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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
and Immigration
Services**

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

JAN 25 2011

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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.¹

The petitioner is in the business of repairing European automobiles. It seeks to employ the beneficiary permanently in the United States as a European car automobile mechanic. 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 July 15, 2009 denial, the 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

¹ In a prior filing, the petitioner filed a Form I-140 on December 27, 2001. The petition was dismissed by the director for failure of the petitioner to establish its ability to pay the proffered wage. The matter was appealed to the AAO who dismissed the appeal on December 8, 2003 for the petitioner's failure to establish its ability to pay the proffered wage from the priority date onward. The petitioner filed a motion to reopen/reconsider the AAO's decision and submitted additional evidence. The AAO granted the petitioner's motion to reopen and affirmed its prior decision denying the appeal for failure of the petitioner to establish its ability to pay the proffered wage from the priority date onward. The petitioner then filed a new Form I-140 petition on behalf of the present beneficiary. The petition was again denied by the director (July 15, 2009) for failure of the petitioner to establish its ability to pay the proffered wage from the priority date. The appeal of the July 15, 2009 denial is presently before the AAO.

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 24, 1997. The proffered wage as stated on the Form ETA 750 is \$17.81 per hour (\$37,044.80 per year).² The Form ETA 750 further reflects that the beneficiary would be required to work five to ten hours of overtime per week for which he would be compensated at the rate of \$26.02 per hour. The beneficiary would, therefore, earn from \$6,765.20 to \$13,530.40 in overtime wages over and above the proffered wage. The Form ETA 750 states that the position requires three years experience in the proffered position plus a high school education.

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.³

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1986 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 9, 1997, the beneficiary did not claim to have worked for the petitioner.

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

² The director states the wage as \$35,526 annually based on a pay rate of \$17.08 per hour. The correct hourly rate is \$17.81 based on the certified labor certification.

³ 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).

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 1997 or subsequently. The petitioner does not claim to have previously employed the beneficiary.

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 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).

The record before the director closed on May 4, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). As of that date of the director’s March 25, 2009 RFE, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The director’s RFE requested, in part, annual reports, federal tax returns or audited financial statements for the years 2002 through 2007. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 1997, the Form 1120S stated net income⁴ of \$9,514.
- In 1998, the Form 1120S stated net income of \$31,585.
- The petitioner did not submit a copy of its 1999 federal tax return. It did submit, however, an Internal Revenue Service (IRS) printout showing that the petitioner had ordinary income in that year of \$19,226.
- In 2000, the Form 1120S stated net income of \$30,609.
- In 2001, the Form 1120S stated net income of \$37,474.

⁴ 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) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions and/or other adjustments shown on its Schedules K for 1997, 1998, 2000 and 2001, the petitioner’s net income is found on Schedule K of those tax returns. As noted above, the petitioner did not provide a copy of its 1999 tax returns with associated schedules.

- Despite the director's RFE request, the petitioner did not provide its tax returns for years 2002 through 2007. Thus, it cannot be determined whether the petitioner had sufficient net income to pay the proffered wage plus applicable overtime during those years. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).⁵

Therefore, for the years 1997, 1998, and 2000, the petitioner's tax returns and 1999 IRS printout do not show sufficient net income to pay the base proffered wage of \$37,044.80, plus a minimum of five hours of overtime at the \$26.02 hourly overtime rate stated on the Form ETA 750. The petitioner's 2001 tax return states sufficient net income to pay the base proffered wage of \$37,044.80. As previously noted, however, the Form ETA 750 states that the beneficiary will work from five to ten hours per week in overtime at the rate of \$26.02 per hour. If the beneficiary worked a minimum of five hours overtime per week during 2001, he would have earned an additional \$6,765.20 over and above the base proffered wage of \$37,044.80. Thus, it would be necessary for the petitioner to establish the ability to pay a minimum of \$43,810 not only in 2001, but in all applicable years. The petitioner's 2001 tax return does not show sufficient net income to pay that amount.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 1997, the Form 1120S stated net current assets of (\$5,275).
- In 1998, the Form 1120S stated net current assets of \$418.
- The petitioner's net current assets could not be determined from the IRS printout submitted for the 1999 tax year.
- In 2000, the Form 1120S stated net current assets of \$10,998.
- In 2001, the Form 1120S stated net current assets of \$11,129.

⁵ The director additionally noted in his decision that the petitioner's net income and net current assets could not be determined for those years. Despite this, the petitioner failed to submit its 2002 through 2007 tax returns on appeal.

⁶According 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.

- The petitioner's net current assets for years 2002 through 2007 cannot be determined as the petitioner did not submit copies of its tax returns for those years despite the director's RFE request.

Therefore, for the years 1997 through 2007, the petitioner has not demonstrated sufficient net current assets to pay the proffered wage plus any applicable overtime.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage plus applicable overtime 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 asserts that the beneficiary would have replaced part-time workers employed by the petitioner during the requisite period and that those wages combined with the petitioner's stated net income in applicable years establishes the petitioner's ability to pay the proffered wage. The petitioner, however, did not address the deficiency in failure to provide its 2002 through 2007 tax returns.

