

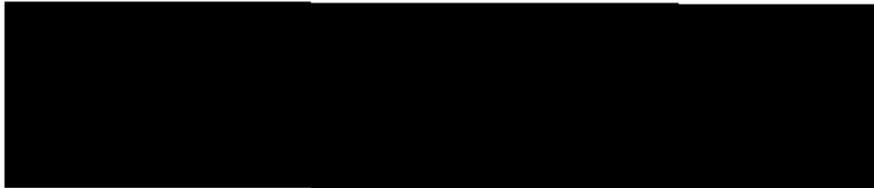
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 08 2010

IN RE:

Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:

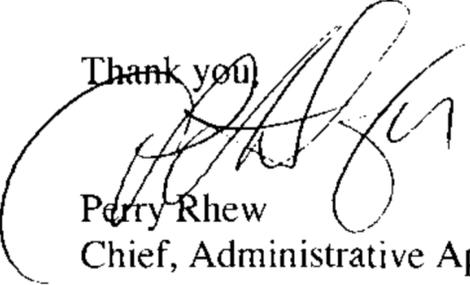


INSTRUCTIONS:

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. The petitioner filed a motion to reopen. The Service Center granted the motion to reopen and reissued its decision. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a machine shop. It seeks to employ the beneficiary permanently in the United States as a machinist. 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 June 4, 2009 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)(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).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$17.73 per hour (\$36,878 per year). The Form ETA 750 states that the position requires two years of experience in the position offered as a machinist.

The AAO conducts appellate review on a *de novo* basis. *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.¹

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 1992 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 13, 2001, the beneficiary did not claim to have worked for the petitioner.

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 provided no evidence that it ever employed or paid the beneficiary any wages.

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (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

¹ 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).

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, 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).

The record before the director closed on September 19, 2008 with the receipt by the director of the petitioner's response to the Notice of Intent to Deny. As of that date, the most current tax return available was the petitioner's 2007 federal tax return.

- In 2001, the Form 1120S stated net income² of -\$9,851.
- In 2002, the Form 1120S stated net income of \$24,096.
- In 2003, the Form 1120S stated net income of -\$7,490.
- In 2004, the Form 1120S stated net income of -\$9,371.
- In 2005, the Form 1120S stated net income of \$4,082.
- In 2006, the Form 1120S stated net income of -\$15,691.
- In 2007, the Form 1120S stated net income of -\$23,135.

Therefore, the petitioner demonstrated insufficient net income to pay the proffered wage in any 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.³ 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.

- In 2001, the Form 1120S stated net current assets of -\$59,442.
- In 2002, the Form 1120S stated net current assets of -\$22,146.
- In 2003, the Form 1120S stated net current assets of -\$14,944.
- In 2004, the Form 1120S stated net current assets of \$7,799.
- In 2005, the Form 1120S stated net current assets of -\$3,679.
- In 2006, the Form 1120S stated net current assets of -\$18,939.
- In 2007, the Form 1120S stated net current assets of -\$28,811.

² 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), or line 18 (2006) of Schedule K. *See Instructions for Form 1120S, 2008*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 3, 2009) (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 adjustments shown on its Schedule K for 2002, the petitioner's net income is found on Schedule K for that year alone. For all other years, the petitioner's net income is found on line 21 of its tax returns.

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

Therefore, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage in any year from the priority date onward.

