

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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

B6

[Redacted]

FILE:

SRC 07 246 52824

Office: TEXAS SERVICE CENTER

Date:

MAY 21 2010

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

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

The petitioner is a licensed day care provider. It seeks to employ the beneficiary permanently in the United States as a teacher's aide. 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 (the 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 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage in 2005.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour (\$16,640.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>1</sup>

On February 25, 2003, the director issued a Request for Evidence (RFE) asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward. Specifically, the director instructed the petitioner to submit federal income tax returns with Schedules L for 2002, 2003, 2004 and 2005. Further, the director requested, if applicable, Wage and Tax Statements (W-2) issued by the petitioner to the beneficiary from 2001 to 2006.

In response, former counsel submitted an explanatory letter dated March 24, 2008; reduction copies of nine checks made payable to the beneficiary from the petitioner issued on a weekly basis from January 3, 2008, to February 28, 2008, in equal amounts of \$322.50; four federal income tax returns Forms 1120S for 2002, 2003, 2004, and 2005; and a letter from the petitioner's accountant dated March 14, 2008.

With the petition, the petitioner, *inter alia*, submitted its 2001 and 2006 federal tax returns Forms 1120S.

Counsel also submitted additional evidence on appeal (not already submitted): a legal brief dated May 15, 2008; the petitioner's Form 1120S tax return for 2007; approximately 196 copies of the petitioner's business banking statements for 2005 including reduction copies of all checks written in that year; copies of pages accessed on the Internet on May 14, 2008 from the sites

and copies of the petitioner's "Payroll Journal (condensed)" for the fourth quarters of 2005, 2006 and 2007, along with each particular year's Forms W-3 "Transmittal of Wage and Tax Statement," and its employees' W-2 Statements; copies of the petitioner's "1099 Payment Journal" for 2005, 2006, and 2007, along with each particular year's Form 1096, and its contracted workers' 1099-Misc Statements; and the petitioner's payroll summaries for 2002, 2003, 2004, 2005, 2006, and 2007 (no employee information provided).

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 in 1997 and to currently employ four workers. 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 April 19, 2001, the beneficiary stated she has worked for the petitioner from November 1996 to "present" (i.e. April 19, 2001).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition

---

<sup>1</sup> 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).

later based on the Form 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.

The beneficiary stated she has worked for the petitioner from November 1996. According to the Form G-325 in the record, signed by the beneficiary under penalty of perjury, she stated that she was employed by the petitioner from November 1996, to "present time" (i.e. June 28, 2007). However, the petitioner's payroll journals for the fourth quarters of 2005 and 2006 do not list the beneficiary as either an employee or contract worker, nor were any checks written to the beneficiary in 2005. There are unresolved inconsistencies in the record. The beneficiary and the petitioner both claim that the beneficiary has been employed by the petitioner since 1996, without substantiation of that claim provided in this case until 2007. There is no evidence of any wage, salary or compensation paid to the beneficiary in 2005 which is the year in question. Such inconsistencies undermine the credibility of other financial documents submitted into evidence. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Evidence of any wages/salary paid to the beneficiary in 2005 would have been calculated in the petitioner's net income for that year, but no such evidence was submitted.

The beneficiary is listed in the fourth quarter of 2007 payroll journal report as earning year-to-date income of \$11,200.00 as substantiated by her W-2 statement. Nine checks made payable to the beneficiary from the petitioner were issued in equal amounts of \$322.50, indicating a yearly wage of \$16,770. Therefore, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001, or subsequently.

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 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054

(S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., 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 record before the director closed on March 25, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 was the most recent return available. The petitioner's tax returns demonstrate its net incomes as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>2</sup> of \$23,085.00.
- In 2002, the Form 1120S stated net income of \$19,365.00.
- In 2003, the Form 1120S stated net income of \$18,829.00.
- In 2004, the Form 1120S stated net income of \$17,567.00.
- In 2005, the Form 1120S stated net income of \$11,856.00.
- In 2006, the Form 1120S stated net income of \$21,208.00.
- In 2007, the Form 1120S stated net income of \$24,940.00.

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

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.<sup>3</sup> 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 return for 2005 demonstrates its end-of-year net current assets as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$7,926.00.

Therefore, for year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

---

<sup>2</sup> 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 (1997-2003), line 17e (2004-2005), and line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 7, 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 had additional income, credits and other adjustments shown on its Schedule K for the years for which tax returns were submitted, the petitioner's net income is found on Schedule K of its tax returns.

<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 2005.

In the instant case, according to the tax returns submitted in evidence, the petitioner had sufficient net income to pay the proffered wage except for year 2005. Counsel asserts that the petitioner's net income can be added to its net current assets in 2005 to show the total amount of funds available to pay the wage. It is clear that counsel wants to combine the petitioner's taxable income with the cash also received by the business for that year as part of the Schedule "L" current assets. USCIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Counsel's method would duplicate revenues received by the business during the year.

Counsel also asserts that cash in the petitioner's bank account in 2005 is proof of its ability to pay the proffered wage. Counsel's reliance on the balances 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 in determining the petitioner's net current assets.

Counsel has submitted a letter from the petitioner's accountant dated March 14, 2008. The accountant contends that officers' compensation may be available to pay the proffered wage. It is not an uncommon practice for a petitioner's sole owner/stockholder to take the corporation's income and compensate herself, thus sheltering it from corporate additional taxation. The amount of officers' compensation is nominally greater than the proffered wage in all of the years for which tax returns were submitted, and in addition, according to the petitioner's accountant, the sole shareholder is paid a salary. However, the amount of officers' compensation does not vary over the course of the pertinent years by more than a nominal amount demonstrating that the amount does represent a fixed amount of compensation. Officers' compensation could have been adjusted to pay the wage in 2005. However, the officer receiving the compensation who is the sole owner/stockholder has not stated in the record that she would relinquish a portion of her compensation in 2005 to pay the proffered wage.

Counsel states on appeal that in 2005 the petitioner paid \$48,128.50 to its salaried employees and \$2,702.50 to its subcontractors as proof of the petitioner's ability to pay the proffered wage. However, the petitioner's Form 1120S tax return for that year stated no figure (i.e. zero) for salary and wages on Line 8 of that Form, and \$29,909.00 as cost of labor (i.e. Form 1120S, Schedule A, Line 3). It is incumbent upon the petitioner to resolve any inconsistencies in the record by

independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho, Id.*

Counsel suggests that the petitioner's payroll lends credence to the petitioner's ability to pay the proffered wage. As already stated above, in *K.C.P. Food Co., Inc. v. Sava, Id.*, the court held that the 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. *Supra* at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the ability to pay the proffered wage.

Counsel asserts that the petitioner's totality of circumstances, according to the evidence submitted, is proof of the petitioner's ability to pay. 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 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.

Counsel contends and submits evidence on appeal that the petitioner's business reputation, its longevity, and ability to make its payroll every year of operation are evidence of its ability to pay the proffered wage. Counsel has not submitted complete payroll records. Counsel contends that 2005 was an "uncharacteristic bad year" for the petitioner but other than reciting the petitioner's nondiscretionary salary and outside labor costs, counsel submitted insufficient evidence that 2005 was an unusual or unique year in which the petitioner's finances were depressed. Counsel has not established a case for application of *Matter of Sonogawa*. Moreover, as noted above, the record contains unresolved inconsistencies pertaining to the petitioner's finances in 2005, including the

payment of wages to the beneficiary and other purported employees. Thus, assessing the totality of the circumstances in this individual case, the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.