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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 and Immigration Services

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FILE:

Office: TEXAS SERVICE CENTER

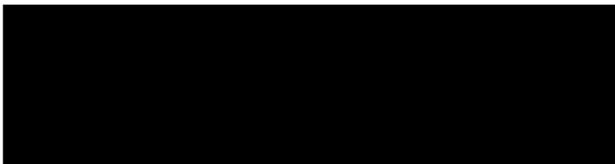
Date:

IN RE: Petitioner:   
Beneficiary:

**NOV 16 2010**

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

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by Form ETA 750, 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 December 14, 2007 denial, the 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. The AAO will address several additional bases of ineligibility below.

The AAO conducts appellate review on a de novo basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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 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.

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<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 by the regulation 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).

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). Here, the Form ETA 750 was accepted for processing on April 30, 2001.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$11 per hour (\$22,880 per year). The director stated that the petitioner's evidence does not demonstrate the ability to pay the proffered wage in 2003 or 2004. This is partially incorrect as will be addressed below.

On the petition, the petitioner claimed to have been established in 1978 and to currently employ thirty workers. According to the tax returns in the record, the petitioner's fiscal year runs from November 1 to October 31. On the Form ETA 750, signed by the beneficiary on April 28, 2001, the beneficiary did not claim to work for the petitioner.

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 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, 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. In the instant case, the petitioner the following Form W-2s for the beneficiary:

- In 2001, the preliminary Form W-2<sup>3</sup> stated that the petitioner paid the beneficiary \$18,811.99.
- In 2002, the Form W-2 stated that the petitioner paid the beneficiary \$20,986.49.
- In 2003, the Form W-2 stated that the petitioner paid the beneficiary \$21,524.44.

<sup>2</sup> 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 is clear.

<sup>3</sup> The record does not contain the final Form W-2 issued.

- In 2004, the Form W-2 stated that the petitioner paid the beneficiary \$21,791.40.
- In 2005, the Form W-2 stated that the petitioner paid the beneficiary \$23,571.25.
- In 2006, the Form W-2 stated that the petitioner paid the beneficiary \$27,755.54.

The Form W-2s establish that the petitioner paid in excess of the proffered wage in 2005 and 2006. The amounts paid to the beneficiary from 2001 through 2004 were less than the proffered wage, so the petitioner must establish that it had the ability to pay an additional \$4,068.01 in 2001, \$1,893.51 in 2002, \$1,355.56 in 2003, and \$1,088.60 in 2004.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d 881. (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

On appeal, the petitioner argues that its aggressive depreciation amount should be taken into account. 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*, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added). As a result, we will not take into account the amounts that the petitioner used in valuing its depreciation amount.

The record before the director closed on December 4, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for tax years 2000 through 2004, as shown in the table below.

- In tax year 2000 (covering the time period November 1, 2000 to October 31, 2001), line 28 of the Form 1120 stated net income (loss) of -\$3,803.
- In tax year 2001 (covering the time period November 1, 2001 to October 31, 2002), line 28 of the Form 1120 stated net income (loss) of -\$12,029.
- In tax year 2002 (covering the time period November 1, 2002 to October 31, 2003), line 24 of the Form 1120-A stated net income of \$257,931.
- In tax year 2003 (covering the time period November 1, 2003 to October 31, 2004), line 28 of the Form 1120 stated net income of \$0.
- In tax year 2004 (covering the time period November 1, 2004 to October 31, 2005), line 28 of the Form 1120 stated net income of \$51,164.<sup>4</sup>

Therefore, the petitioner did not demonstrate sufficient net income to pay the difference in the actual wage paid and the proffered wage in tax years 2000 or 2001 (corresponding to calendar year 2001). The petitioner demonstrated sufficient net income to pay the difference between the actual wage and the proffered wage in tax years 2002 and 2004, corresponding to the calendar years of 2003 and 2005. Considering two months of the 2004 total net income encompassed in tax year 2004, this would be sufficient to show the petitioner's ability to pay the difference of \$1,088 between the proffered wage and actual wage. Similarly, the petitioner's net income for tax year 2002, including two months of calendar year 2002, would be sufficient to pay the difference of \$1,893 between the proffered wage and actual wage in 2002. As a result, the petitioner demonstrated its ability to pay the proffered wage in 2002 and 2004 as well.

