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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., MS2090  
Washington, DC 20529-2090



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



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FILE:



Office: TEXAS SERVICE CENTER

Date:

**FEB 28 2011**

IN RE:

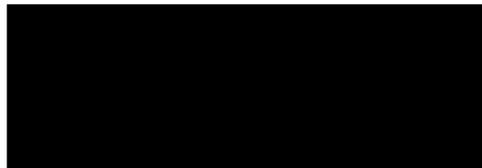
Petitioner:



Beneficiary:

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

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,

*Elizabeth McCormack*

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 operates a cleaning service. It seeks to employ the beneficiary permanently in the United States as a night janitorial supervisor. 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 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 23, 2009 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, 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, 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 (Act. Reg. Comm. 1977).

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

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 1985 and to currently employ 165 workers. The petitioner's tax returns indicate that it incorporated on December 11, 1985. The Form ETA 750 was accepted on October 25, 2004. The proffered wage as stated on the Form ETA 750 is \$11.76 per hour which equates to \$24,460.80 per year based on a 40-hour week.<sup>2</sup>

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 beneficiary claims on Form ETA 750, Part B, Statement of Qualifications of Alien, that she was employed by the petitioner as a janitor from July 2001 to July 2003, and as a night janitor supervisor from July 2003 to October 1, 2004 (the date Form ETA 750 was signed). In the instant case, the petitioner provided the Forms W-2 showing the wages it paid to the beneficiary during the time periods shown in the table below.<sup>3</sup>

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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 at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> The petitioner lists an overtime rate of \$15.00 per hour on the labor certification but does not state that overtime is regularly required.

<sup>3</sup> The beneficiary's W-2 forms are issued to the beneficiary under the name of [REDACTED] and the social security number [REDACTED]. The beneficiary's 2004, 2005, 2006 and 2007 Forms 1040A U.S. Individual Income Tax Returns, however, indicate a tax identification number of [REDACTED]. Absent clarification of this inconsistency in the record, the AAO is not inclined to accept the W-2 forms as persuasive evidence of wages paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain

- In 2004, the beneficiary was paid \$13,945.50 (\$10,515.30 less than the proffered wage).<sup>4</sup>
- In 2006, the beneficiary was paid \$10,857.21 (\$13,603.59 less than the proffered wage).
- In 2007, the beneficiary was paid \$7,052 (\$17,408.80 less than the proffered wage).

It is not clear from the record that the beneficiary's name is also [REDACTED] and that the wages paid to [REDACTED] may be credited as paid to the beneficiary. Assuming these W-2s represent wages paid to the beneficiary, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for the years 2004, 2006, and 2007. The petitioner must show that it can pay the remaining wages for the years 2004, 2006, and 2007.

The petitioner also provided the beneficiary's earning record for 2004 and the beneficiary's year to date (YTD) earning statements for the pay periods ending December 23, 2005 and 2006 and December 22, 2007.<sup>5</sup> The AAO has considered the beneficiary's 2004 earnings as listed on the beneficiary's 2004 IRS Form W-2 Wage and Tax Statement. The petitioner also provided the beneficiary's 2004, 2005, 2006 and 2007 federal income tax returns which attach Forms W-2 from a different employer or duplicate the petitioner's W-2 Forms to the beneficiary already considered. These documents do not show the petitioner's ability to pay the proffered wage from the priority date, October 25, 2004, and onwards.

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. 813, 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

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or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is also noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. See *Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8<sup>th</sup> Cir. 2010).

<sup>4</sup> The petitioner did not provide Form W-2 for the year 2005.

<sup>5</sup> This statement reflects year-to-date total wages of \$9,496.49 as of December 23, 2005; \$9,962.63 as of December 23, 2006 and \$4,706.53 as of December 22, 2007. The record does not contain any explanation for why the beneficiary's Form W-2 from the petitioner indicated that she earned \$7,052 in 2007; when the payroll record reflects that as of December 22, 2007, she had only earned \$4,706.53. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 v. Napolitano*, *supra* (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 record before the director closed on June 4, 2008 with the petitioner's response to the director's request for evidence (RFE). The petitioner submitted its 2004 through 2007 Form 1120, U.S. Corporation Income Tax Returns, its Profit and Loss Statements for the years 2005 through 2007 and its Balance Sheets for the periods ending December 31, 2005 through 2007. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the petitioner's Form 1120 stated net income on line 28 of \$951.

- In 2005, the petitioner's Form 1120 stated net income on line 28 of -\$14,214.
- In 2006, the petitioner's Form 1120 stated net income on line 28 of -\$9,320.
- In 2007, the petitioner's Form 1120 stated net income on line 28 of -\$842.

The petitioner has not established its ability to pay the proffered wage of \$24,460.80 as of the priority date and onwards.

USCIS records indicate that the petitioner has filed five Form I-140 petitions, of which two were approved and three were denied, including the instant petition. The petitioner would need to demonstrate its ability to pay the two approved sponsored worker's proffered wages in addition to the beneficiary's wage, from the respective priority date until each respective beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the petitioner's Form 1120 stated net current assets of \$30,430.
- In 2005, the petitioner's Form 1120 stated net current assets of -\$86,604.
- In 2006, the petitioner's Form 1120 stated net current assets of -\$75,927.
- In 2007, the petitioner's Form 1120 stated net current assets of -\$72,879.

The petitioner could not have paid the difference between what the beneficiary already earned and the beneficiary's proffered wage from its net current assets for the years 2004 through 2007.

The petitioner provided its Profit and Loss Statements for the years 2005 through 2007 and its Balance Sheets for the periods ending December 31, 2005, December 31, 2006, and December 31, 2007. However, there is no indication that these financial statements have been audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. As the statements are unaudited, they are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The evidence submitted by the petitioner demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 the instant case, the petitioner has not provided its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage. The petitioner has not established that unusual or extraordinary circumstances prevented it from paying the beneficiary the proffered wage in any of the relevant years. 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.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the proffered wage and both of its other sponsored workers from the priority date, October 25, 2004, through the present.

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.