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 onward through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel stated that the value of the building in which the petitioner operates should be considered in a determination of whether the petitioner has the means necessary to pay the proffered wage.⁴ To that end, the petitioner provided a real estate appraisal for property owned by ██████████ ██████████ an entity other than the petitioner, and documents concerning the current mortgage held on the property. A letter was also included from ██████████ the petitioner's certified public accountant, stating that the president of the petitioner, ██████████ is the same as the president of ██████████. The tax returns in the record show that ██████████ is the 100% shareholder of the petitioner; the tax return submitted for ██████████ identifies ██████████ as its 100% shareholder. However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Accordingly, assets of the owner or another corporation with a common owner will not be considered in determining the petitioner's ability to pay. Additionally, while counsel asserts an equity line could have been obtained to pay the proffered wage, nothing shows that the petitioner held an equity line as of the priority date.⁵

⁴ Counsel cites the recent decision of *Construction and Design Co. v. USCIS*, No. 08-2461 (7th Cir. 2009), an unpublished case in a jurisdiction other than the petitioner's, for the proposition that additional materials should be considered beyond tax returns in determining the petitioner's ability to pay the proffered wage. First, the AAO is not bound to follow the unpublished decision of a United States circuit court in cases arising from a different circuit. The reasoning underlying an unpublished decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. Second, nowhere in the above cited case did the Seventh Circuit state that assets of another entity or individual besides the petitioner must be considered in determining the petitioner's ability to pay the proffered wage. Instead, the Seventh Circuit stated that additional documents concerning the financial position of the petitioner may be considered in appropriate cases. The petitioner has submitted no evidence beyond its tax returns to show its ability to pay the proffered wage. However, the totality of the petitioner's circumstances will be considered and addressed below.

⁵ Further, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines,

In addition, to any equity in the property, the petitioner paid rent in each year. For tax purposes, the corporate petitioner gets a deduction for the rents it pays to the shareholder (which is included in our calculation of net income), and the shareholder shows the rent payments as income on his IRS Form 1040, Schedule E. The shareholder also gets to claim depreciation for the property on IRS Form 1040, Schedule E. Adding back rents from line 11 would be double accounted for in that respect as rents are already accounted for in the calculation of line 21 net income, and the petitioner produced no evidence that the rent could be reduced in order to pay the proffered wage. The petitioner must pay the fair rental value for the property. Rents below fair rental value may be adjusted by the IRS. *See* I.R.C. § 482. Therefore, rents paid will not be considered in calculating the petitioner's ability to pay.

In response to the director's Request for Evidence, counsel argues that the petitioner's negative net income can be offset by looking at the receivables, inventory, and depreciation lines on the Schedule L. Counsel's accounting convolutes the two means of determining a company's financial standing by looking at the net income as well as items on its balance sheet (Schedule L) combined. Because of the nature of net current assets, demonstrating the ability to pay the proffered wage with net current assets is truly an alternative to demonstrating the ability to pay the proffered wage with income and wages actually paid to the beneficiary. Net current assets are not cumulative with income, but must be considered separately. This is because income is viewed retrospectively and net current assets are viewed prospectively. That is, for example; a 2007 income greater than the amount of the proffered wage indicates that a petitioner could have paid the wages during 2007 out of its income. Net current assets at the end of 2007 which are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those receipts. Therefore, the amount

or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner must establish that the unused funds from the line of credit are available at the time of filing the petition. Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

of the petitioner's net income is not added to the amount of the petitioner's net current assets in the determination of the petitioner's ability to pay the proffered wage. The petitioner's inventory and accounts receivables were considered in determining the petitioner's net current assets and offset against liabilities in the calculation set forth above. The depreciation amount is not a "paper loss" as claimed by counsel, but instead, amounts to a real cost of doing business and therefore does not amount to a cash asset available to pay the proffered wage. See *River Street Donuts*, 558 F.3d at 116, *Taco Especial*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6, and discussion *supra*.

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's net income and net current assets were minimal or negative for each year. In addition, the petitioner's gross receipts have declined from 2001 when they were \$332,097 to \$174,476 in 2007. The petitioner also paid minimal total costs of labor in every year including two years, 2005 and 2007, where the total cost of labor paid was less than the proffered wage. The petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. We additionally note that the proffered wage for a machinist exceeds the amount paid in officer compensation in most years in question. 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.

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.

[REDACTED]

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ORDER: The appeal is dismissed.