

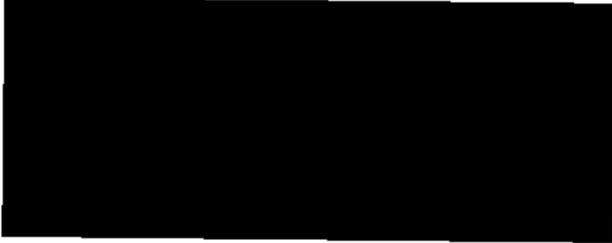
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

**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

FILE:

Office: NEBRASKA SERVICE CENTER

Date: NOV 29 2010

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 \$630. 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, 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 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 3, 2008 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.

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 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(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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.50 per hour (\$19,760 per year). The Form ETA 750 states that the position requires one year of experience in the proffered position.

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>

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$319,092, and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year runs on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have previously worked for the petitioner.<sup>2</sup>

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, or any wages, from the priority

---

<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).

<sup>2</sup> The petitioner submitted copies of its Articles of Incorporation which indicate that it was incorporated in the State of [REDACTED] on [REDACTED]. The beneficiary states on the Form ETA 750 that he was employed by [REDACTED] from May 1996 until the date the Form ETA 750 was signed (April 18, 2001). The petitioner indicated in a letter dated October 16, 2007 that the beneficiary began working for the petitioner in May 2001 as a cook.

date onwards. The petitioner did submit, however, copies of W-2 Forms which show wages paid to the beneficiary by the petitioner as follows:

- 2004 - \$13,680.<sup>3</sup>
- 2005 - \$16,720.
- 2006 - \$10,400.
- 2007 - \$18,400.

Since the W-2 Forms show partial wages were paid to the beneficiary by the petitioner, the petitioner need only establish the ability to pay the difference between wages actually paid and the full proffered wage.<sup>4</sup> Those sums are as follows:

- 2004 - \$6,080.
- 2005 - \$3,040.
- 2006 - \$9,360.
- 2007 - \$1,360.<sup>5</sup>

The petitioner must establish that it can pay the full proffered wage in 2001 through 2003.

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 sales and profits and wage expense is

---

<sup>3</sup> Although the petitioner claimed to employ the beneficiary from 2001 onwards, the petitioner did not submit W-2 statements for 2001 through 2003.

<sup>4</sup> USCIS records also reveal that the petitioner has at least one additional Form I-140 filing, which was received by USCIS on July 27, 2007 [April 23, 2001 priority date]. The petitioner would need to demonstrate its ability to pay the full proffered wage in 2001, 2002 and 2003, and the difference between the proffered wage and wages paid to the beneficiary from 2004 through 2007, plus the proffered wage for each Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2).

<sup>5</sup> The petitioner submitted a checking "Reconciliation Detail" sheet for the time period ending December 31, 2007. This shows one month of the petitioner's checking with payments referenced to the beneficiary. These amounts are superceded by the beneficiary's W-2 2007 statement.

misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010) (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 118. "[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 October 27, 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 is the most recent return available. The petitioner's tax returns demonstrate its net income for years 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of (\$11,048).
- In 2002, the Form 1120 stated net income of (\$12,170).
- In 2003, the Form 1120 stated net income of (\$41,823).
- In 2004, the Form 1120 stated net income of (\$14,411).
- In 2005, the Form 1120 stated net income of \$4,128.
- In 2006, the Form 1120 stated net income of (\$12,243).
- In 2007, the Form 1120 stated net income of \$4,678.

