

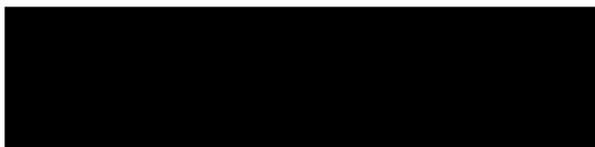
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date:

JUL 19 2011

Office: NEBRASKA 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:

SELF-REPRESENTED

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.

The petitioner is a dried meat processor and producer. It seeks to employ the beneficiary permanently in the United States as a meat technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.62 per hour or \$24,169.60 per year. The position requires six years of elementary school education, six months training, and no experience in the job offered.

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

On appeal, the petitioner's president asserts that the petitioner has the ability to pay the proffered wage. The petitioner's president contends that the petitioner included balance sheets rather than a Schedule L with its federal tax returns as a result of simplification in 2004, 2005, 2006, 2007, and 2008. The petitioner's president provides copies of the petitioner's balance sheets as of December 31, 2004, December 31, 2005, December 31, 2006, December 31, 2007, and December 31, 2008 as well as copies of previously submitted copies of the Schedule L of the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, and 2003 in support of the appeal. Relevant evidence in the record also includes the petitioner's Form 1120S tax returns for 2001, 2002, 2003, 2004, 2005, 2006, and 2007, and Form W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary in 2001, 2002, 2003, 2004, 2005, 2006 and 2007.

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 August of 1995, listed gross annual income of \$1,500,000.00, and to currently employ nineteen workers. According to the tax returns in the record, the petitioner's fiscal year corresponds to the calendar year. The Form ETA 750B, signed by the beneficiary on October 16, 2006, reflects that the beneficiary has worked for the petitioner since April 1997.

On February 9, 2011, the AAO issued a Notice of Derogatory Information/Request for Evidence (NDI/RFE) informing the petitioner that a review of the website at <http://www.kepler.sos.ca.gov/cbs.aspx> revealed that the petitioner, Glenoaks Food, Inc., has been suspended and that the petitioner's agent for service of process had resigned on March 11, 2008. The status "suspended" is defined at the website <http://www.sos.ca.gov/business/be/cbs-field-status-definitions.htm> as:

The business entities, powers, rights and privileges were suspended or forfeited in California 1) by the Franchise Tax Board for failure to file a return and/or failure to pay taxes, penalties, or interest; and/or 2) by the Secretary of State for failure to file the required Statement of Information and, if applicable, the required Statement by Common Interest Development Association.

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

If a petitioning business is no longer an active business, the petition and its appeal to this office have become moot. Therefore, the AAO requested that the petitioner provide evidence demonstrating that the business is not suspended and that it has current business activity. Furthermore, AAO requested that the petitioner submit copies of any licenses or permits issued to operate the meat processing and production facility at [REDACTED] and evidence that the facility is currently licensed by the United States Department of Agriculture, the state of California, or municipal subdivision, as applicable.

The AAO also noted that on appeal, the petitioner's president asserted that the petitioner has the ability to pay the proffered wage and that the petitioner included balance sheets rather than a Schedule L with its federal tax returns in 2004, 2005, 2006, 2007, and 2008 as a result of simplification. The AAO acknowledged that the petitioner's president included copies of the petitioner's balance sheets as of December 31, 2004, December 31, 2005, December 31, 2006, December 31, 2007, and December 31, 2008, in addition to copies of previously submitted copies of the Schedule L of the petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, and 2003 in support of the appeal. However, the petitioner's president failed to cite any statutory, regulatory, or judicial authority to support this claim. Consequently, the AAO requested evidence demonstrating that the petitioner was not required to include a completed Schedule L with the Form 1120S tax return in 2004, 2005, 2006, 2007, and 2008, as well as copies of the petitioner's Form 1120S tax returns for 2008 and 2009. Additionally, AAO noted the balance sheets contained in the record for 2004, 2005, 2006, 2007, and 2008, appear to have been prepared by the petitioner and are neither reviewed nor audited. Therefore, the AAO asked that the petitioner provide audited financial statements for 2004, 2005, 2006, 2007, 2008, and 2009, rather than the previously submitted balance sheets.

In response, the petitioner's president submits documentation and a wide sampling of its products establishing that the petitioner is an active business and that the meat processing and production facility at [REDACTED] is currently licensed by the County of Los Angeles, California.

The petitioner's president also includes a letter from [REDACTED] [REDACTED] indicates that a Schedule L was not prepared on the petitioner's behalf from 2004 to 2008 because "...total assets were below threshold levels...."

