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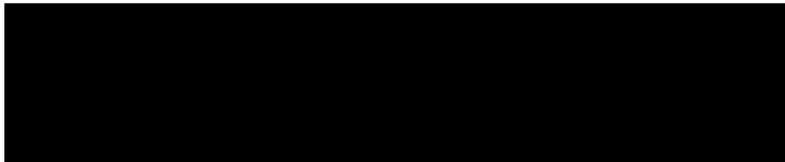
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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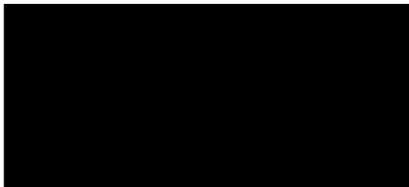
FILE:  Office: TEXAS SERVICE CENTER Date:

JAN 12 2011

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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. 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 Chinese 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 denial, the primary issue to be examined 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 other 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 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 accepted on May 1, 2003. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour or \$20,800.00 per year. The position requires six years of elementary

school education and six years of high school education, six months training as a "helper (cook)," in a related occupation, and three 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

On appeal, counsel asserts that the director failed to consider all of the petitioner's assets to determine its ability to pay the proffered wage. Counsel submits a cash warranty deed, mortgage, promissory note, bill of sale, and act of sale in support of the appeal. Relevant evidence in the record also includes the petitioner's IRS Forms 1120-A, U.S. Corporation Short-Form Income Tax Return, for 2003, 2004, 2005, and 2006 and a Form 1120, U.S. Corporation Income Tax Return, for 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on May 31, 2001, gross annual income of \$81,591.00, and to currently employ between five and ten workers. Although the tax returns in the record contain no information relating to the petitioner's fiscal year, it is assumed that the petitioner's fiscal year corresponds to the calendar year. The Form ETA 750B, signed by the beneficiary on July 13, 2006, reflects that the beneficiary has not worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains no evidence demonstrating that the beneficiary has worked for the petitioner.

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).

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 record before the director closed on October 16, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The record contains the petitioner’s Form 1120-A tax return for 2003, 2004, 2005, and 2006 and Form 1120 tax return for 2007. These tax returns demonstrate the following financial information concerning the petitioner’s ability to pay the beneficiary the proffered wage of \$20,800.00 per year from the priority date of May 1, 2003:

- In 2003, the Form 1120-A stated a net income² of <\$11,951.00.>³
- In 2004, the Form 1120-A stated a net income of <\$14,774.00.>
- In 2005, the Form 1120-A stated a net income of <\$11,794.00.>
- In 2006, the Form 1120-A stated a net income of <\$16,453.00.>
- In 2007, the Form 1120 stated net income⁴ of <\$12,597.00.>

Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the years 2003, 2004, 2005, 2006, and 2007.

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.⁵ A corporation’s year-end current assets are shown on the Form 1120-A tax return at Part III, lines 1 through 6. Its year-end current liabilities are shown on the Form 1120-A tax return at Part III, lines 13 and 14. A corporation’s year-end current assets are shown on the Form 1120 tax return on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on the Form 1120 tax return on Schedule L, 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 for 2003, 2004, 2005, 2006, and 2007 as shown in the table below.

² Taxable income before net operating loss deduction and special deductions on Line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁴ 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.

⁵ 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.

- In 2003, the Form 1120-A stated net current assets of \$23,283.00.
- In 2004, the Form 1120-A stated net current assets of \$18,275.00.
- In 2005, the Form 1120-A stated net current assets of \$16,245.00.
- In 2006, the Form 1120-A stated net current assets of \$17,192.00.
- In 2007, the Form 1120 stated net current assets of \$17,651.00.

Consequently, while the petitioner had sufficient net current assets to pay the proffered wage in 2003, the petitioner did not have sufficient net current assets to pay the proffered wage in 2004, 2005, 2006, and 2007.

Counsel asserts on appeal that the director failed to consider all of the petitioner's assets to determine its ability to pay the proffered wage on appeal. Counsel submits a cash warranty deed, mortgage, promissory note, bill of sale, and act of sale in support of the appeal. These documents reflect the transactions constituting the transfer of the real property, buildings, structures, fixtures, business, and equipment of the Hunan Chinese Restaurant from the previous owners to the petitioner on July 3, 2001. However, it is improbable that the petitioner would liquidate these assets to pay the proffered wage as this property and the associated assets are the petitioner's place of business and the means by which such business is conducted. Further, the petitioner has failed to provide evidence demonstrating that any liens or encumbrances on these assets would not exceed their value. It is noted that the petitioner did not submit audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance, or existence, of the claimed assets. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from 2004 to 2007 through an examination of wages paid to the beneficiary, or its net income, or net current assets.

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 Sonegawa*, 12 I&N Dec. 612. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception on May 31, 2001. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage.

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.

Beyond the decision of the director and relevant to the Form ETA 750's requirement that the beneficiary possess three years of employment experience in the certified job of cook, the next issue to be examined in this proceeding is whether the beneficiary can be found qualified for classification as an other worker. 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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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.

Here, the Form I-140 was filed with USCIS on July 30, 2007. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for an other worker.

The regulation at 8 C.F.R. 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(ii) *Other documentation – (A) General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

* * *

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

In this case, the Form ETA 750 indicates that the requirements are three years of experience in the position offered of cook. Accordingly, based on the labor certification requirements, the petitioner could only file the I-140 petition under the 2 “e” category for a “skilled worker” requiring a minimum of two years of training or experience. However, the petitioner requested the other worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner’s request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition, select the proper category box, and submit the proper fee and required documentation.

The evidence submitted does not establish that the petition requires less than two years of training or experience such that the beneficiary may be found qualified for classification as an other worker. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.⁶

ORDER: The appeal is dismissed.

⁶ It is further noted that, according to the public corporate records of the State of Louisiana, the petitioner is currently “not in good standing” in Louisiana. If the appeal were not being dismissed for the reasons set forth herein, this would call into question the petitioner’s eligibility for the benefit sought. It appears that the petitioner may no longer be in operation and, thus, the job offer is no longer bona fide.