

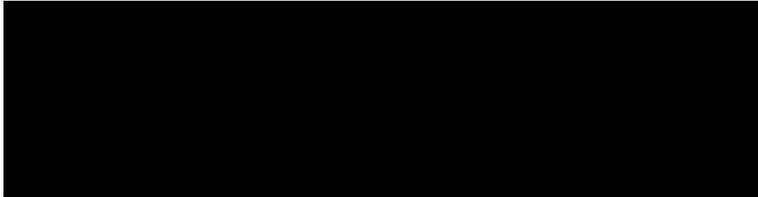
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., NW - MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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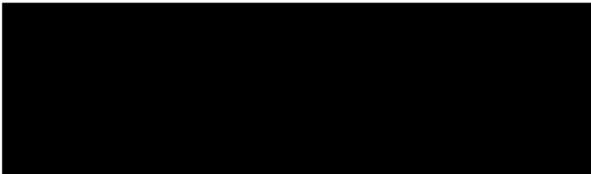
Petitioner:

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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 director denied the petition accordingly.

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 October 7, 2008 denial, the single 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.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. The petitioner states on the petition that the company was established on August 30, 1990 and currently employs 35 workers. The Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour which equates to \$20,800 per year based on a 40-hour week.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner's letter dated February 23, 2007 and the Form G-325A submitted by the beneficiary in support of the Form I-485 Application to Adjust Status state that the beneficiary has been employed by [REDACTED] as a cook from March 1998 to June 2002. The beneficiary also claims on Form ETA 750, Part B, Statement of Qualifications of Alien, that he was employed by [REDACTED] as a cook from March 1998 to April 17, 2001 (the date Form ETA 750 was signed). However, [REDACTED] is a separate and distinct corporate entity from the petitioner and the payments by the beneficiary's employer in Pasadena, Ca., may not be credited to the petitioner in determining whether it has the ability to pay. The petitioner has not shown that the petitioning entity and [REDACTED] are classified as members of a controlled group.² The petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date, April 20, 2001 and onwards.

¹ 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).

² Corporations are classified as members of a controlled group if they are connected through certain

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. 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 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

stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled. Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120).

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).

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 17, 2008³ with the receipt by the director of the petitioner's submissions in response to the director's second request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The director's first RFE requested the petitioner to provided evidence of its ability to pay the proffered wage of \$20,800 per year as of April 20, 2001, copies of the petitioner's federal income tax returns for 2002, 2003, 2005, 2006 and 2007, annual reports, or audited financial statements and copies of the beneficiary's W-2 statements for the same years, and the beneficiary's most recent pay vouchers. The petitioner submitted copies of its income tax returns that show that its fiscal year is from July 1st of the current year to June 30th of the next year for the years 2001 to 2006. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2001, the petitioner's Form 1120 stated net income on line 28 of -\$42,146.
- In 2002, the petitioner's Form 1120 stated net income on line 28⁴ of \$26,575.
- In 2003, the petitioner's Form 1120 stated net income on line 28 of -\$20,563.
- In 2004, the petitioner's Form 1120 stated net income on line 28 of -\$4,882.
- In 2005, the petitioner's Form 1120 stated net income on line 28⁵ of \$15,642.
- In 2006, the petitioner's Form 1120 stated net income on line 28 of \$4,024.
- In 2007, the petitioner's Form 1120 stated net income on line 28 of \$4,592.

Therefore, for the years 2001, 2003, 2004, 2005, 2006 and 2007 the petitioner did not have sufficient net income to pay the proffered wage of \$20,800 per year. USCIS records indicate that the petitioner

³ The director's decision gives this date as the date a response was received from the petitioner's counsel.

⁴ The director erred in stating the petitioner's net income was \$0 in 2002. Therefore, this portion of the director's decision is withdrawn.

⁵ The director erred in stating the petitioner's net income was \$0 in 2005. Therefore, this portion of the director's decision is withdrawn.

has filed 11 Form I-140 petitions, of which five were approved, and six were denied, including the instant petition. The petitioner would need to demonstrate its ability to pay the sponsored worker's proffered wages for each I-140 beneficiary, including the instant beneficiary, from the respective priority date until each respective beneficiary obtains permanent residence, or until the respective Form I-140 is denied. 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.⁶ 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 2001, the petitioner's Form 1120 stated net current assets of \$6,359.
- In 2002, the petitioner's Form 1120 stated net current assets of \$45,317.
- In 2003, the petitioner's Form 1120 stated net current assets of \$33,080.
- In 2004, the petitioner's Form 1120 stated net current assets of \$10,822.
- In 2005, the petitioner's Form 1120 stated net current assets of \$34,505.
- In 2006, the petitioner's Form 1120 stated net current assets of \$1,379.
- In 2007, the petitioner's Form 1120 stated net current assets of \$5,400.

