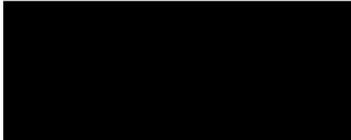


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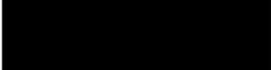
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



B6

FILE:  Office: TEXAS SERVICE CENTER Date: FEB 07 2011

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section  
203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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 your 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  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the visa preference petition. The petitioner appealed. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a kitchen helper. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the DOL accompanied the petition. The director determined that the petitioner failed to establish its continuing ability to pay the proffered wage. The director denied the petition on May 28, 2009.

On appeal, the petitioner submits evidence relevant to the petitioner's ability to pay the proffered wage and contends that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

Section 203(b)(3)(A)(iii) of 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:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be

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<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).

submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate the ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on July 14, 2003, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is \$6.55 per hour (\$13,624 per year).<sup>2</sup> There are no requirements for training or education. The record indicates that the instant beneficiary is a substitution for the original beneficiary specified on the Form ETA 750.<sup>3</sup>

On Part 5 of the Form I-140, Immigrant Petition for Alien Worker, filed on July 16, 2007, the petitioner claimed to have been established on July 5, 1983 and to currently employ five workers. It also claimed gross annual income of \$410,685 and \$43,699 in net annual income. On Part B of Form ETA 750, the beneficiary does not claim to have worked for the petitioner.

Relevant to its continuing ability to pay the proffered wage, the petitioner has provided copies of its 2003, 2004, 2005, 2006 and 2007 Form 1120, U.S. Corporation Income Tax Return.<sup>4</sup> The

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<sup>2</sup>On appeal, counsel claims that the wage should be \$11,921 based on 35 hours at \$6.55 an hour. The labor certification specifically states that the position is for 40 hours a week and was certified based on 40 hours. 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).

<sup>3</sup> The regulation at 20 C.F.R. part 656 was amended through a final rule-making published on May 17, 2007, which took effect on July 16, 2007 (71 Fed. Reg. 27904) ("DOL final rule"). The DOL final rule included several provisions that impacted adjudication of Form I-140 petitions that require DOL-approved labor certifications as a supporting document. New 20 C.F.R. § 656.11 prohibited the alteration of any information contained in the labor certification after the labor certification application is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. New 20 C.F.R. § 656.30(b)(1) also provided a 180-day validity period for approved labor certifications; employers have 180 calendar days after the date of approval by DOL within which to file an approved permanent labor certification in support of a Form I-140 petition with USCIS. New 20 C.F.R. § 656.30(b)(2) established an implementation period for the continued validity of labor certifications that were or are approved by DOL prior to [July 16, 2007]; such labor certifications will have to be filed in support of an I-140 petition within 180 days after the effective date of the DOL final rule. USCIS accepts Form I-140 petitions that request labor certification substitution that are filed prior to July 16, 2007. An additional USCIS UPDATE, dated July 13, 2007, and superseding an announcement, dated May 24, 2007, advised that the new DOL regulations prohibiting substitution of an alien beneficiary on any petition filed with a permanent labor certification filed *after* July 16, 2007. The instant petition requesting substitution of the original beneficiary was accepted because it was filed on July 16, 2007.

<sup>4</sup> For a C corporation, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable

returns indicate that the petitioner's fiscal year runs from April 1 to March 31, of the following year. Thus, its 2003 through 2007 tax returns begin covering the period from April 1, 2003 through March 31, 2006. The returns indicate the following:

	2003	2004	2005	2006
Net Income	-\$ 4,476	\$49,054	\$43,699	\$135,377
Current Assets	\$60,778	\$95,498	\$136,393	\$ 48,834
Current Liabilities	\$14,033	\$15,118	\$ 21,739	\$ 58,063
Net Current Assets	\$46,745	\$80,380	\$114,654	-\$ 9,229
	2007			
Net Income	\$ 79,246			
Current Assets	\$101,434			
Current Liabilities	\$ 13,825			
Net Current Assets	\$ 87,609			

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>6</sup>

income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

<sup>5</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.

<sup>6</sup> A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 overall 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, there is no evidence that the petitioner has employed the beneficiary.

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 (1<sup>st</sup> 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). 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).

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and will not, therefore, become funds available to pay the proffered wage.

With respect to depreciation as claimed by counsel, 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 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

Here, the director determined that the petitioner had sponsored three other beneficiaries. Therefore, the petitioner’s ability to pay the instant beneficiary must be considered within the context of the petitioner’s sponsorship of other beneficiaries. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its job offer to the beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In this case, information provided by the petitioner indicates that it has sponsored the beneficiaries under receipt numbers: [REDACTED] with a priority date of September 17, 2001 and a proffered wage of \$11,960; [REDACTED] with a priority date of May 8, 2003 and a proffered wage of \$22,069;<sup>7</sup> and [REDACTED] with a priority date of August 27, 2003 and a proffered wage of \$28,392.

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<sup>7</sup> USCIS electronic records indicates that this beneficiary obtained permanent residency on October 23, 2010, however, the period of time that the petitioner was obligated to demonstrate the ability to pay this wage in combination with the other sponsored beneficiaries’ wages remains relevant.

It is noted, however, that USCIS electronic records indicate that an additional beneficiary was sponsored in a Form I-140 petition with a receipt number [REDACTED] and which was approved on May 14, 2008 with a priority date of March 12, 2007. The petitioner did not include any information about this beneficiary, the petition's priority date, or the proffered wage when it responded to the director's request for additional evidence. The petitioner additionally did not submit any Wage or Tax Statements (W-2s) indicating the employment or payment of wages to any of the sponsored beneficiaries.

As noted by the director, the sponsored four beneficiaries' offered wages (including the beneficiary's) collectively amounted to \$76,045. As set forth above, this amount could be covered by either the petitioner's net current assets or its net income in 2004, 2005, 2006 and 2007 and show its ability to pay in those years for these four beneficiaries, but could not be covered by either the petitioner's net income of -\$4,476 or its net current assets of \$46,745 in 2003. However, with the additional sponsored worker to consider in 2007, it is unclear that the petitioner could pay this worker as well since the petitioner failed to identify the proffered wage.

On appeal, the petitioner, through counsel submits copies of 2003 W-2s for two shareholders as additional income for the petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is noted that 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."

Counsel also submits copies of the 2003 through 2007 W-2s of one of the petitioner's employees whom counsel states that the beneficiary will replace. Counsel's undocumented assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, there has been no evidence submitted to verify the worker's full-time employment and no credible evidence that the petitioner has replaced him with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Additionally, there is no evidence that the position of the worker identified by counsel involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) are applicable. That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the present matter, as set forth above, the petitioner has not established that the petition merits approval under *Sonegawa*. As noted above, the petitioner must demonstrate that it can pay the proffered wage of all sponsored workers, as well as the instant beneficiary's proffered salary. Although information relevant to three of the other sponsored beneficiaries was submitted, no information relevant to [REDACTED] was provided, despite that the petition was filed and pending at the time of the petitioner's RFE response. Further, no unusual business circumstances or reputational factors have been shown to exist in this case that parallel those in *Sonegawa*, nor has it been established that the filing year was an uncharacteristically unprofitable year for the petitioner within a framework of profitable years. Additionally, the petitioner has not established its historical growth since 1983, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Thus, assessing the overall 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 beginning as of the priority date.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.