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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  
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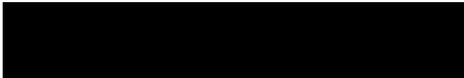


Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 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 \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 car wash company based in City of Industry, California. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage of \$44,928 per year, specifically in 2005, 2006, and 2007. The director also found that the petitioner failed to pay the beneficiary the full proffered wage from the priority date.

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 September 25, 2008 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the petitioner submitted and the DOL accepted for processing the Form ETA 750 labor certification on April 30, 2001. The rate of pay or the proffered wage as stated on that approved labor certification form is \$21.60 per hour or \$44,928 per year. Further, the approved labor certification form indicates that the position requires no specific experience or education. The petitioner indicated in part B of the Form ETA 750 that the beneficiary had worked for the petitioner since January 1990.

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>

To show that it has the ability to pay \$21.60 per hour or \$44,928 per year beginning on April 30, 2001, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2001 - 2007;
- Form 1120S of [REDACTED]. ([REDACTED]) for 2007 along with statements of assets, liabilities, and equities of [REDACTED] for 2007;
- Forms W-2 issued to the beneficiary by various companies, including the petitioner, from 2001 to 2007;<sup>2</sup>
- Pay stubs for July and August 2008 pay periods from [REDACTED];
- The beneficiary's individual tax returns filed on IRS Forms 1040 for 2001-2007;
- A letter from the petitioner's tax preparer, [REDACTED] CPA, who states that both [REDACTED] and [REDACTED] (the petitioner) are owned by the same individual, [REDACTED] and [REDACTED];
- Various documents relating to a fire incident at [REDACTED] on August 20, 2005.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation, with [REDACTED] as the only shareholder and officer of the corporation. On the petition, the petitioner claimed to have been established in April 1997,<sup>3</sup> to currently employ 26 workers, and to have a gross annual income of \$1,194,616.

<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> Between 2001 and 2007, the AAO notes that, the beneficiary also received Forms W-2 and 1099-MISC from [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED].

<sup>3</sup> A search of the California Secretary of State's website reveals that [REDACTED] or the petitioner was incorporated on March 21, 1991.

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.

Here, while the beneficiary claimed in part B of the Form ETA 750 that he was employed and paid by the petitioner since January 1990, no evidence of his continuous employment with the petitioner has been submitted. Instead, the petitioner submitted copies of the W-2s from [REDACTED] for the years 2001 through 2007. The director declined to accept any of the W-2s from [REDACTED] as evidence of the petitioner's ability to pay since [REDACTED] has a different name, address, and employer identification number than the petitioner.

On appeal, the petitioner disagrees with the director's conclusion and contends that USCIS should consider the W-2s from [REDACTED] as evidence of the petitioner's ability to pay since [REDACTED] and [REDACTED] (the petitioner) are both owned and run by the same individual – [REDACTED]. The petitioner's tax preparer, [REDACTED], CPA, confirms in his letter that [REDACTED] is the sole owner of both entities.

Upon *de novo* review, the AAO agrees with the director that the Forms W-2 from [REDACTED] are not evidence of the petitioner's ability to pay. Nor are they evidence of the beneficiary's employment with the petitioner.<sup>4</sup> It is an elementary rule that a corporation is a separate and distinct

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<sup>4</sup> The AAO also notes that the social security number listed on the beneficiary's W-2s is different from the social security number listed on his individual tax returns. The social security number on the beneficiary's Forms W-2 is [REDACTED]; whereas, the social security number on his tax returns is [REDACTED]. The inconsistencies in the record concerning the beneficiary's social security number call into question whether the petitioner knowingly utilized a social security number belonging to another person. The inconsistencies in the record also cast doubt on the petitioner's claim that it has employed and paid the beneficiary since 1990. We cannot accept any of the W-2s submitted as evidence of the petitioner's ability to pay for this additional reason.

legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. 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.” Hence, since [REDACTED] is a distinct and separate legal entity from the petitioner, it has no legal obligation to pay the wage of the beneficiary.

