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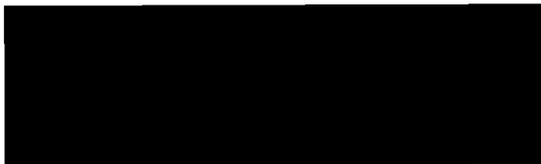
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

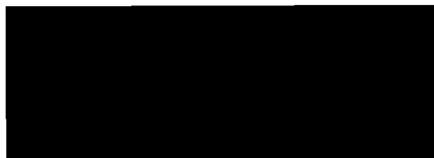
Beneficiary:



**NOV 16 2010**

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

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,

*Elizabeth McCormack*

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 operates a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 (DOL). The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing to the present. 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 November 28, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director noted that the petitioner had filed three Form I-140 petitions, including the present petition, and that the petitioner had not established the ability to pay the beneficiary and the other two beneficiaries.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The AAO conducts appellate review on a *de novo* basis. *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> Counsel states on appeal that his brief and/or additional evidence will be submitted within 30 days. To date, no brief and/or additional evidence has been submitted. Therefore, a decision will be rendered based on the evidence of record.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the Form I-140 petition, the petitioner states that it was established on October 9, 1992 and currently employs two or three workers. The Form ETA 750 states that the name of the employer is [REDACTED]. The Form ETA 750 was accepted on August 16, 2002. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour which equates to \$21,603.40 per year based on a 35-hour week.<sup>2</sup> The Form ETA 750 states that the position requires two years of experience in the job offered.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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 petitioner has not established that it employed and paid the beneficiary any wages from the priority date, August 16, 2002, and onwards.

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

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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 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).

<sup>2</sup> DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

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. 813, 881 (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*, --- F. Supp. 2d. at \*6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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).

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 record before the director closed on September 4, 2007, when the petitioner's response to the director's Notice of Intent to Deny (NOID) was due. As of that date, the petitioner's 2007 federal income tax return was not yet due.

In the NOID the director informed the petitioner that it had filed multiple petitions and needed to establish the ability to pay the beneficiaries of all the petitions. The director stated that the petitioner filed three I-140 petitions including the instant petition; that the proffered wage for each of these petitions was \$11.87 per hour equating to \$21,603.20 per year (based on a 35-hour week); and that the three wages together totaled \$64,810.20 annually. The director noted that the petitioner submitted tax returns for the years 2002 through 2005, and that the net income and net current assets for each year were less than the total wages needed to pay the beneficiary's proffered wage and the wages of the two other sponsored workers. The petitioner failed to respond to the NOID or provide any additional evidence in support of the petition within the time provided.

On appeal, the petitioner resubmits its tax returns for 2002-2005 and also submits its returns for 2006. The petitioner asserts that its current assets and cash are sufficient to pay the proffered wage. The petitioner also submits compiled financial statements for 2003, 2004, 2006 and 2007. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2002, the petitioner's Form 1120 stated net income on line 28 of \$37,229.
- In 2003, the petitioner's Form 1120 stated net income on line 28 of \$127.
- In 2004, the petitioner's Form 1120 stated net income on line 28 of \$6,558.
- In 2005, the petitioner's Form 1120 stated net income on line 28 of \$56,002.
- In 2006, the petitioner's Form 1120 stated net income on line 28 of \$6,000.

The petitioner did not have sufficient net income to pay the beneficiary's proffered wage for the years 2003, 2004 and 2006. For the years 2002 and 2005, the petitioner would have sufficient net income to pay the instant beneficiary's proffered wage of \$21,603.40 per year based on a 35-hour week. However, as noted by the director, USCIS records indicate that the petitioner has filed three Form I-140 petitions, including the instant petition. One of the petitions, [REDACTED] also has a priority date of August 16, 2002 and was approved on October 12, 2007. USCIS records reflect that the second petition, [REDACTED] was denied on November 29, 2007. Thus, the petitioner needs to establish that it can pay for two sponsored workers from the priority date onwards. *See* 8 C.F.R. § 204.5(g)(2). In his decision, the director stated that the proffered wage for the other petition is \$11.87 per hour, equating to \$21,603.40 annually. The instant beneficiary's proffered wage and the other sponsored worker's wages total \$43,206.80 annually. The petitioner's net income figures indicate that the petitioner could not pay the proffered wage and the wages of the sponsored worker in 2002, 2003, 2004 and 2006, but would be able to pay the wages of both workers in 2005.

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 returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2002, the petitioner's Form 1120 stated net current assets of \$13,680.
- In 2003, the petitioner's Form 1120 stated net current assets of -\$21,443.
- In 2004, the petitioner's Form 1120 stated net current assets of -\$5,444.
- In 2006, the petitioner's Form 1120 stated net current assets of \$22,669.

The petitioner could have paid the proffered wage of \$21,603.40 from its net current assets in 2006, but could not also have paid the second sponsored worker. Thus, the petitioner has not established the ability to pay for 2002, 2003, 2004 and 2006.

On appeal, counsel submitted two letters dated January 31, 2005 and January 31, 2007 and signed by [REDACTED] certified public accountants, attaching year end complied financial statements for 2003-2004 and 2006-2007. The regulations 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 statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also submitted its commercial checking account bank statements from the [REDACTED] [REDACTED] for the period January 31, 2003 through December 31, 2004. The petitioner's reliance on the balances in its bank accounts 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

<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.

amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *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's Form I-140 states that the company was established on October 9, 1992 and currently employs two or three individuals. The petitioner's tax returns show fairly low net incomes and fairly low net current assets for all the years. 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). Moreover, precedent law states that the USCIS may properly rely on net income without consideration of depreciation. In the instant case, the petitioner has not provided its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage. Additionally, a visa petition

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<sup>4</sup> The address reflected on the bank account statements is different from the address that appears on the Form I-140 and the petitioner's federal tax returns.

may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1998).

Counsel's assertions on appeal do not outweigh the evidence presented in the tax returns that demonstrate that the petitioner could not pay the proffered wage for the instant beneficiary and the sponsored worker from the day the Form ETA 750 was accepted for processing by the DOL, August 16, 2002, through 2004 and continuing from 2006 and onwards.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, August 16, 2002.

Beyond the decision of the director, the petitioner has not established that the beneficiary met the two years experience requirement of the labor certification at the time of filing, August 16, 2002.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on August 16, 2002.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed by [REDACTED] located in Taishan City, Guangdong, China, as a cook from May 1994 to July 15, 2002, the date the beneficiary signed the Form ETA 750.

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 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).

The petitioner must submit evidence that the beneficiary obtained the required two years of experience in the job offered before August 16, 2002. The regulations at 8 C.F.R. § 204.5(g)(1) state in pertinent part that evidence relating to qualifying experience shall be in the form of letter(s) from current or

former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.

The petitioner provided an English translation of the beneficiary's work experience letter dated July 6, 2002 and signed by the manager, [REDACTED]. The letter states that the beneficiary worked as a cook from May 1994 to present performing cooking duties 48 hours per week. In this letter, the previous employer gives his name and title but does not give his address and a specific description of the duties performed by the beneficiary as stipulated in the regulations at 8 C.F.R. § 204.5(g)(1). As the record does not establish the beneficiary's qualifications, the petition may not be approved.

In conclusion, the petitioner has not established its ability to pay the beneficiary's proffered wage and the wages of its sponsored worker from 2002 through 2004 and from 2006 and onwards and has not established that the beneficiary met the minimum requirements of two years of experience in the job being offered as stipulated on the labor certification at the time the labor certification was accepted for processing, August 16, 2002. Therefore, the petition may not be approved.

Accordingly, 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.