

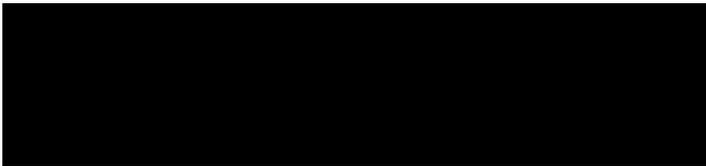
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

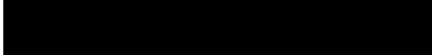


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Date: **APR 27 2011** Office: TEXAS SERVICE CENTER

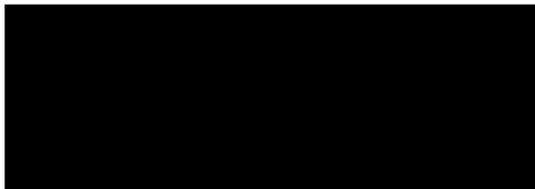
FILE: 
SRC 08 039 52974

IN RE: Petitioner: 

Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled 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, 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 for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fruit and vegetable store. It seeks to employ the beneficiary permanently in the United States as a stock clerk. 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 evidence submitted was not sufficient to warrant a favorable decision and 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 timely filed.¹ 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 July 29, 2008 denial, the primary 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.

¹ As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. We note that counsel has not specifically identified any erroneous conclusion of law or statement of fact for the appeal. Therefore, this appeal may be summarily dismissed. However, because counsel submitted additional evidence of the petitioner's ability to pay the proffered wage on appeal, the AAO will review the evidence submitted.

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 Form ETA 750 was accepted on April 19, 2002. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour for a 35-hour work week, which equates to \$18,200 per year. The Form ETA 750 states that the position requires six months of experience in the job offered.

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.²

It is noted that USCIS records indicate that the petitioner has filed at least three additional Forms I-140, Immigrant Petitions for Alien Workers on behalf of other beneficiaries.³ The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until each beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner failed to note the date that it was established,⁴ its current number of employees, its gross annual income, or its net annual income.⁵ According to the tax returns submitted on appeal, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 3, 2002, the beneficiary claimed to have worked 35 hours per week for the petitioner as a stock clerk from February 2001 until the date he signed the petition.

² 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).

³ LIN 07 011 52177, with a priority date of July 22, 2002, was filed on October 14, 2006 and approved on June 7, 2007; LIN 07 096 52118, with a priority date of January 24, 2006, was filed on February 13, 2007 and approved on February 19, 2008; EAC 01 2226 54989 (priority date not known) was filed on July 18, 2001 and denied on January 23, 2002.

⁴ According to the New York Department of State Division of Corporations website, the petitioner was incorporated on March 18, 1998. *See* http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=2285822&p_corpid=2240105&p_entity_name=%61%6D%62%6F%79%20%66%6F%6F%64&p_name_type=%41&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0 (accessed March 09, 2011). The petitioner's tax returns indicate that it was incorporated on May 29, 1998.

⁵ The director noted in his decision that the I-140 petition was incomplete and that several questions were left unanswered.

The beneficiary also indicated that he had worked 35 hours per week as a stock clerk for [REDACTED] from January 1995 until April 1997.

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 submitted Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, establishing that it employed and paid the beneficiary \$15,600, \$15,750, \$15,554, \$15,616, \$15,808, and \$15,808 in the years 2002 through 2007, respectively. Therefore, the petitioner must establish that it can pay the difference between the proffered wage and the wages paid, which is \$2,600 in 2002; \$2,450 in 2003; \$2,646 in 2004; \$2,584 in 2005; and, \$2,392 in 2006 and 2007.

If, as in this case, 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*, 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 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 at 881 (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 petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2003, the Form 1120 stated net income of \$18,294
- In 2004, the Form 1120 stated net income of \$58,531
- In 2005, the Form 1120 stated net loss of -\$51,803
- In 2006, the Form 1120 stated net income of \$63,570

Therefore, for the years 2003, 2004 and 2006, the petitioner had sufficient net income to pay the beneficiary the difference between the wages paid and the proffered wage. As previously noted, however, in 2002, 2003, 2004 and 2005, the petitioner had a pending petition for an additional alien beneficiary (LIN 07 011 52177). In 2006 and 2007, the petitioner had pending petitions for two additional beneficiaries (LIN 07 011 52177 and LIN 07 096 52118). The record does not indicate

the proffered wages for those beneficiaries.⁶ The petitioner also did not submit its IRS Forms 1120 for the years 2002 and 2007,⁷ and in 2005, the petitioner shows negative net income. Therefore, the petitioner has not established that it had sufficient net income in 2002, 2003, 2004, 2005, 2006 and 2007 to pay the beneficiary the difference between the wages paid and the proffered wage, and to pay the proffered wages of the other beneficiaries with petitions pending in those 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. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ 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 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 2003, the Form 1120 stated net current assets of - \$271,995
- In 2004, the Form 1120 stated net current assets of -\$312,220
- In 2005, the Form 1120 stated net current assets of - \$180,624
- In 2006, the Form 1120 stated net current assets of -\$159,820

Therefore, in 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the beneficiary the difference between the wages paid and the proffered wage, or to pay the proffered wages of the other beneficiaries with petitions pending in those years. The petitioner has also failed to establish that it had sufficient net current assets in 2002 and 2007 to pay the beneficiary the difference between the wages paid and the proffered wage, or to pay the proffered wages of the other beneficiaries with petitions pending in those years, as it did not submit its federal tax returns or other regulatory prescribed evidence for those years.⁹

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 difference between the

⁶ In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

⁷ It is noted that the State of New York estimated tax forms submitted for 2007 do not show the petitioner's net income or net current assets.

⁸ 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.

⁹ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

wages paid and the proffered wage, and to pay the proffered wages of the other beneficiaries with pending petitions, through an examination of wages paid to the beneficiary, or its net income or net current assets, in the years 2002, 2003, 2004, 2005, 2006 and 2007.

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 this case, the record reflects that the petitioner was established in 1998. It had substantial gross receipts in 2003, 2004, 2005 and 2006 and paid salaries and officer compensation in those years; however, the petitioner has not submitted any evidence of its gross receipts, salaries and officer compensation for 1998, 1999, 2000, 2001, 2002 and 2007. Therefore, the petitioner has not established its long-term sustained financial solvency and viability. The petitioner has not established the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry. Thus, assessing the totality of circumstances in this individual case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the instant beneficiary, as well as its additional alien beneficiaries, the proffered wage beginning on the priority date.

Beyond the decision of the director,¹⁰ the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with six months of qualifying employment experience. 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). 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). As previously discussed, the labor certification application was accepted on April 19, 2002 and stated that the proffered position requires six months of experience in the position offered.

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.

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petition is for an unskilled (other) worker and the job requires six months of experience in the proffered position. However, the record of proceeding does not contain evidence reflecting that the beneficiary has the qualifying employment experience that conforms to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position with six months of qualifying employment experience.

¹⁰ 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) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.¹¹ 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.

¹¹ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.