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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: JUN 14 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 preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider.¹ The motion is denied and the appeal is dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary² permanently in the United States as a hostess. 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 AAO determined that there was insufficient evidence in the record to show that the petitioner had the ability to pay the proffered wages in 2004 and 2006 for the beneficiary and an additional sponsored beneficiary. The AAO dismissed the appeal and affirmed the director's decision.

As set forth in the director's denial and the AAO's decision, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage to the beneficiary and an additional sponsored beneficiary in 2004 and 2006 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

¹ A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

² In the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested the visa preference classification for "any other worker" (i.e. unskilled worker) by checking box (g) in Part 2. The AAO adjudicated the petition as one seeking a preference classification as a skilled worker/professional. Since the petition was accompanied by a Form ETA 750 Part A which does not require job experience, the AAO on review of the petitioner's motion will consider the appeal as classifying the beneficiary pursuant to section 203(b)(3)(A)(iii) of the Act (that is "other worker," also known as unskilled worker).

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 October 8, 2004. The proffered wage as stated on the Form ETA 750 is \$6.75 per hour or \$13,665.00 per year.

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

Accompanying the petition and labor certification, counsel submitted a letter dated July 5, 2007; the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2005; and the beneficiary's biographic page from her Czech Republic passport and her United States visa issued February 10, 1997. According to the Form I-140 petition, the beneficiary entered the United States on March 17, 1999.⁴

On March 12, 2008, the director issued a Request for Additional Evidence (RFE). The director requested the petitioner's federal income tax returns for the years 2004 and 2006, or a copy of the petitioner's annual report, or audited or reviewed financial statement. Further, the director requested additional information such as profit/loss statements, bank account records, or payroll records. Finally, the director requested evidence relating to any wages or salary paid by the petitioner to the beneficiary in 2004 and 2006. In response, counsel submitted the petitioner's Form 1120S tax returns for 2004 and 2006 but failed to submit any other additional documentation.

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 2003 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year corresponds to the calendar year. On the Form ETA 750B, signed by the beneficiary on September 28, 2004, the beneficiary did not claim to have worked for the petitioner.

³ 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).

⁴ The Form ETA 750B, Item 15, concerning the beneficiary's prior employment experience in blank.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application 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, 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, there is no evidence that the beneficiary has been in the petitioner's employ.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash

expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner’s tax returns demonstrate its net income for the years 2004, 2005, and 2006 as shown in the table below.

- In 2004, Schedule K of the Form 1120S stated net income⁵ of <\$5,940.00.>⁶
- In 2005, Schedule K of the Form 1120S stated net income of \$38,255.00.
- In 2006, Schedule K of the Form 1120S stated net income of <\$678.00.>

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

⁵ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on May 12, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner has additional deductions and other adjustments shown on its Schedules K for 2004, 2005, and 2006, the petitioner’s net income is found on Schedule K of its tax returns.

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

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.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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, 2005, and 2006, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of <\$8,322.00>.
- In 2005, the Form 1120S stated net current assets of \$12,269.00.
- In 2006, the Form 1120S stated net current assets of \$11,599.00.

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

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 as of the priority date through an examination of its net income or net current assets in 2004 and 2006.

On appeal and on motion, counsel asserts 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. 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 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 *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

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.

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, counsel contends on motion that a statement by the petitioner's accountant was submitted that the petitioner's [REDACTED] location is one of the most highly visited areas of tourism on the Gulf Coast. According to counsel, the petitioner was established in 2003, and is well known in the area. Counsel submitted a letter dated August 16, 2010; a letter dated April 22, 2008, from [REDACTED], of [REDACTED]; a copy of the restaurant's menu; two pages of newsletter from the [REDACTED] [REDACTED], issued November 2005; four separate pages downloaded from four websites identifying the business and providing consumer reviews of the petitioner's business, all dated August 16, 2010; and, eight pages downloaded from [REDACTED] as accessed August 9, 2010. According to counsel, at the time the petition was submitted the business was "relatively new" but at the same time "relatively well known" which shows that the petitioner's job offer to the beneficiary is a realistic one.

The petitioner claims to employ eight workers. The petitioner has submitted Form 1120S tax returns showing its gross receipts were \$411,203.00 in 2004; \$542,155.00 in 2005; and, \$543,473.00 in 2006. Compensation of corporate officers for those same years was \$67,600.00, \$72,000.00, and \$102,977.00, respectively (which were 16%, 13%, and 19% of the gross receipts for each of those years and the largest cash outlay). It is unclear if the two officers receive compensation for services rendered to the business, but the AAO notes that wages and salaries stated in the tax returns for the three years are \$30,907.00, \$48,856.00, and \$46,044.00, respectively, for the eight employees which may indicate that no worker was employed on a fulltime basis. There is no offer by the company officers to utilize their compensation to pay the proffered wage(s).

While the petitioner's business location is an important factor in this case, despite the petitioner's increase in gross receipts from year to year, both its net income and net current assets were insufficient to pay the proffered wage in 2004 and 2006. No statement was made that there were unusual circumstances that accounted for the poor financial results in 2004 and 2006.

Further, as pointed out by the AAO in its prior decision dated July 16, 2010, the petitioner has filed another Form I-140 petition for another beneficiary at the proffered wage of \$16,161.60, with a priority date of October 8, 2004, as reflected on a Form ETA 750. The petitioner has not demonstrated by sufficient evidence that it had sufficient income to pay the wages for both sponsored beneficiaries in 2004 and 2006.

Counsel's assertions on appeal and on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates the petitioner could not pay the proffered wage in 2004 and 2006

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 motion is dismissed, and the petition remains denied.