

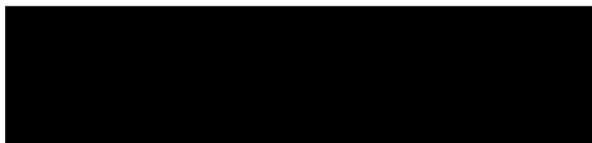
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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FILE:



Office: TEXAS SERVICE CENTER

Date:

**JAN 03 2011**

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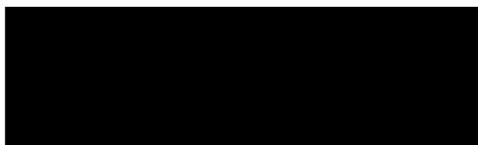
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*Kerian S. Rhew for*

Perry Rhew

Chief, Administrative Appeals Office

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

The petitioner is an Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a pastry chef. 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 and 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 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.22 per hour for a 35 hour work week, which equates to \$427.70 per week or \$22,240.40 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

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>

On April 30, 2001, the Form ETA 750 was filed by [REDACTED] located at [REDACTED]. On January 12, 2008, the Form I-140, Immigrant Petition for Alien Worker, was filed by [REDACTED] located at [REDACTED]. In support of the petition, the petitioner submitted Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Returns, for the years 2001, 2002, 2004, 2005 and 2006 from [REDACTED] showing its address as [REDACTED] (in 2001, 2002 and 2004) and [REDACTED].

The petitioner has not established that its corporate name is [REDACTED], and that its assumed name is [REDACTED]. The petitioner did not submit an assumed/fictitious name certificate evidencing that it operates under an assumed name. In support of the petition, the petitioner submitted a 2007 local business tax receipt from the Miami-Dade County tax collector showing the owner as [REDACTED], with a business name of [REDACTED], and an office building lease between [REDACTED], and [REDACTED], dba [REDACTED], dated December 20, 2004. Neither of those assumed names [REDACTED] matches the name listed for the petitioner on the Form I-140 and ETA 750. It is further noted that the Florida Department of State, Division of Corporations, website reflects that the fictitious name [REDACTED] is registered to a different corporation, [REDACTED], with a different EIN than that of the petitioner.<sup>3</sup>

<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). On appeal, counsel submitted a brief and indicated that a brief and/or additional evidence would be submitted within 30 days of filing the appeal. However, as of this date, no additional documentation has been received.

<sup>2</sup> The federal tax Employment Identification Number (EIN) shown on the IRS Forms 1120 for [REDACTED] is [REDACTED]. This EIN does not match the EIN [REDACTED] listed for the petitioner on the Form I-140.

<sup>3</sup> See [http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq\\_doc\\_number=\[REDACTED\]&inq\\_came\\_from=NAMFWD&cor\\_web\\_names\\_seq\\_number=0000&names\\_name\\_ind=N&names\\_cor\\_number=&names\\_name\\_seq=&names\\_name\\_ind=&names\\_comp\\_name=\[REDACTED\]&names\\_filing\\_type=](http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=[REDACTED]&inq_came_from=NAMFWD&cor_web_names_seq_number=0000&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=[REDACTED]&names_filing_type=) (accessed December 8, 2010).

On the petition, the petitioner claimed to have been established in October 1989 and to currently employ 14 workers. On the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary claimed not to have worked for the petitioner.<sup>4</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 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. Here, the petitioner has submitted no documentation indicating that it ever paid the beneficiary.

If, as in this case, 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); *Uheda 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the

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<sup>4</sup> It is noted that on a Form G-325, Biographic Information sheet, signed by the beneficiary under penalty of perjury on January 10, 2008, she indicated that she had worked for the [REDACTED] in [REDACTED] as a pastry chef from September 2000 to May 2004. This discrepancy in the record has not been explained. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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).

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).

On April 29, 2009, the director issued a Request for Evidence (RFE) requesting the petitioner to establish its ability to pay the beneficiary the proffered wage from April 30, 2001, the date the Form ETA 750 was accepted for processing, and continuing until the beneficiary obtains lawful permanent residence.

In a response received on June 11, 2009, the petitioner, through counsel, submitted the first page of IRS Forms 1120 in the name of Amici, Inc., for the years 2001, 2002, 2004 and 2005; pages one through four of IRS Form 1120 in the name of [REDACTED], for 2006 (including Schedule L); monthly operating small business bank account statements for [REDACTED] for

January through April 2009; unaudited profit & loss statements for [REDACTED] for the years 2006, 2007 and 2008; Florida Secretary of State Uniform Business Reports for [REDACTED] for 2001, 2002 and 2003; Florida Secretary of State For Profit Corporation Annual Reports for [REDACTED], for 2004, 2005, 2006, 2007, 2008 and 2009; and, 2008 Employer's Quarterly Federal Tax Returns (IRS Forms 941) in the name of [REDACTED], showing a trade name of [REDACTED]. The Florida Secretary of State Uniform Business Reports and For Profit Corporation Annual Reports submitted contain no financial documentation evidencing the petitioner's continuing ability to pay the beneficiary the proffered wage.

With regard to the unaudited profit & loss statements, the regulation at 8 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. Counsel's reliance on unaudited financial records is misplaced. 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.

Furthermore, reliance on the balances in the petitioner's 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 will be considered below in determining the petitioner's net current assets.

The record reflects that [REDACTED] is structured as a C Corporation. 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 11, 2009 with the receipt by the director of the petitioner's submissions in response to the director's RFE. Therefore, the petitioner's tax return for 2009 was not yet due and the tax return for 2008 was the most recent return available.<sup>5</sup> The tax returns submitted for [REDACTED], demonstrate its net income as follows:

<u>Year</u>	<u>Net Income/Loss (\$)</u>
2001	-75,204
2002	15,872
2004	-16,203
2005	-22,580
2006	-15,434

<sup>5</sup> Counsel indicates that the petitioner had requested an extension to file its 2008 tax return.

Even assuming the petitioner's corporate name is [REDACTED] in the years 2001, 2002, 2004, 2005 and 2006, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage. The petitioner failed to submit financial documentation for 2003 and 2007 and therefore it has not established that it had sufficient net income to pay the beneficiary the proffered wage in 2003 and 2007.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's 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 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The tax returns for [REDACTED], demonstrate its end-of-year net current assets as follows:

<u>Year</u>	<u>Net Current Assets/Liabilities (\$)</u>
2006	11,986

Even assuming that the petitioner's corporate name is [REDACTED], in 2006, the petitioner did not have sufficient net current assets to pay the beneficiary the proffered wage. The petitioner did not submit a Schedule L for [REDACTED] for 2001, 2002, 2004 and 2005. As previously indicated, the petitioner did not provide any evidence its ability to pay the proffered wage for the years 2003 and 2007.

Therefore, the petitioner has not established that it had sufficient net current assets to pay the proffered wage in any relevant year.

Based on the evidence submitted, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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

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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.

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

In the instant case, the petitioner claims to have been established in 1989 and to employ 14 workers. There is no evidence of consistent historical growth,<sup>7</sup> the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. The petitioner claims that it had to move in 2006 and incurred a loss as a result, however, no evidence to substantiate this claim has been provided. 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)).

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it has the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As always in these proceedings, the burden of proof 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.

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<sup>7</sup> The record reflects that [REDACTED] gross receipts or sales were \$899,168, \$983,531, \$766,227, \$575,144, and \$1,165,962 in 2001, 2002, 2004, 2005 and 2006, respectively.