The record, nevertheless, establishes that the beneficiary was employed and paid by the petitioner in 2003 and 2004. The W-2s in the record reflect that the beneficiary received \$68 in 2003 and \$367.25 in 2004 from the petitioner. Both of these amounts are lower than the proffered wage of \$44,928 per year.

When the petitioner fails to establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner’s gross sales and profits and wage expense is 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.

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).

The record before the director closed on September 11, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). 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 the years 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income (loss)<sup>5</sup> of (\$54,421) (line 23 of Schedule K).
- In 2002, the Form 1120S stated net income (loss) of (\$16,375) (line 21, page one).
- In 2003, the Form 1120S stated net income (loss) of (\$51,322) (line 23 of Schedule K).
- In 2004, the Form 1120S stated net income (loss) of \$5,548 (line 21, page one).
- In 2005, the Form 1120S stated net income (loss) of (\$254,217) (line 21, page one).
- In 2006, the Form 1120S stated net income (loss) of (\$27,077) (line 21, page one).
- In 2007, the Form 1120S stated net income (loss) of (\$26,155) (line 21, page one).

Based on the table above, the petitioner did not have sufficient net income to pay the beneficiary’s wage in any of the years from 2001 to 2007.

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<sup>5</sup> Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In this case, there is no additional income, credit, or deduction on the petitioner’s schedule K and thus, the petitioner’s net income is found on line 21. However, because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K in 2001 and 2003, the petitioner’s net income in those years is found on Schedule K of its tax returns.

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>6</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 (liabilities) for 2001-2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets (liabilities) of \$144,823.
- In 2002, the Form 1120S stated net current assets (liabilities) of \$127,004.
- In 2003, the Form 1120S stated net current assets (liabilities) of \$115,503.
- In 2004, the Form 1120S stated net current assets (liabilities) of \$82,144.
- In 2005, the Form 1120S stated net current assets (liabilities) of \$11,336.
- In 2006, the Form 1120S stated net current assets (liabilities) of \$31,313.
- In 2007, the Form 1120S stated net current assets (liabilities) of (\$4,410).

Therefore, the petitioner had sufficient net current assets to pay the beneficiary's wage in 2001, 2002, 2003, and 2004 but not in 2005, 2006, and 2007.

Based on the net income and net current asset analysis, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, specifically in 2005, 2006, and 2007.

On appeal, the petitioner submits copies of [REDACTED] federal tax return for 2007. The record also contains copies of the beneficiary's individual tax returns and all of the supporting documentation from 2001 to 2007.

These documents are not relevant and cannot be used to support the petitioner's ability to pay the proffered wage. As noted above, [REDACTED] has no legal obligation to pay the wage of the beneficiary. Concerning the beneficiary's tax returns, no information about the petitioner's ability to pay can be concluded from the beneficiary's tax returns.

On appeal, the petitioner also indicates that the business suffered a great loss due to a fire incident in August 2005. Documentation concerning this loss is submitted on appeal. The petitioner also states that it has never had any problems with paying wages to all of its employees.

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<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.

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. 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 has submitted documentation of fire damage to the business in 2005. The extent of the fire damage is unclear. While there appears to have been over \$100,000 in damages, the record does not establish whether the business was closed, and if so, for how long. The AAO acknowledges that the loss that the petitioner suffered due to the fire incident in that year may have caused the petitioner to scale back on its gross receipts and profits. However, the record includes no evidence that would explain the petitioner's inability to pay the proffered wage in 2006 and 2007.

The petitioner has been in business since 1991 and, as of the date of filing the Form I-140, allegedly had 26 employees. On appeal, the petitioner claims to have never had any problems paying wages to all of its employees since the company was established in 1991, but no evidence has been submitted to show how many employees the petitioner has had since 1991 and how much they are paid. A mere claim or assertion by the petitioner concerning the petitioner's ability to pay cannot by itself demonstrate the reliability of that claim or statement. 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)).

Further, the tax returns and other relevant evidence in the record do not reflect a pattern of historic growth. In addition, the petitioner, unlike *Sonegawa*, has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1991. Nor has it included any evidence

or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability. 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.