

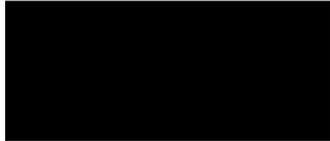
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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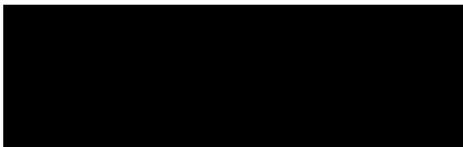
Date: Office: NEBRASKA SERVICE CENTER File: 

DEC 02 2011

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, 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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. On August 23, 2011, this office provided the petitioner with a Notice of Derogatory Information (NDI) in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information. The petitioner failed to respond to the NDI. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Indian specialty pursuant to sections 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, a labor certification accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that it had the continuing ability to pay the beneficiary the proffered wage for the 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.²

On August 23, 2011, this office notified the petitioner that no restaurant by the name of [REDACTED] operates at [REDACTED]. Instead, a business by the name of [REDACTED] advertised its grand opening on December 3, 2010. In addition, this office noted that the Connecticut Secretary of State Commercial Recording Division indicated that the business address for the petitioner, as reported on the petitioner's 2009 annual report, is [REDACTED]. And, the business advertised on the internet as occupying that address is [REDACTED] a Moroccan themed restaurant. Corresponding print-outs were provided with the NDI. The NDI requested evidence from the petitioner that the petitioning entity has not been dissolved and is in active status or that a valid successor-in-interest to the petitioner exists.

This office notified the petitioner that if it is currently dissolved or not in active status, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I & N Dec. 582, 586 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the

¹ Section 203(b)(3)(A)(i) of 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.

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).

visa petition). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See id.*

This office allowed the petitioner 30 days in which to provide the requested evidence. More than 30 days have passed and the petitioner has failed to respond to this office's NDI.³ Thus, the appeal will be dismissed.⁴

Further, 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. 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 United States Department of Labor (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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on February 14, 2003.⁵ The proffered wage as stated on the

³ The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

⁴ Additionally, as noted in the NDI, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

⁵ Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the

Form ETA 750 is \$12.50 per hour (\$26,000 per year). The Form ETA 750 states that the position requires two years of experience as a cook, Indian specialty.

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 1991 and did not specify the number of workers. On the Form ETA 750B, signed by the beneficiary on February 2, 2007, the beneficiary did not indicate that he had 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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'l Comm'r 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 submitted one pay stub showing that the petitioner paid the beneficiary \$1,000 in 2008 (check was dated April 11, 2008). As this amount is less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which was \$25,000 in 2008. The petitioner must demonstrate its ability to pay the full proffered wage in every other relevant year.

portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to United States Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

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*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial*, 696 F. Supp. 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, 558 F.3d 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*, 719 F.Supp. 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 submitted the following Forms 1120:

- The 2003 Form 1120 demonstrated net income of \$2,556.⁶
- The 2004 Form 1120 demonstrated net income of \$5,521.
- The 2005 Form 1120 demonstrated net income of \$31,255.
- The 2006 Form 1120 demonstrated net income of \$3,171.

Therefore, for the years 2003, 2004, and 2006, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner had sufficient net income to pay the proffered wage in 2005. However, USCIS electronic records show that the petitioner filed eight other Form I-140 petitions, which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

The other petitions submitted by the petitioner have priority dates of January 5, 1998, January 12, 1998, March 1, 2001, March 20, 2001, April 27, 2001 (two), July 18, 2002, and January 3, 2005, respectively.

In response to the RFE, the petitioner stated the proffered wage for four of the sponsored workers and stated that those four workers have all left the petitioner's employ. The petitioner stated that the worker with a priority date of March 20, 2001 and the two workers with a priority date of April 27, 2001 had a proffered wage of \$23,400 and the sponsored worker with a priority date of July 18, 2002 had a proffered wage of \$26,000. The petitioner did not submit the labor certifications for any of the other sponsored workers so that we are unable to ascertain the proffered wage for those workers. The petitioner submitted Forms W-2 for some of these other sponsored workers. The Forms W-2 show that the petitioner paid the represented proffered wage to one beneficiary in 2002 and 2003 and the full proffered wage to another in 2006. No evidence was submitted to show the proffered wage for the other four beneficiaries of the petitions, about the current immigration status of any of the beneficiaries, whether any of the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to any of the beneficiaries. Although the petitioner states that

⁶ The petitioner submitted its tax returns for 2001 and 2002, but as those returns cover a period prior to the priority date, they will be considered only generally.

four of the workers have left its employ, it submitted no evidence to support this assertion. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner's net income in 2005 exceeded the proffered wage to the instant beneficiary, however, the petitioner failed to establish its ability to pay the wages of its other sponsored beneficiaries in 2005 based on its net income.

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.⁷ 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 Forms 1120 demonstrated the following net current assets:

- The 2003 Form 1120 demonstrated net current assets of \$5,824.
- The 2004 Form 1120 demonstrated net current assets of \$8,011.
- The 2005 Form 1120 demonstrated net current assets of \$12,903.
- The 2006 Form 1120 demonstrated net current assets of \$33,929.

The petitioner's net current assets for 2003, 2004, and 2005 were less than the proffered wage, so the petitioner did not establish its ability to pay the proffered wage for those years for the instant beneficiary or any of the additional sponsored workers. The petitioner's net current assets in 2006 exceed the beneficiary's proffered wage, but the petitioner presented no evidence concerning the proffered wage to the other beneficiary(s) whose petitions were also pending at that time and any wages paid to those sponsored workers. Thus, the petitioner did not have sufficient net current assets to pay the proffered wages of all of its sponsored beneficiaries in 2003, 2004, 2005, and 2006.

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 through an examination of wages paid to the beneficiary, or its net income or net current assets.⁸

⁷ 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.

⁸ The record contains a May 4, 2004 memorandum from [REDACTED] without explanation from counsel or the petitioner as to why it was provided. Interoffice Memo. from [REDACTED]

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner was incorporated in 1991. It has sponsored nine workers, including the beneficiary, since 1998. The petitioner's 2001 to 2006 tax returns did not demonstrate an overall increase in gross revenues⁹ or that the petitioner's expenditures or losses in one year were not indicative of its overall financial standing. In addition, the total amount of salaries and wages paid fluctuated between 2001 and 2006 from a high of \$112,920 in 2004 to a low of \$44,496 in 2006. The petitioner submitted no evidence to liken its situation to the one in *Sonegawa* including evidence of its reputation or unusual expenses.

In response to the director's March 13, 2008 request for evidence, the petitioner also stated that the beneficiary would be assuming the position of another sponsored worker who had already left the petitioner's employ. On appeal, counsel stated that the beneficiary would be taking the place of "temporary cooks." "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*,

Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004).

⁹ The petitioner's gross revenues fluctuated between 2001 and 2006 from a high of \$333,041 in 2005 to a low of \$220,998 in 2006.

19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner submitted no evidence that the beneficiary would be taking the position of a former employee. Although the director in his decision also noted this deficiency, the petitioner submitted no new evidence to this point on appeal. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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.

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