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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

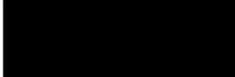


**U.S. Citizenship
and Immigration
Services**

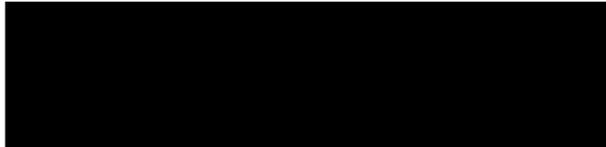


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DATE: **DEC 08 2011** OFFICE: TEXAS SERVICE CENTER

FILE: 

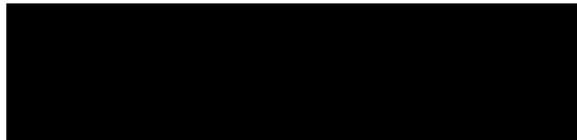
IN RE: Petitioner:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The immigrant visa petition was denied by the Director, Texas Service Center (Director). An appeal was filed, which was rejected by the Chief, Administrative Appeals Office (AAO), as not timely filed and returned to the Director for consideration as a motion to reopen. The Director dismissed the motion as not timely filed. The AAO reopened the case on its own motion for the purpose of considering the appeal on the merits. The appeal will be sustained, and the petition approved.

The petitioner is a pediatric medical center. It seeks to employ the beneficiary permanently in the United States as a handyman in accordance with section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). Under this statutory provision, preference classification may be granted 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 petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on November 20, 2007. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification, which was filed at the Department of Labor (DOL) on March 23, 2005, and certified by the DOL on July 25, 2007.

On October 29, 2008, the Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary.

The petitioner filed an appeal, Form I-290B (Notice of Appeal or Motion), on January 1, 2009, accompanied by additional documentation. On June 24, 2010, the AAO issued a decision rejecting the appeal on the ground that it was not filed within the 33-day period prescribed in the regulations. The AAO found that the untimely appeal met the requirements of a motion to reopen, however, and returned the case to the Director for the issuance of a new decision.

On August 31, 2010, the Director dismissed the motion on the ground that the Form I-290B was not filed within the 30-day period prescribed in the regulations, and did not demonstrate that the delay was reasonable and beyond the petitioner's control.

On September 20, 2011, the AAO reopened the proceeding on its own motion, in accordance with its authority under 8 C.F.R. § 103.5(a)(5)(ii). On that date the AAO sent a notice to the petitioner advising of the reopening and requesting that additional evidence be submitted to establish the petitioner's continuing ability to pay the proffered wage and the beneficiary's qualifications for the job offered in accordance with the terms of the labor certification. The petitioner responded on October 20, 2011, with a brief from counsel and additional documentation.

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.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

Petitioner's Ability to Pay the Proffered Wage

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 labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In this case, the Form ETA 750 was accepted by the DOL on March 23, 2005. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour for the basic 40-hour work week, plus \$24.00 per hour for six hours of overtime per week. That amounts to \$40,768 per year – consisting of \$33,280 in basic pay and \$7,488 in overtime pay. U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, 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, 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 between the priority date and the present, USCIS first examines 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 indicates that it has employed the beneficiary as a handyman since July 2004, but that it paid the beneficiary in cash for the first few years before putting him on its payroll in 2009. Consistent with this scenario, the record includes Forms W-2, Wage and Tax Statements, issued by

which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

the petitioner to the beneficiary for the years 2009 and 2010, and two pay statements issued to the beneficiary in 2011. The W-2 form for 2009 records “wages, tips, other compensation” to the beneficiary of \$23,549.82. The W-2 form for 2010 records “wages, tips, other compensation” to the beneficiary of \$36,380.96. The pay statements in 2011 – one for the pay period ending April 1 and the other for the pay period ending October 14 – show that the beneficiary’s gross weekly pay is \$830.77 and that his year-to-date gross pay amounted to \$30,061.57 on October 14, 2011. This accounts for 41 weeks of 2011. Assuming no change in the beneficiary’s rate of pay through the end of 2011, his gross pay for the year will be approximately \$38,126.87. No documentation has been submitted to show how much the petitioner paid the beneficiary during the years 2005-2008. Thus, based on the evidence in the record, the beneficiary received the following compensation from the petitioner from the priority date onward:

