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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**



B6

Date: **JUL 01 2011** Office: TEXAS SERVICE CENTER

File: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

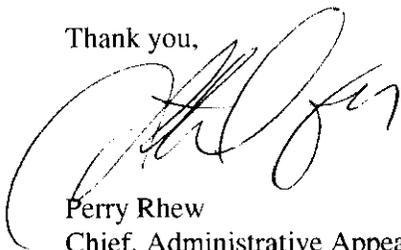


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center and now is 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 chef. 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 22, 2008 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 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 7, 2003. The proffered wage as stated on the Form ETA 750 is \$550 per week (\$28,600 per year). The Form ETA 750 states that the position requires two years of experience in the position offered as a chef.

The AAO conducts appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner stated that it was established in 2001 and currently employs four workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on December 17, 2002, 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 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. The petitioner provided the following Forms W-2:

- The 2003 Form W-2 states that the petitioner paid the beneficiary \$23,520.
- The 2004 Form W-2 states that the petitioner paid the beneficiary \$25,440.
- The 2005 Form W-2 states that the petitioner paid the beneficiary \$24,960.
- The 2006 Form W-2 states that the petitioner paid the beneficiary \$24,960.
- The 2007 Form W-2 states that the petitioner paid the beneficiary \$24,960.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- The petitioner provided paystubs showing that it paid the beneficiary \$10,080 through May 11, 2008.

As the amounts paid are less than the proffered wage, the petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage, which in 2003 was \$5,080; in 2004 was \$3,160; in 2005, 2006, and 2007 was \$3,640; and in 2008 was \$18,520.

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, 881 (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*, 696 F. Supp. 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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).²

The record before the director closed with the receipt by the director of the petitioner's response to the Request for Evidence on June 6, 2008. As of that date, the most current tax return available was the petitioner's 2007 federal tax return. The petitioner submitted the following Forms 1120S:

- In 2003, the Form 1120S stated net income³ of -\$11,196.
- In 2004, the Form 1120S stated net income of \$3,040
- In 2005, the Form 1120S stated net income of -\$2,963.
- In 2006, the Form 1120S stated net income of -\$938.
- In 2007, the Form 1120S stated net income of \$1,881.

Therefore, the petitioner demonstrated insufficient net income to pay the difference between the actual wages paid and the proffered wage in any year.

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

² Counsel on appeal states that the depreciation amounts taken should be considered in determining the petitioner's profit. As stated by the court in *River Street Donuts*, "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, . . . even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages." *River Street Donuts*, 558 F.3d at 116.

³ 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, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 3, 2009) (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 no additional adjustments shown on its Schedule K for any year, the petitioner's net income is found on line 21 of its tax returns for all years.

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 Forms 1120S stated:

- In 2003, the Form 1120S stated net current assets of -\$3,334.
- In 2004, the Form 1120S stated net current assets of -\$491.
- In 2005, the Form 1120S stated net current assets of -\$7,104.
- In 2006, the Form 1120S stated net current assets of -\$6,980.
- In 2007, the Form 1120S stated net current assets of -\$27,872.

Negative net current assets are insufficient to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage in all of the years at issue.

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 as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner submitted its financial statements for the six months ending June 30, 2008. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The notation at the bottom of the page makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also provided two letters from its accountant, [REDACTED] [REDACTED] states in both letters that the petitioner "has maintained its operation in the black . . . [and] has survived for

⁴ 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.

years where others have not.” The letter dated August 21, 2008 states that the first six months of 2008 shows that the petitioner’s business is expanding and that the petitioner “has never had a problem meeting payroll, and is current with its obligations.” The fact that the petitioner’s business has continued operations where other businesses failed is not evidence of the petitioner’s ability to pay the proffered wage to the beneficiary. The letter dated June 4, 2008 states that the officer compensation amount should be considered as “an equity distribution instead of salary” because the shareholder/officer does not take an active role in the business. The tax returns reflect that *no* officer compensation was paid in 2003, 2004, 2005, or 2007 and was only paid in 2006, where officer compensation was only \$12,000. Therefore, as there was no officer compensation paid in 2003, 2004, 2005, or 2007, the petitioner would not be able to establish its ability to pay in these years based on officer compensation. Additionally, nothing in the record shows that the petitioner’s sole officer was willing or able to reasonably forego compensation in 2006, the only year where officer compensation was paid, to pay the proffered wage.

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 tax returns demonstrate minimal or negative net income in every year and negative net assets in every year. Although the petitioner claims to have four employees on its I-140 petition, the total wages paid on the tax returns are only marginally more than the amount paid to the beneficiary in each year.⁵ The petitioner’s tax returns do not reflect continuous growth, for example,

⁵ The 2003 tax return states total salaries and wages paid of \$28,856, the 2004 tax return states total salaries and wages paid of \$30,312, the 2005 tax return states total salaries and wages paid of \$32,664, the 2006 tax return states total salaries and wages paid of \$28,644, the 2007 tax return

the petitioner's 2007 gross receipts are lower than its 2004, 2005, and 2006 gross receipts. On appeal, counsel states that *Matter of Sonogawa* applies here because of the amount taken by the petitioner in depreciation. As stated above, depreciation amounts represent a real cost of doing business and cannot be considered in determining the petitioner's ability to pay the proffered wage. See *River Street Donuts*, 558 F.3d at 116. Also, counsel states that the 2008 financial statement demonstrates the petitioner's ability to pay the proffered wage. As stated above, these statements are unaudited, compiled statements and, therefore, not in conformance with 8 C.F.R. § 204.5(g)(2) and are management's representation and are not supported by evidence. 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 petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture.⁶ The record does not reflect historical continuous growth. Although the petitioner has paid partial wages to the beneficiary in each year, the record before us lacks evidence from which we may conclude that the totality of the circumstances applies in this instance. 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 director's decision, the record lacks sufficient evidence to conclude that the beneficiary has the experience required to meet the terms of the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

states total salaries and wages paid of \$34,528.

⁶ An online "Yelp" review as of May 24, 2011, notes that the restaurant is closed. See <http://www.yelp.com/biz/el-danzante-mexican-american-restrnt-kingston>, and while not a basis of the instant decision or a source of official evidence, the petitioner should address whether the business is still operational in any further filings and whether this remains a bona fide job offer. Where there is no active business, no *bona fide* job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

(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

(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 occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The Form ETA 750 requires two years of experience as a chef. The beneficiary stated on Form ETA 750B that he worked for [REDACTED] located in Valo Mexico, from January 1994 to February 1996. The beneficiary did not state on the Form ETA 750 the number of hours worked at [REDACTED]. The beneficiary did not list any other experience on Form ETA 750B. The letter submitted from [REDACTED], [REDACTED] stated that the beneficiary worked as a chef from January 1994 to February 1996. [REDACTED] did not state that the beneficiary was employed in a full-time capacity, as opposed to part-time capacity, to establish a full two years of experience. In any further filings, the petitioner must demonstrate that this experience was full-time for the entire two years in order to establish that the beneficiary has the two years of experience required by the labor certification. Any claims of employment should be supported by pay records or appropriate documentation from the relevant Mexican Ministry, which recorded employment or wages paid.

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.

ORDER: The appeal is dismissed.