

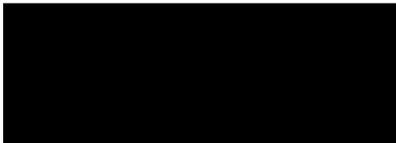
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: JUL 01 2011 OFFICE: TEXAS SERVICE CENTER

FILE: 

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, 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 Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a trucking company. It seeks to employ the beneficiary permanently in the United States as a tractor-trailer truck driver. 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 August 12, 2008 denial, and reaffirmed in the director's January 16, 2009 decision on the petitioner's motion to reopen and reconsider,¹ at issue in this case is whether the petitioner has possessed the ability to pay the proffered wage from 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ The petitioner's first motion to reopen and reconsider, filed on September 16, 2008, was incorrectly rejected by the director on November 5, 2008 as untimely filed. The petitioner filed a second motion to reopen and reconsider on November 28, 2008. The director determined that the initial motion to reopen and reconsider had been timely filed, reconsidered the evidence presented on both the first and second motions to reopen and reconsider, and, on January 16, 2009, reaffirmed the original decision to deny the petition.

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 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$10.53 per hour, which equates to \$21,902.40 per year. The Form ETA 750 states that the position requires six months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, counsel submitted an affidavit from the petitioner's president and sole owner claiming that the company was established on December 28, 1994, has gross annual income of \$4,000,000 and employs 42 workers.³ According to the tax returns in the record, the petitioner is a personal services corporation with a fiscal year based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claims to have worked for the petitioner since August 2000.

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

² 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).

³ On the Form I-140, Immigrant Petition for Alien Worker, the petitioner failed to indicate the date that it was established, its current number of employees, its gross annual income, and its net annual income.

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 what appears to be receipts for payments to [REDACTED] or [REDACTED] for multiple dates in 2000, 2001 and 2002. There is not enough information on the receipts to conclude that they reflect wages paid to the beneficiary. It is also unclear why the receipts are made out to [REDACTED].⁴ The record also contains a Form 1099, Miscellaneous Income, stating that the petitioner paid the beneficiary \$97,948.79 in 2002. However, the Form 1099 is not persuasive evidence of wages paid to the beneficiary because information contained on this form is inconsistent with claims made by the petitioner on the Form I-140. Specifically, the Form 1099 provides a social security number of [REDACTED] as the beneficiary's identification number. However, the petitioner responded "NONE" to the query on Form I-140 asking for the beneficiary's social security number. 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). Absent clarification of this inconsistency in the record, the AAO will not accept the Form 1099 as persuasive evidence of wages paid to the beneficiary.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner did not establish that it employed and paid the beneficiary any wages.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (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 873

⁴ According to Part 7 of Form I-140, the beneficiary's spouse is named [REDACTED]

(E.D. Mich. 2010) (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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

In the AAO's Request for Evidence (RFE) dated March 1, 2011, the AAO noted that the petitioner submitted only the first page of its Form 1120, U.S. Corporation Income Tax Return, for 2001, and only the first pages of its Forms 1120-A, U.S. Corporation Short-Form Income Tax Return, for 2002, 2003, 2004, and 2005. Therefore, the AAO instructed the petitioner to provide all pages of its Forms 1120 and 1120-A for the years 2001 through 2005, and evidence of all payments that the petitioner made to contractors in those years. In the response received by the AAO on April 14, 2011, the petitioner failed to respond to this request.⁵ The regulation 8 C.F.R. § 204.5(g)(2) states that the evidence of ability to pay "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). Providing one page of a tax return is not sufficient to meet the documentary requirements of 8 C.F.R. § 204.5(g)(2). The petitioner's failure to provide this evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for

⁵ On March 13, 2011, the director issued a RFE requesting that the petitioner submit copies of its federal tax returns, including copies of all schedules, copies of its published annual reports, or copies of its financial statements for the years 2001 through 2007. Therefore the petitioner has been provided multiple opportunities to provide this documentation.

evidence required by regulation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, 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)).

The partial copies of the petitioner's tax returns state its net income, as shown in the table below:⁶

- In 2001, the Form 1120 stated net income of \$ 0.00
- In 2002, the Form 1120-A stated net income of \$ 0.00
- In 2003, the Form 1120-A stated net income of \$ 0.00
- In 2004, the Form 1120-A stated net income of \$ 0.00
- In 2005, the Form 1120-A stated net income of \$ 0.00
- In 2006, the Form 1120 stated net income of \$ 0.00
- In 2007, the Form 1120 stated net income of \$ 0.00

Therefore, for the years 2001 through 2007, the petitioner has not established that it had sufficient net income to pay the beneficiary the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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.

