

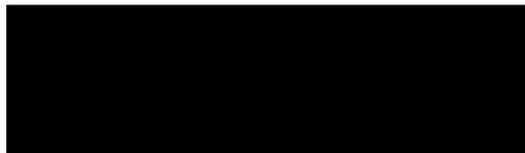
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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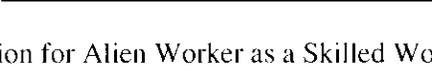
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FILE:  Office: NEBRASKA SERVICE CENTER

Date: **JAN 10 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, 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 Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also questioned whether the petitioner was a successor-in-interest to the company that filed the Form ETA 750.

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 November 29, 2007 denial, the primary 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 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 USDOL. 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 USDOL 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 that was accepted for processing on April 27, 2001 shows the proffered wage as \$18.98 per hour (\$39,478.40 per year) and that the position requires two years 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.¹

The petitioner is structured as an S corporation. The petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, reflect it was incorporated on May 2, 2001 and operates on a calendar year basis. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on April 27, 2001, he stated he had been employed by [REDACTED] since August 1997.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a 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).

A threshold issue is whether the petition is accompanied by an individual labor certification from the USDOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). The employer identified in the Form ETA 750 is Gee Whiz Restaurant. According to the petitioner, the restaurant was operated by 295 Quality Purveyors Inc., a company whose effective date of election as an S corporation was March 15, 1990 under Employer Identification Number [REDACTED]. Its 2001 tax return is submitted as evidence of the petitioner's ability to pay the proffered wage during that year. However, the petitioner is identified in the Form I-140 as [REDACTED] having [REDACTED]. It is noted that the record contains a letter dated March 15, 2007 from [REDACTED] who states in part that [REDACTED] was in existence from 1991 until 2002 and that this company was located in lower Manhattan in close proximity to the World Trade Center, now "Ground Zero." He further states that [REDACTED], doing business as [REDACTED] was formed in March 2002 and that "we re-incorporated" due to the devastating impact of the events of, and following, "9/11/01." However, the 2002 through 2006 tax returns for [REDACTED] submitted as evidence of the petitioner's ability to pay the proffered

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 this case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

wage show the company's effective date of election as an S corporation was May 2, 2001, over five months prior to September 11, 2001 contradicting the petitioner's claim that it was re-incorporated due to the devastating impact of the events of and following 9/11/01. The record contains a letter dated December 26, 2007 from [REDACTED] in Brooklyn, New York, who states that [REDACTED] was incorporated on May 2, 2001. However, he also states the company was formed with the intent to renegotiate the business lease for [REDACTED] that was coming to term and that after the terrorist attack occurred, the new corporation was used in order to rebuild the restaurant. On its face, the letter from the petitioner's CPA is inconsistent with the petitioner's March 15, 2007 letter as to why [REDACTED] was formed. 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). As the two companies are separate and distinct corporations, a petitioner could use a Form ETA 750 approved for a different employer only if it established it is a successor-in-interest to that company. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, both the predecessor and the purported successor must establish eligibility in all respects by a preponderance of the evidence. The petitioner is required to submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. The purported successor must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer.

In this matter, the record does not contain evidence that the petitioner is the successor-in-interest to the employer identified in the Form ETA 750. In a letter dated September 20, 2007, [REDACTED] states that prior to the formation of [REDACTED] the company was called [REDACTED] and was in existence from 1991-2002. However, the New York State Department of State on its official website indicates that [REDACTED] dissolved on October 28, 2009. Simply put, the petitioner has not established it was a successor-in-interest prior to the devastating impact of the events of September 11, 2001 or thereafter. Accordingly, the petition shall not be approved for this reason. As the assets of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage, the evidence submitted pertaining to [REDACTED] is of questionable

value. Nevertheless, for sake of argument, the materials submitted on behalf of the purported predecessor-in-interest will be included in the AAO's analysis. As shown below, even assuming that [REDACTED] was a successor-in-interest and that the instant petition is properly supported by the accompanying approved Form ETA 750, the petitioner has failed to establish it had the ability to pay the proffered wage.

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. On July 3, 2007, the director issued a Request for Evidence (RFE), instructing the petitioner, in part, to submit the beneficiary's Forms W-2 for 2001 through 2006 and his three most recent pay vouchers. On September 21, 2007 the petitioner responded to the RFE and submitted a paystub showing he was paid \$735.20 for the period from September 3, 2007 to September 9, 2007. The petitioner also submitted a letter dated September 19, 2007 from the beneficiary explaining that "No W-2 Forms were attached to my United State(s) Income Tax Returns because I am self-employed and cannot provide this for myself." On appeal, counsel submitted pay stubs showing the beneficiary was paid \$735.20 each for the periods from September 10, 2007 to September 16, 2007, October 29, 2007 to November 4, 2007, November 5, 2007 to November 11, 2007, November 12, 2007 to November 18, 2007, November 17, 2007 to November 25, 2007, November 26, 2007 to December 2, 2007, December 3, 2007 to December 9, 2007, December 10, 2007 to December 16, 2007, and December 17, 2007 to December 23, 2007. The petitioner did not submit any Forms W-2 or Forms 1099-MISC for the beneficiary.

