its net current assets of -\$9,656 was enough to cover the \$32,100 difference between the actual wages paid to the beneficiary and proposed wage offer. The petitioner failed to demonstrate its ability to pay in this year.

Finally, the petitioner failed to provide persuasive evidence of a federal tax return, audited financial statement, annual report or evidence of payment of the full proffered salary to the beneficiary in 2006. It may not be concluded that the petitioner demonstrated its ability to pay the proposed wage offer of \$54,600 in this year.

Beyond the decision of the director, it is noted that the petitioner has not sufficiently documented that the beneficiary acquired the requisite employment experience as set forth on the ETA 750.⁷ An employment verification letter, dated November 13, 2006, is contained in the record that is from [REDACTED] of [REDACTED] in Coyoacan,

⁷ The regulation at 8 C.F.R. § 204.5(l)(3) requires:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Mexico, which states that the beneficiary worked as a mechanic from 1986 to 1990. This letter will not be considered as probative of the beneficiary's required work experience in view of the fact that Part B of the ETA 750, signed by the beneficiary under penalty of perjury on April 26, 2001, lists only employment as a tire mechanic from 1986 to 1990, but fails to identify the employer or its address. The employer's name is merely stated as [REDACTED] He did not specifically include his employment with [REDACTED] in his employment history claimed on Part B of the ETA 750. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) Further, the petitioner's letter, dated November 15, 2006, did not specify the dates of the beneficiary's employment "working in the Auto parts and mechanic shop," but merely states that he has ten years of experience while employed with the petitioner. The evidence must clearly support that the beneficiary has acquired the requisite experience as a set forth on Item 14 of the ETA 750 in that the applicant must have two years of full-time work experience as a bi-lingual manager or four years full-time as an auto parts mechanic as of the priority date of April 27, 2001. In this case, the petitioner has failed to establish that the beneficiary possesses the requisite work experience.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 at n. 9.(noting that the AAO reviews appeals on a *de novo* basis).

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its *continuing* ability to pay the proffered wage as required by the regulation at 8 C.F.R. § 204.5(g)(2) as of the priority date. The petitioner has also failed to establish that the beneficiary possesses the requisite work experience as set forth on the ETA 750.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.