Therefore, for the years 2001 through 2004 and 2006 the petitioner did not have sufficient net income to pay the proffered wage. While the petitioner's net income in 2007 would show its ability to pay the difference of wages paid to this beneficiary and the proffered wage, previously footnoted USCIS records also reveal that the petitioner has at least one additional Form I-140 filing, which was received by USCIS on July 27, 2007 [April 23, 2001 priority date]. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Here, the petitioner would need to demonstrate its ability to pay for two beneficiaries for the entire time period of 2001 onwards. From the record, it is unclear that the petitioner could pay the difference in the wages paid and the proffered wage for the instant beneficiary as well as the wage for the other sponsored worker for all of the relevant years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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

---

<sup>6</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.

using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2007 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$7,865.
- In 2002, the Form 1120 stated net current assets of \$8,763.
- In 2003, the Form 1120 stated net current assets of (\$6,276).
- In 2004, the Form 1120 stated net current assets of (\$14,746).
- In 2005, the Form 1120 stated net current assets of (\$3,695).
- In 2006, the Form 1120 stated net current assets of (\$1,896).
- In 2007, the Form 1120 stated net current assets of \$10,900.

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage of the present beneficiary plus those of the additional worker petitioned for. In 2007, it is unclear from the record that the petitioner's net current assets would be sufficient to pay the difference between the wages paid and the proffered wage for the instant beneficiary plus the second sponsored worker's proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the proffered wage of all sponsored workers as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. The petitioner also submitted copies of some 2007 bank records in support of its ability to pay the proffered wage. The petitioner did not submit bank records for years 2001 through 2006. Reliance on the balances in the petitioner's 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 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 have been considered in determining the petitioner's net current assets.

The petitioner submitted a copy of a 2008 mortgage statement from [REDACTED] for [REDACTED], an officer of the petitioner. The statement shows the amount of the monthly mortgage payment. It does not establish the value of the property or show that the property mortgaged is in any way related to the petitioner. The petitioner also submitted a copy of utility, cable, telephone and car payment bills for Mr. [REDACTED] from 2008. These documents are of no evidentiary value in these proceedings.<sup>7</sup> Because a corporation is a separate and distinct legal entity from its owners and

<sup>7</sup> As the record was lacking evidence of the petitioner's corporate structure, the director's request for evidence stated that, "from the evidence it appears that you are a sole proprietor or individual

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."

On appeal, the petitioner asks that the appeal be considered. The petitioner states that upon USCIS's request for additional evidence, an employment letter was submitted to establish that the beneficiary met the experience requirement set forth on the Form ETA 750. The petitioner further stated that he submitted federal tax returns for 2001 through 2006 demonstrating its ability to pay the proffered wage as of the priority date. The petitioner also submitted, on appeal, copies of the beneficiary's W-2 Forms for years 2004 through 2007 (previously discussed) with copies of the beneficiary's personal income tax returns.

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 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.

In the instant case, the petitioner had minimal, or negative, net income and net current assets during all relevant years (2001 – 2007). Wages paid during all relevant periods were minimal, ranging from

---

employer," and requested documents on that basis. As the tax returns show that the petitioner is structured as a C corporation, the owner's personal assets cannot be used to establish the petitioner's ability to pay.

\$0 reported in 2001 to a high of \$88,280 reported in 2007. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner maintained the ability to pay the proffered wage from the priority date onward. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not established that the beneficiary met the experience requirements set forth on the Form ETA 750 (one year of experience in the proffered position) as of the priority date. 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 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 submitted an experience letter on behalf of the beneficiary which indicates that the beneficiary was employed by [REDACTED] as a cook from May 1996 until May 2001. Also submitted was a copy of a certificate issued on June 11, 2006 by the [REDACTED] certifying that the beneficiary satisfied the requirements of the [REDACTED]. The food service safety certificate does not establish that the beneficiary had experience as a cook, and is, therefore, of little evidentiary value. The referenced letter does not establish that the beneficiary had one year of experience as a cook as of the priority date. Valid experience letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The experience letter is not signed. The letter also does not include a specific description of the duties performed by the beneficiary and does not contain the name and title and address of the letter's author. The letter, therefore, is insufficient to establish the experience required by the Form ETA 750. In any further filings, the petitioner should submit an experience letter in accordance with the regulations which addresses these deficiencies.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, or that the beneficiary meets the experience requirement set forth on the Form ETA 750 as of the priority date.

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.