In the instant case, the petitioner states in a letter submitted with the underlying filing that the following workers performed the same duties the beneficiary would have performed, and that these part-time workers would have been replaced by the beneficiary and that wages paid to those workers could have instead been paid to the beneficiary. The employees to be replaced and wages paid to those employees, as stated by the petitioner, are set forth below:⁷

- The petitioner stated that at least two of the listed employees for 1997 would have been replaced by the beneficiary and wages paid to the replaced employees would have been used to pay the beneficiary: ■■■ - \$17,588.86; ■■■ - \$15,584.96; and ■■■ - \$16,295.16.
- The petitioner stated that in 1998 the beneficiary would have replaced ■■■ who earned \$15,797.90, and ■■■ who earned \$10,993.20.
- The petitioner stated that in 1999 the beneficiary would have replaced ■■■ who earned \$20,134.94, and ■■■ who earned \$12,702.90.
- The petitioner did not provide any W-2 Forms or list employees that would have been replaced by the beneficiary in 2000.

⁷ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

- The petitioner stated that in 2001 the beneficiary would have replaced [REDACTED] who earned \$17,065, and [REDACTED] who earned \$17,840.
- The petitioner stated that the beneficiary would have replaced [REDACTED] and [REDACTED] in 2002 through 2005. Those individuals were paid wages by the petitioner in those years as follows:

	[REDACTED]	[REDACTED]	Total Combined
2002	\$12,715.00	\$17,760.00	\$30,475
2003	\$14,132.50	\$18,022.50	\$32,154
2004	\$14,250.00	\$17,280.60	\$31,530
2005	\$14,693.00	\$4,965.00	\$19,658

The petitioner stated that in 2006 he “could have replaced [REDACTED] and [REDACTED] whose combined salaries were \$26,741.”

The petitioner did not state that the beneficiary would have replaced any part-time workers in 2007.⁸

The petitioner listed the job duties performed by these employees and those duties are consistent with the duties to be performed by the beneficiary as stated on the Form ETA 750. The petitioner provided copies of W-2 Forms for these employees showing that they were paid the wages listed above for the years designated. It is important, however, to note that the petitioner did not assert that the beneficiary would replace part-time workers and that wages paid to those part-time workers would have been used to pay the beneficiary until it filed a motion to reopen the AAO’s decision denying its appeal of the director’s decision. Even though the director denied the petition stating that the petitioner had failed to establish the ability to pay the proffered wage, the petitioner did not assert its replacement theory on appeal to the AAO. Thus it brings into question whether or not the petitioner ever intended to replace the listed part-time workers with the services of the beneficiary. A petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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 (BIA 1988). Even if the petitioner’s replacement theory were accepted and wages paid to the listed part-time workers added to the petitioner’s stated net current assets or net income, the petitioner has failed to establish its ability to pay the proffered wage from the priority date onward. The amounts stated in “replacement” wages paid are less than

⁸ Additionally, despite the petitioner’s stated need for the beneficiary as a full-time worker, there is a substantial gap in time between the petitioner’s first petition and second petition, which calls into question the petitioner’s need for a full-time worker. 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 (BIA 1988).

the proffered wage and applicable overtime in each year from 2002 through 2007. Additionally, the director specifically requested the petitioner's 2002 through 2007 tax returns in an RFE. The petitioner failed to provide these returns either in response to the RFE or on appeal.⁹ Without such returns, the petitioner's net income and net current assets cannot be determined, or whether the petitioner had the amounts necessary to cover the difference between the replacement wages and net income. Additionally, without the returns, the AAO cannot further assess the legitimacy of whether the petitioner is able to replace part-time workers based on the volume of its business reflected in its gross receipts.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included [REDACTED] movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

It should further be noted that the petitioner has provided no evidence of its reputation in the industry which would indicate that it is more likely than not that it had the ability to pay the proffered wage from the priority date onward. The petitioner did not provide copies of its tax returns for each year from the 1997 priority date until the record closed in 2008. As stated on the tax returns that were provided, the petitioner paid total wages ranging from \$0 in 2000 to a high of \$103,620 in 1997. Wages paid in all years reported on available tax returns were less than those reported in 1997, the first year of the applicable period. The petitioner paid officer compensation in 2000 of \$1,500, and did not pay officer compensation in any other year. The petitioner reported minimal or

⁹ As a consequence, such returns would not be accepted in any motion to reopen. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988).

negative net current assets on the tax returns that were provided, and its net income listed on those tax returns was insufficient to pay the proffered wage plus applicable overtime listed on the Form ETA 750. Under these circumstances, the petitioner has not established by a totality of the circumstances that it had the continuing ability to pay the proffered wage from the priority date onward.

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.