2005	0
2006	0
2007	0
2008	0
2009	\$23,549.82
2010	\$36,380.96
2011	\$30,061.57 (partial year)

Thus, the petitioner has not established its ability to pay the annualized proffered wage of \$40,768 based on its actual compensation to the beneficiary for any of the years from 2005 through 2011.

As an alternate means of determining the petitioner’s ability to pay the proffered wage USCIS will next examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. *See 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. *See 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 wage expense is misplaced. Showing that the petitioner’s gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary 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 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). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner’s net income.

The petitioner is a personal services corporation. The record includes the petitioner’s federal income tax returns – Forms 1120, U.S. Corporation Income Tax Returns – for the years 2005-2009.² Net income for those years (recorded on page 1, line 28) amounted to the following:

2005	\$37,558
2006	\$12,824
2007	- \$13,598
2008	- \$102,284
2009	\$35,003

Thus, the petitioner cannot establish its continuing ability to pay the annualized proffered wage of \$40,768 based on its net income in any of the years 2005 through 2008. In 2009, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As another alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ A

² The petitioner had not yet filed its federal income tax return for 2010 at the time of its response to the AAO’s request for evidence in October 2011.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist

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 this case the petitioner's federal income tax returns show net current assets for the years 2005-2008 in the following amounts:

2005	-\$22,618
2006	\$4,694
2007	\$3,554
2008	\$34,093

For the years 2005-2008, the petitioner's net current assets did not equal or exceed \$40,768, and there is no record of any payments from the petitioner to the beneficiary. For the years 2005-2008, therefore, the petitioner has not established its ability to pay the proffered wage based on its net current assets.

Thus, with the exception of the year 2009, the petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present by means of wages actually paid to the beneficiary, its net income, or its net current assets.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612.⁴ As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside

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.

⁴ 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.

of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner indicated on the Form I-140 that its medical center was established in [REDACTED] at the time the instant petition was filed in 2007. The petitioner's website [REDACTED] accessed November 30, 2011) states that it currently has 13 licensed physicians, a nurse practitioner, and 30 other employees at five office locations in [REDACTED]. The federal income tax returns in the record show that the petitioner's gross receipts during the five-year period of 2005-2009 were fairly consistent – \$6,100,824 (2005), \$6,724,803 (2006), \$7,308,364 (2007), \$7,300,202 (2008), and \$6,877,379 (2009). Thus, the petitioner's business appears to be solid, with a modest rise in income over the recent five-year period. As previously discussed, the petitioner's net income or net current assets were never enough to pay the annualized proffered wage of \$40,768 between 2005 and 2011 (with the exception of 2009), though net income was close in 2005 (\$37,558) and net current assets were close in 2008 (\$34,093) and 2009 (\$38,509). The petitioner's actual pay to the beneficiary was also close to the annualized proffered wage in 2010 (\$36,380.96) and 2011 (\$30,061.57, with \$38,126.87 projected by the end of the year). Only in 2006 and 2007 were there great gaps between the annualized proffered wage and all three of the foregoing figures – the petitioner's net income, the petitioner's net current assets, and the petitioner's actual compensation to the beneficiary (no record).

The AAO notes that the petitioner's federal income tax returns include amounts for compensation of officers (entered at page 1, line 12, and Schedule E) for each of the years 2005-2009. Compensation of officers is an expense category explicitly itemized on the Form 1120, U.S. Corporation Income Tax Return. For this reason, the figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to the figures for ordinary income. Moreover, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa*, the AAO notes that the petitioner's personal service corporation status is a relevant factor to be considered in determining its ability to pay. A personal service corporation is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate.

Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The federal income tax returns indicate that [REDACTED] held 33% of the petitioner's common stock during the years 2005-2009 and performed the personal services of the pediatric medical practice. The Forms 1120 show in Schedule E (Compensation of Officers) that the petitioner elected to pay [REDACTED] the following amounts during those years:

	[REDACTED]	[REDACTED]	<u>Total</u>
2005	\$204,504	\$283,118	\$487,622
2006	\$275,055	\$316,850	\$591,905
2007	\$241,864	\$284,511	\$526,375
2008	\$247,482	\$218,058	\$465,540
2009	\$232,464	\$228,058	\$460,522

The figures for [REDACTED] are supported by W-2 Forms for the years 2006-2009. The compensation received by Dr. [REDACTED] during the years 2005-2009 was not in the form of fixed salaries. As explained by [REDACTED] the petitioner's president, in a letter to the AAO dated October 7, 2011: "My compensation is determined after all expenses have been paid." In his letter [REDACTED] also declared that for every year the petitioner's tax returns did not demonstrate its ability to pay the proffered wage to the beneficiary, "I would have been personally willing to reduce my compensation as a pediatrician and officer of [REDACTED] to pay that salary."

As previously discussed, for four of the seven years from 2005 through 2011 the shortfall between the annualized proffered wage of \$40,768 and the petitioner's net income (2005) or net current assets (2008) plus the beneficiary's actual compensation from the petitioner (2010 and 2011) was small.⁵ The shortfalls in those years were \$3,210 (2005), \$6,675 (2008), \$4,387.04 (2010), and \$10,706.43 (2011), although the shortfall will only be \$2,641.13 if the beneficiary's rate of pay remains unchanged for the remainder of 2011. In 2005 and 2008 the shortfalls represented about 1.6% and 2.7%, respectively, of [REDACTED] yearly compensation. This percentage range will more likely than not be even lower in 2010 and 2011, assuming the same range of compensation for [REDACTED] as he received in the previous five years.⁶ In the AAO's view, [REDACTED] had the ability to pay these modest amounts to the beneficiary out of his personal compensation. In 2006 the shortfall

⁵ As previously discussed, there was no shortfall in 2009 because the amount of compensation the beneficiary received from the petitioner plus the petitioner's net income or net current assets exceeded the annualized proffered wage.

⁶ This assumption is borne out in [REDACTED] Form W-2 for 2010, which recorded "wages, tips, other compensation" in the amount of \$244,464.00.

between the annualized proffered wage and the petitioner's net income (\$12,824) was \$27,944, which represented about 10% of [REDACTED] compensation that year. In 2007, as far as the record shows, the shortfall was the entire proffered wage of \$40,768, which represented close to 17% of Dr. [REDACTED] compensation that year.⁷ Even if [REDACTED] covered these shortfalls in their entirety in 2006 and 2007, his remaining compensation in those years would have amounted to about \$250,000 and \$200,000, respectively. It is also noted that the combined compensation of [REDACTED] and [REDACTED] totaled more than \$500,000 in each of the years 2006 and 2007. Accordingly, the petitioner has established its ability to pay the proffered wage in those years as well.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of USCIS is 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*. Based on all the documentation of record and the foregoing analysis, the AAO concludes that the totality of the petitioner's circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage for the subject position from the priority date up to the present. The job offer is realistic.

Accordingly, the Director's decision of October 29, 2008, denying the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage, will be withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The Director's decision of October 29, 2008 is withdrawn. The petition is approved.

⁷ In actuality, the shortfalls in 2006 and 2007 were probably less than \$27,944 and \$40,768, respectively, because the beneficiary states he has worked for the petitioner since 2004 and the petitioner states that the beneficiary was paid in cash until 2009. The evidence of record, however, does not reveal how much compensation the beneficiary received from the petitioner in 2006 and 2007. Accordingly, none of the alleged cash payments in 2006 and 2007 can be taken into account.