Although the evidence shows that the petitioner had sufficient net current assets to pay the beneficiary in 2002, 2003 and 2005, it had insufficient net current assets to pay the proffered wage in 2001, 2004, 2006 and 2007. Further, as noted above, the petitioner must be able to show the ability to pay all of its sponsored workers from each respective priority date. The chart reflects that the petitioner could not have paid the proffered wage of \$20,800 for the beneficiary and the other sponsored workers from its net current assets. Thus, the petitioner has not established its ability to pay the proffered wage from its net income or its net current assets for all sponsored workers from the instant beneficiary's priority date, April 20, 2001, and onwards.

The petitioner submits a chart into the record that it states reflects the salaries paid to four of its main cooks and a summary of the total wages paid to each of the four cooks from 2001 through 2007. The petitioner states that the beneficiary is the replacement for its former full-time cook [REDACTED]

⁶ 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.

⁷ According to the petitioner's chart, the petitioner paid [REDACTED] \$32,200 in 2001, \$31,200 in 2002, and \$7,900 in 2003. This information is substantiated by the Quarterly Wage and Withholding

The petitioner also states that the salary and overtime pay of [REDACTED] is available to pay the beneficiary's proffered wage.⁸ The petitioner also states that there is a very high turnover of cooks and that it constantly needs cooks. The petitioner submits a list of 38 cooks employed by the petitioner at various times from 2001-2008. It states that it needs four cooks per day to cover both shifts and sometimes needs six cooks on weekends. However, the record does not verify [REDACTED] full-time employment, or provide evidence that the petitioner will replace [REDACTED] with the beneficiary or reassign [REDACTED] salary and overtime work to the beneficiary. In general, wages 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. Moreover, there is no evidence that the positions held by [REDACTED] involve the same duties as those set forth in the Form ETA 750. Although the declaration signed by the petitioning entity's president, [REDACTED], states that the cooks' duties are similar, the petitioner has not documented the positions held by [REDACTED] the duties they performed and their termination. The petitioner has not documented how much of the wages paid to [REDACTED] were his regular salary and how much were his overtime wages for his work as a cook. Without further proof, the petitioner has not established that the beneficiary will replace [REDACTED], or perform the work of [REDACTED] and that any wages paid to [REDACTED] can be figured to calculate whether the petitioner has the ability to pay the beneficiary's proffered wage.⁹ Simply 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The record contains copies of checks made payable to the beneficiary from [REDACTED]. The checks are dated January 11, 2008, January 25, 2008, February 1, 2008 and February 15, 2008 and made payable for the total amount of \$0 but refer to a direct deposit amount of \$1,183.66, \$2,367.33, \$617.96 and \$2,985.29, \$1,183.67 and \$4,168.96, respectively. However, the checks are not issued by the petitioning entity and the petitioner has not established the relationship between [REDACTED] and itself.

The petitioner also submitted its Income Statement for the period January 1 through December 31, 2007 which shows the net income as \$46,137.90. However, the statement is not audited and differs from the net income reported on the petitioner's 2007 federal income tax return. The regulation at 8

Reports contained in the record.

⁸ [REDACTED] was paid \$21,764 in 2001, \$19,701 in 2002, \$21,118 in 2003, \$25,175 in 2004, \$29,095 in 2005, \$29,442 in 2006 and \$28,404 in 2007. This information is substantiated by the Quarterly Wage and Withholding Reports contained in the record.

⁹ Even if the wages paid to [REDACTED] in 2001, 2002 and 2003 and the overtime wages paid to [REDACTED] in 2001-2007 were credited to the petitioner as wages available to pay the beneficiary in those years, the record does not indicate the petitioner's ability to pay the wage in 2004, 2005, 2006 and 2007. Further, the wages paid to [REDACTED] do not cover the salaries owed to the other five sponsored workers.

C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited.

The record also contains the petitioner's Bank of America business checking account statements for four months in 2001, 11 months in 2004, 11 months in 2006, and the entire year of 2007. The petitioner's reliance on the balances in its bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

Counsel contends that the petitioner has consistent growth in gross receipts. However, 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. *K.C.P. Food Co., Inc. v. Sava, supra*. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

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's Form I-140 states that the company was established on August 30, 1990 and currently employs 35 individuals. Counsel claims that any financial analysis should include an examination of the company's financial strength and vitality since 1990 and its continuous employment of numerous employees including cooks. Counsel contends that the petitioner will pay the proffered wage to the beneficiary as can be shown by its payment of wages to [REDACTED] who the beneficiary will replace and to [REDACTED] of wages and overtime pay. However, as noted above, wages already paid to others are not available to prove the ability to pay the wages proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner's tax returns show fairly low and negative net incomes in all years and fairly low net current assets for all the years. 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). 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. Nor has the petitioner shown that unusual or extraordinary circumstances prevented it from paying the proffered wage in the relevant years.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the beneficiary and its other sponsored workers the proffered wage from the priority date of the instant petition, April 20, 2001, through the present.

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.