- In 2001, the Form 1120 did not contain a Schedule L
- In 2002, the Form 1120-A did not contain a Schedule L
- In 2003, the Form 1120-A did not contain a Schedule L
- In 2004, the Form 1120-A did not contain a Schedule L
- In 2005, the Form 1120-A did not contain a Schedule L
- In 2006, the Form 1120 stated net current assets of \$86,000
- In 2007, the Form 1120 stated net current assets of \$294,200

⁶ Taxable income before net operating loss deduction and special deductions as reported on Line 24 of Form 1120-A and Line 28 of Form 1120.

⁷ 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.

Therefore, for the years 2006 and 2007, the petitioner has established that it had sufficient net current assets to pay the beneficiary the proffered wage. However, for the years 2001, 2002, 2003, 2004 and 2005, the petitioner has not established that it had sufficient net current assets to pay the beneficiary the proffered wage.

Thus, the petitioner has 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, 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 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.

In the instant case, the petitioner claims to have been established in 1994, and to employ 42 workers. According to the tax returns in the record, the petitioner had gross sales of \$1,868,240 in 2001; \$1,214,620 in 2002; \$1,375,458 in 2003; \$1,859,315 in 2004; \$3,095,028 in 2005; \$4,228,018 in 2006; and \$3,706,833 in 2007. The magnitude of the petitioner's operations is relevant factor in the determination of its ability to pay the proffered wage. The petitioner's tax returns also state that it paid salaries and wages of only \$65,200 in 2001; \$28,500 in 2002; \$45,600 in 2003; \$42,500 in 2004; \$45,600 in 2005; \$60,000 in 2006; and, \$60,000 in 2007. The petitioner also had costs of labor (listed on Page 2, Line 3 of Schedule A of IRS Forms 1120) in 2006 and 2007 of \$34,560 and \$22,970, respectively, and contractor payments as shown on the supplemental sheets, Line 4 of Schedule A of IRS Forms 1120, in 2006 and 2007 of \$3,368,620 and \$2,454,063, respectively. In the AAO's RFE dated March 1, 2011, the petitioner was requested to submit evidence of all payments it made to contractors for the years 2001 through 2005, but that the petitioner failed to

respond to this request. As is noted above, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)).

The submitted tax records indicate that the petitioner is structured as a personal services corporation. A “personal service corporation” is a corporation where the “employee-owners” are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines “personal services” as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting.⁸ 26 U.S.C. § 448(d)(2). As a corporation, a personal services corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, it is taxed at the highest marginal rate. Because of the high tax rate on the corporation’s taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. Because the tax code encourages the distribution of corporate income to the employee-owners of a personal services corporation, and because the employee-owners have the flexibility to adjust their income on an annual basis, the AAO may consider an employee-owner’s claim that it has been willing and able to forego a portion of wages to pay the beneficiary’s proffered wage if the petitioner pays its employee-owner(s) a substantial salary, and the amount required to meet the proffered wage is only a small percentage of the total salary paid.

The evidence in the record states that [REDACTED] holds 100 percent of the company’s stock. The record contains a statement from [REDACTED] that he has been willing and able to forego a portion of his officer’s compensation in order to pay the beneficiary’s proffered wage. According to the petitioner’s Forms 1120-A and 1120, [REDACTED] elected to pay himself \$64,500 in 2001; \$65,000 in 2002, 2003, 2004 and 2005; and, \$115,000 in 2006 and 2007. The record contains [REDACTED] IRS Forms 1040, U.S. Individual Income Tax Return, and a listing of his family’s personal household expenses for the years 2001 through 2005. There is no documentary support for the claimed household expenses. According to his personal tax returns, [REDACTED] has a household of six, and his adjusted gross income was \$75,380 in 2001, \$72,963 in 2002, \$75,080 in 2003, \$70,721 in 2004, and \$75,020 in 2005. Based on these facts, the AAO does not accept [REDACTED] claim that he has been willing and able to forego over \$20,000 in annual income. [REDACTED] compensation is not substantial, and the amount he claims to be willing to forego would be a significant percentage of his compensation.

⁸ In its RFE dated March 1, 2011, the AAO requested the petitioner to provide evidence as to how it, a trucking company, qualifies as a personal services corporation. In a response received by the AAO on April 14, 2011, the petitioner failed to respond to this request. 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

In summary, it is concluded that the petitioner failed to submit documentation required by 8 C.F.R. § 204.5(g)(2). The petitioner also failed to submit requested evidence that precluded material lines of inquiry. In addition, considering the totality of the circumstances, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage as of the priority date of the petition. Therefore, the appeal will be dismissed.

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.