

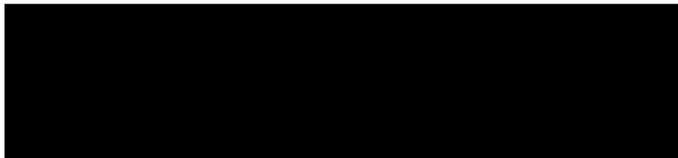
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

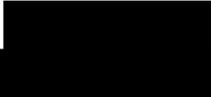


U.S. Citizenship
and Immigration
Services



B6

DATE: Office: NEBRASKA SERVICE CENTER

FILE: 

JUN 07 2011

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, Nebraska Service Center, and is now 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 restaurant manager. 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 the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 June 19, 2008 denial, the issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director determined that the petitioner failed to demonstrate that the beneficiary had the two years required experience as a restaurant manager to perform the duties of the proffered position as of the filing date of the labor certification application.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 January 26, 2004.

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

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

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).

(ii) *Other documentation*—

(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 or the experience of the alien.

(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.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The petitioner submitted a letter dated June 17, 2001, from [REDACTED] who indicated that he was the president of Church's Chicken located at [REDACTED]. He stated that the beneficiary was employed by the restaurant as a restaurant manager from February 1999 to March 2001, and that he performed the duties of a manager accordingly.

The director requested in a Request for Evidence (RFE) dated April 22, 2008, that the petitioner provide evidence to explain discrepancies in the record regarding the beneficiary's place of employment in Arlington, Texas, and his place of residence in Glenview, Illinois, during the alleged period of his employment. In response, counsel asserts that although the beneficiary managed the business in Arlington, Texas, he has always maintained his principal residence in Glenview, Illinois. Counsel further asserted that the beneficiary did not receive any Forms W-2, Wage and Tax Statements or Forms 1099-MISC, Miscellaneous Income, for 1999 through 2001 because the beneficiary was working as a partner, receiving 10% of the profits of the company as a result of his time spent in the business. The petitioner submitted as evidence a shareholder's agreement dated December 28, 1998 which indicated that the beneficiary was to receive 10% of the shares of stock of the business [REDACTED], dba Church's Chicken located at [REDACTED].

Consequently, the director determined that the petitioner failed to

submit evidence sufficient to establish that the beneficiary had the requisite qualifications for the job offered, and denied the petition.

On appeal, counsel asserts that although the beneficiary's primary residence was in Illinois from 1999 through 2001, he temporarily resided in various places in Texas during his employment at Church's Chicken located at [REDACTED]. As evidence on appeal, counsel submitted the following:

- A copy of car title and motor vehicle insurance statement dated October 4, 2000 and October 25, 2000, and bearing the beneficiary's name and home address of [REDACTED]
- A copy of telephone and gas bills dated from November 2000 to May 2001, bearing the beneficiary's name and home address of [REDACTED]
- A copy of a motor vehicle insurance statement dated January 26, 2001, bearing the beneficiary's name and home address of [REDACTED] Weatherford, Texas.
- A copy of an apartment lease signed by the beneficiary and dated July 18, 2001 for the premises known as [REDACTED]
- A copy of telephone bills dated September 12, 2001, bearing the beneficiary's name and home address of [REDACTED]
- A copy of telephone bills dated September 18, 2001 to January 16, 2002, bearing the beneficiary's name and place of residence at [REDACTED] Texas.

The record does not contain any other evidence relevant to the beneficiary's qualifications.

The beneficiary set forth his credentials on the labor certification application and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On section 15 of the labor certification which elicits information of the beneficiary's work experience, he represented that he was employed as a restaurant manager for Church's Chicken located at [REDACTED] from February 1999 through March 2001. He does not provide any additional information concerning his employment background on that form.

Counsel states that the beneficiary temporarily resided in Texas during his employment with Church's Chicken, and that his primary residence was in Illinois however there is insufficient evidence in the record to substantiate that claim. Although the beneficiary stated on the Form G-325A, Biographic Information that he resided at [REDACTED] from September 1994 through August 2007, the date he signed the Form G-325A, he also stated on that form that he was employed by [REDACTED] One Stop located in Annona, Texas from September 2001 through August 2007. The employment letter written by Church's Chicken is inconsistent with the shareholder's agreement submitted by the petitioner in that the declarant of the former describes the beneficiary as an employee, whereas the latter indicates that he was a shareholder and part owner of the facility. Although counsel asserts that as a shareholder/part

owner the beneficiary served as a manager of the restaurant and was paid in shared profits derived from the operation, he has failed to provide evidence to substantiate that claim. There is no evidence of any compensation in any form having been paid to the beneficiary. Regardless, there is no evidence in the record to demonstrate that the beneficiary resided in or near to Arlington, Texas since February 1999, the beginning of his alleged employment at Church's Chicken. In addition, on the shareholder agreement it is stated that the name of the business is to be known as [REDACTED] and is to be located at [REDACTED]

However, electronic records at <https://ourcna.cna.state.tx.us/coa/servlet/cna.app.coca> show that [REDACTED] was located at [REDACTED]. The inconsistencies and contradictions cast doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as of the priority date.

Beyond the decision of the director, under the current record, the petitioner has not demonstrated its ability to pay the proffered wage.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition (Form I-140), the petitioner claimed to have been established in 1991, and to currently employ 16 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The proffered wage as stated on the Form ETA 750 is \$39,000.00.

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. The petitioner does not indicate that it ever employed the beneficiary.

Therefore, the evidence fails to demonstrate that the petitioner paid the beneficiary the proffered wage.

If, as in the instant case, the petitioner does not establish that it was able to pay the proffered wage of all beneficiaries 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, a 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 the Service 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). Accordingly, contrary to counsel’s claim in his letter dated September 28, 2006, depreciation expense will not be added back into net income.

The record before the director closed on June 2, 2008, with the petitioner’s response to the director’s request for additional evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available before the director. The petitioner’s Forms 1120S² tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S stated net income of \$30,969.00.
- In 2005, the Form 1120S stated net income of \$86,500.00.
- In 2006, the Form 1120S stated net income of \$131,273.00.
- In 2007, the Form 1120S stated net income of \$174,915.00.

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 17e (2004-2005) and line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 28, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Where the petitioner has additional entries on its Schedules K, the petitioner’s net income is found on Schedule K of its tax returns. In this case, the petitioner’s net income is found on Schedule K.

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

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$5,275.00.

The evidence demonstrates that for 2004, the petitioner had sufficient net current assets 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.

The evidence and argument presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL, or that the beneficiary is qualified to perform the duties of the proffered position with two years of qualifying employment experience.

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

³According 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.

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 as is stated here or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In 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 petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The petitioner has not established that the relevant years were uncharacteristically unprofitable years or difficult periods for its business. The petitioner has not established its reputation within the industry. The petitioner has not indicated that the beneficiary is replacing as an employee or outsourced service.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage or that the beneficiary has experience sufficient to perform the duties of the job offered beginning on the priority date.

The petition will be dismissed for the above stated reasons, with each considered as an alternative ground for dismissal. 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). 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.