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 27, 2001 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 (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 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*, 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 petitioner's income tax returns demonstrate net income as follows:²

| Year | Net Income |
|------|-------------------------|
| 2001 | -\$207,203 ³ |
| 2002 | -\$69,586 |
| 2003 | \$9,469 |

² Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf>.

³The IRS Form 1120S for [REDACTED] was submitted by the petitioner for 2001. The petitioner also submitted its own 2001 tax return, beginning May 2, 2001, showing no income.

| | |
|------|-----------|
| 2004 | \$22,261 |
| 2005 | \$74,419 |
| 2006 | -\$42,904 |

Therefore, for the years 2001 through 2004 and 2006, neither the petitioner nor its alleged predecessor had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. We reject, however, any suggestion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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 net current assets as follows:

| Year | Net Current Assets (\$) |
|------|-------------------------|
| 2001 | \$14,973 ⁵ |
| 2002 | -\$359,355 |
| 2003 | -\$349,117 |
| 2004 | -\$328,011 |
| 2005 | -\$280,812 |
| 2006 | -\$309,301 |

⁴According 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.

⁵ The IRS Form 1120S for [REDACTED] was submitted by the petitioner for 2001. The petitioner also submitted its own 2001 tax return, beginning May 2, 2001, showing net current assets of -\$29,142.00.

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the USDOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel submits a letter, cited above, containing analyses dated December 26, 2007 from [REDACTED] who states that the director should have added back to net income, amortization and depreciation which, in fact, represents a paper loss/expense. However, upon review, [REDACTED] arguments in his letter and analyses do not outweigh the evidence presented in the tax returns that indicate that the petitioner did not have the ability to pay the proffered wage in 2001 through 2004 or 2006. The thrust of [REDACTED] letter is that depreciation and amortization should be added back into the petitioner's net income in considering the petitioner's ability to pay the proffered wage. However, as discussed above, this approach has already been rejected by both USCIS and the federal courts. *See, e.g., River Street Donuts, LLC*, 558 F.3d at 116. [REDACTED] also indicates that included in the petitioner's net assets is a long-term loan of approximately \$380,000 and argues that only the yearly payment on this loan, approximately \$20,000, represents a current liability and therefore should be used to reduce "net assets." However, the reason only a current payment and not the loan should be considered a current liability remains unexplained. Also, he provides a table of "cash available" amounts for 2001 through 2006 but does not explain where these cash availability numbers came from. 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)). In any event, an expense, even an extraordinary one, may not be considered an asset. Finally, [REDACTED] states "[REDACTED] Inc. D/B/A Gee Whiz was a restaurant established on January 8, 1990. [REDACTED] This entity was destroyed by the terrorist attack on the WTC on September 11, 2001. Enclosed is a copy of their liquor license." The record reflects that the New York State Liquor Authority issued a license granting [REDACTED], operating as [REDACTED] to sell wine as of September 1, 2001. Therefore, by that date, the petitioner had clearly not obtained successor-in-interest status because, had it accomplished that organizational change, the license would have been issued to [REDACTED] which had been existent since May 2, 2001.

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

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, supra*. However, this analysis is not appropriate in this case because it has been determined that the corporation that filed the labor certification is not the same corporation that filed the Form I-140 and that these two organizations are not linked by an actual successorship. Regardless, the petitioning entity in

Sonegawa had been in business for over 11 years. 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.

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, both the predecessor and the purported successor must establish eligibility in all respects by a preponderance of the evidence. The petitioner is required to submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. The purported successor must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

As stated above, evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. Although the petitioner was existent prior to the World Trade Center terrorist attack of September 11, 2001, the record reflects it had not purchased assets from the predecessor nor acquired essential rights and obligations necessary to carry on the business for [REDACTED], prior to that horrendous event. Moreover, the petitioner's existent loans, for whatever business reason, were or should have been reflected in the Schedule L balance sheets provided in the tax returns and have therefore have been fully considered in the above evaluation of the corporation's net current assets. Furthermore, with the exception of 2005, the petitioner missed being able to pay the proffered wage every year during the requisite period. 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 beginning on the priority date.

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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.