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains Form W-2, Wage and Tax Statements, reflecting employee compensation paid to the beneficiary by the petitioner as follows:

- 2001 – \$17,548.25 (\$6,621.35 less than the proffered wage of \$24,169.60).
- 2002 – \$17,366.00 (\$6,803.60 less than the proffered wage of \$24,169.60).
- 2003 – \$19,960.00 (\$4,209.60 less than the proffered wage of \$24,169.60).
- 2004 – \$21,420.51 (\$2,749.09 less than the proffered wage of \$24,169.60).
- 2005 – \$22,127.66 (\$2,041.94 less than the proffered wage of \$24,169.60).
- 2006 – \$21,583.76 (\$2,585.84 less than the proffered wage of \$24,169.60).
- 2007 – \$24,153.52 (\$16.08 less than the proffered wage of \$24,169.60).

Clearly the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date of April 30, 2001 onwards. However, it must be noted that the petitioner is only obligated to show that it can pay the difference between the proffered wage and wages already paid in each year.

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).

Although the AAO specifically requested that the petitioner provide copies of its tax returns for 2008 and 2009 in the NDI/RFE dated February 9, 2011, the petitioner failed to submit tax returns for these years. The petitioner's tax returns demonstrate its net income for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007 as shown in the table below.

- In 2001, Schedule K of the Form 1120S stated net income² of <\$207,392.00.>³

² 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-present) of Schedule K. *See* Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on June 16, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

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

- In 2002, Schedule K of the Form 1120S stated net income of <\$149,918.00.>
- In 2003, Schedule K of the Form 1120S stated net income of <\$235,642.00.>
- In 2004, Schedule K of the Form 1120S stated net income of <\$177,225.00.>
- In 2005, Schedule K of the Form 1120S stated net income of <\$63,390.00.>
- In 2006, Schedule K of the Form 1120S stated net income of <\$106,763.00.>
- In 2007, Schedule K of the Form 1120S stated net income of <\$16,280.00.>

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007 the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages already paid in each year. Furthermore, the record is absent evidence to determine whether the petitioner possessed sufficient net income to pay the proffered wage in either 2008 or 2009 as the petitioner failed to provide the requested tax returns for these 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).

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.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 tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004, 2005, 2006, and 2007 as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$148,746.00.
- In 2002, the Form 1120S stated net current assets of \$136,772.00.
- In 2003, the Form 1120S stated net current assets of \$175,213.00.
- In 2004, the petitioner did not complete Schedule L.
- In 2005, the petitioner did not complete Schedule L.
- In 2006, the petitioner did not complete Schedule L.
- In 2007, the petitioner did not complete Schedule L.

Consequently, the petitioner had sufficient net current assets to pay the difference between the proffered wage and wages already paid in 2001, 2002, and 2003. Schedule L to IRS Form 1120S is not required to be completed if the corporation's total receipts for the tax year and its total assets at

financial statement, a loss.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the end of the tax year are less than \$250,000. See <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 16, 2011). Although the petitioner's president and independent accountant claim that the petitioner did not complete Schedules L in 2004, 2005, 2006, and 2007 because it was not required to do so as it did not meet the \$250,000.00 threshold of total receipts and total assets, a review of page 1 of the petitioner's Form 1120S tax returns shows that petitioner exceeded this \$250,000.00 threshold in each of those years. The petitioner also checked "no" to question 8 in Schedule B of each year which asks "Are the corporations total receipts (see instructions) for the tax year and its total assets at the end of the year less than \$250,000.00" If "Yes," the corporation is not required to complete Schedules L and M-1." Nevertheless, assuming a "total asset" calculation from page 1 of the Form 1120S is even partly applicable to establishing the petitioner's net current assets, it cannot be determined whether the petitioner had sufficient net current assets to pay the difference between the proffered wage and wages already paid in 2004, 2005, 2006, and 2007.

On appeal, the petitioner's president included the petitioner's balance sheets for 2004, 2005, 2006, 2007, and 2008. However, these balance sheets appear to have been internally prepared by the petitioner and have not been audited or reviewed. 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 that the financial statements of the business are free of material misstatements. Reviews are governed by the American Institute of Certified Public Accountants and [redacted], and accountants only express limited assurances in reviews. The unaudited and unreviewed balance sheets for 2004 to 2008 the petitioner's president submitted with the appeal are not persuasive evidence. The balance sheets are the representations of the petitioner's management and are unaccompanied by any opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 wages paid to the beneficiary, or its net income, or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in August 1995. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. 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.