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<sup>4</sup> The director misstated the petitioner's net income as \$0 for this year.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</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 returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In tax year 2000, the Form 1120 stated net current assets (liabilities) of -\$83,186
- In tax year 2001, the Form 1120 stated net current assets (liabilities) of -\$68,707.

Therefore, for the tax years 2000 and 2001, corresponding to the calendar year of 2001, the petitioner did not demonstrate sufficient net current assets to pay the difference between the actual wage and the proffered wage.

On appeal, the petitioner submits a letter from [REDACTED] which states that the petitioner has accumulated "equity of over \$350,000" in over thirty years of operation. In addition, [REDACTED] states that the values shown on the petitioner's Schedule L do not reflect fair market value for the petitioner's assets as opposed to historical costs and that the petitioner's net income is kept at a low level by means of rent controlled by the 100% shareholder. [REDACTED] provides no evidence to support his assertions and does not explain where he derived the \$350,000 figure or the valuation for items on the petitioner's Schedule L. 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)).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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. Based on the foregoing, the petitioner has not established its ability to pay in 2001.

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 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and

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<sup>5</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.

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 *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.

In the instant case, the petitioner did not demonstrate some sort of off year. Nothing demonstrates that the tax returns paint an inaccurate financial picture of the petitioner's ability to pay the proffered wage. Instead, the tax returns demonstrate an unexplained, precipitous drop in gross income in 2002, with gross receipts of under \$100,000, which is substantially inconsistent with prior or subsequent tax returns. The petitioner must demonstrate that the job offer was realistic from the time of the priority date onward and remained so. Absent explanation of the circumstances surrounding the petitioner's 2002 tax return, despite the petitioner's length of time in business and high gross receipts in other years, we are unable to conclude that *Matter of Sonegawa* is applicable here.<sup>6</sup> The tax returns also reflect inconsistent net income, no salaries or wages paid except for in 2003 and 2004, and inconsistent compensation of officers, rent, and other expenses. Nor did the petitioner submit evidence of its reputation that would liken its situation to the one presented in *Sonegawa*. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Additionally, although not raised by the director, the petitioner failed to establish that the beneficiary had the experience for the position offered and that the petition was filed under the proper category. The petition filed is that for "other worker requiring less than two years of training or experience," however, the labor certification requires two years of experience in the position offered. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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<sup>6</sup> In any further filings, the petitioner must address its 2002 return and that the job offer remained realistic based on the petitioner's continued operation.

The labor certification requires two years as a cook. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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.

The petitioner required two years of experience as a cook. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In response to the director's RFE, the petitioner submitted a letter from [REDACTED], general manager of the petitioner, which states that the beneficiary worked full-time as a cook for the petitioner from June 28, 1996 to November 30, 2007. The AAO notes that the beneficiary did not indicate on the Form ETA 750 that he worked for the petitioner or any other employer. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). Although the petitioner submitted a W-2 statement for 2000, the record does not contain evidence of employment prior to that date and would thus be insufficient to demonstrate two full years of experience before the April 30, 2001 priority date. As a result, we are unable to conclude that the beneficiary possessed the requisite experience as of the priority date and the petition may not be approved.

Additionally, the petition was filed under the wrong category. 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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 not available in the United States.

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for "an other worker (requiring less than two years of training or experience)." On Form ETA 750, Part A, Block

14, the petitioner indicated that two years experience was required for the position. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition, request the proper category, and submit the proper fee and required documentation.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.