

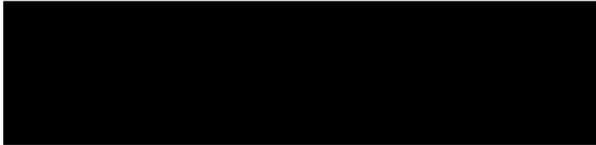
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

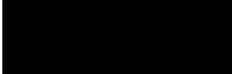


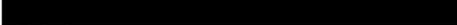
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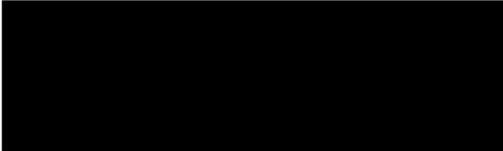


B6

FILE:  Office: TEXAS SERVICE CENTER Date: JAN 04 2011

IN RE: 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,

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 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage. The director also found that the petitioner failed to pay the full proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 May 27, 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)(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 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 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 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 filed and accepted for processing by the DOL on March 26, 2001. The proffered wage stated on that form is \$11.87 per hour or \$24,689.60 per year. The Form ETA 750 also states that the position requires the beneficiary to have two years work experience in the job offered or as a cook helper. The record shows that the DOL approved the Form ETA 750 on January 22, 2007.

However, the approved Form ETA 750 was not filed for the current beneficiary in the instant case but for a beneficiary named [REDACTED]. On July 13, 2007, along with the Form I-140 petition, counsel for the petitioner submitted a letter to United States Citizenship and Immigration Services (USCIS), requesting that [REDACTED] – the named beneficiary on the approved Form ETA 750 – be replaced by [REDACTED] or the current beneficiary in this instant case. Counsel also appropriately submitted part B of the Form ETA 750 listing the current beneficiary's education, training and work experience.

Since the director did not discuss the issue of substitution of the beneficiary, the AAO will first determine whether the substitution is permitted.

The DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). The DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750 or ETA Form 9089. Memo from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3.

In this case, the petition along with the approved Form ETA 750 and the request for substitution was filed and received by USCIS on July 13, 2007, before the DOL's final rule became effective. Accordingly, the substitution for the present petition will be allowed, and the petition for the current beneficiary will retain the same priority date as the original Form ETA 750.

To show that the petitioner has the ability to pay \$11.87 per hour or \$24,689.60 per year beginning on March 26, 2001, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 2001 through 2007;
- The petitioner's bank statements issued between January 2004 and May 2008;
- The petitioner's statements of profit and loss for the years 2004 through 2007 and for January through May 2008 (all unaudited); and
- The beneficiary's Forms W-2 issued by the petitioner from 2002 to 2007.

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. On the petition, the petitioner claims to have been established in 1993 and to currently employ 28 workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 individual 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, 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 the instant case, although the record establishes that the petitioner has employed the beneficiary since 2002, it has not established that it paid the beneficiary the full proffered wage of \$24,689.60 per year during any relevant time frame including the period from the priority date in March 2001 or subsequently. The W-2 forms submitted show that the beneficiary received the following wages from the petitioner:

- \$13,074.17 in 2002 (\$11,615.43 less than the proffered wage).
- \$17,721.54 in 2003 (\$6,968.06 less than the proffered wage).

¹ 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).

- \$17,809.73 in 2004 (\$6,879.87 less than the proffered wage).
- \$17,226.40 in 2005 (\$7,463.20 less than the proffered wage).
- \$16,652.66 in 2006 (\$8,036.94 less than the proffered wage).
- \$16,264.80 in 2007 (\$8,424.80 less than the proffered wage).

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date, it must be able to pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is:

- \$24,689.60 in 2001;
- \$11,615.43 in 2002;
- \$6,968.06 in 2003;
- \$6,879.87 in 2004;
- \$7,463.20 in 2005;
- \$8,036.94 in 2006; and
- \$8,424.80 in 2007.

The petitioner can pay the difference between the two wages – the actual wage and the proffered wage – through its net income or net current assets.

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 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). 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 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 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).

The record before the director closed on April 14, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s notice of intent to deny (NOID). 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.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120. The petitioner’s tax returns demonstrate its net income for the years 2001 through 2007, as shown below:

- In 2001 the Form 1120 stated net income (loss) of \$0.²
- In 2002 the Form 1120 stated net income (loss) of \$158.
- In 2003 the Form 1120 stated net income (loss) of \$148.
- In 2004 the Form 1120 stated net income (loss) of \$478.
- In 2005 the Form 1120 stated net income (loss) of \$752.
- In 2006 the Form 1120 stated net income (loss) of \$293.
- In 2007 the Form 1120 stated net income (loss) of \$25,209.

² The petitioner did not report any taxable income for 2001; line 28 of the petitioner’s Form 1120 for the year 2001 is blank.

Therefore, except in 2007, the petitioner did not have sufficient net income to pay the remainder of the beneficiary's wage from 2001 to 2006.

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.³ 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. The petitioner's tax returns demonstrate its net current assets (liabilities) for the years 2001 through 2006, as shown in the table below:

- In 2001, the Form 1120 stated net current assets (liabilities) of (\$120,251).
- In 2002, the Form 1120 stated net current assets (liabilities) of (\$107,232).
- In 2003, the Form 1120 stated net current assets (liabilities) of (\$108,555).
- In 2004, the Form 1120 stated net current assets (liabilities) of (\$78,613).
- In 2005, the Form 1120 stated net current assets (liabilities) of (\$77,971).
- In 2006, the Form 1120 stated net current assets (liabilities) of \$9,100.

Based on the table above, the petitioner only has sufficient net current assets to pay the remainder of the beneficiary's wage in 2006. Therefore, the AAO concludes that the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains permanent residence, specifically from 2001 to 2005.

On appeal, counsel submits copies of the petitioner's monthly bank statements issued from January 2004 to May 2008 showing various end-of-month balances. Counsel states that the petitioner has maintained a positive cash flow in its bank account throughout the qualifying period from 2004, keeping from around \$15,000 to about \$100,000 balance each month.

The petitioner's reliance on the balances in the bank accounts is misplaced. Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept or the petitioner to submit additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for 2001-2007. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns or in

³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the cash entry on Schedule L. Further, the bank statements only show balances in the petitioner's bank accounts from January 2004. They do not explain how those balances can help the petitioner pay the proffered wage in 2001, 2002, and 2003. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay.

The record also contains statements of profit and loss for the years 2004 through 2007 and for January through May 2008.

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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. In the instant case, none of the financial or income statements submitted is accompanied by a statement indicating that the financial or income statement has been audited. Therefore, they are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel also asserts that there are many items such as depreciation, special deductions, and credits that reduce the petitioner's taxable income but do not actually decrease the company's cash flow.

As for depreciation, the court in *River Street Donuts, supra* has held that a depreciation expense is a real expense, and thus, it should not be added back to boost or reduce the company's net income or loss. By the same token, annual depreciation expense should not be added back to net assets.

Counsel fails to specifically state the special deductions and credits that reduce the petitioner's taxable income. Merely stating that certain special deductions or credits reduce the petitioner's taxable income does not establish the reliability of the assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, 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)).

Finally, 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. 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. 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, no evidence has been presented to show that the petitioning corporation has as sound and outstanding reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1993. Nor does it include any evidence or detailed explanation of its milestone achievements. The evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from the priority date, specifically between 2001 and 2005.

While the record contains evidence regarding the petitioner's viability, it does not establish that the petitioner has the continuing ability to pay the proffered wage. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, this office concludes that the petitioner has not established that it had the ability to pay the salary offered as of the priority date and continuing to 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.