

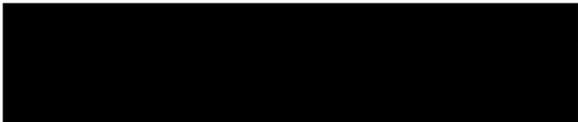
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

Date: **JUN 07 2011** Office: TEXAS SERVICE CENTER

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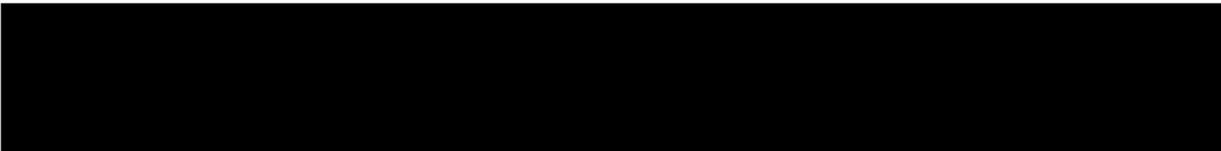
IN RE:

Petitioner: 

Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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.

Elizabeth McCormack

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 married couple who seeks to employ the beneficiary as a housekeeper in the United States permanently.¹ 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 and 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 May 24, 2009 denial, the single 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 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

¹ The petitioner is [REDACTED] [REDACTED] is an attorney and a sole proprietor of the Law Offices of [REDACTED] who also represents the petitioner and the beneficiary in this proceeding. [REDACTED] according to the tax returns submitted, is an office manager.

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 ETA Form 750 was accepted for processing by the United States Department of Labor (DOL) on January 2, 2004.² The rate of pay or the proffered wage specified on the approved Form ETA 750 labor certification is \$8.70 per hour or \$18,096 per year. Further, the Form ETA 750 states that the position requires a minimum of 3 months experience in the job offered.³

The petitioner originally submitted copies of the following evidence to show that it had the ability to pay \$8.70/hour or \$18,096/year beginning on January 2, 2003:

- Individual tax returns of [REDACTED] filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2003 through 2007; and
- A list of the [REDACTED] monthly living expenses.

Upon review of the evidence submitted, the director determined that the petitioner did not have the continuing ability to pay the proffered wage from the priority date, specifically in 2004 and 2005.

On appeal, the petitioner contends that the director's decision is arbitrary and capricious, in that the director fails to consider the facts and evidence of record in support of the petitioner's case. Counsel argues on appeal that United States Citizenship and Immigration Services (USCIS) should be able to add back the depreciation expenses into the petitioner's net income, that [REDACTED]. [REDACTED] could have diverted some of the money he spent on advertisement to pay for the beneficiary's salary, and that the petitioner has over half a million dollars cash on hand and has lines of credit of \$2 million dollars. The following additional evidence is submitted to demonstrate that the petitioner has the continuing ability to pay the beneficiary's proffered salary, specifically in 2004 and 2005:

- A letter from [REDACTED] a certified public accountant, who asserts that depreciation expenses should be added back to the petitioner's gross income and that

² The AAO observes that the cover page of the approved Form ETA 750 shows the date of acceptance for processing as "January 2, 2003;" however, the stamp on the Form ETA 750 itself reflects the date of acceptance as "January 2, 2004." The director in his decision deemed January 2, 2004 as the priority date. We agree.

³ The petitioner stated upon submitting the petition that the beneficiary had about 20 years of experience as a housekeeper in the Philippines. On part B of the Form ETA 750, which the beneficiary signed on December 15, 2003, the beneficiary claimed she worked as a housekeeper/babysitter for the following individuals/organizations: [REDACTED] from November 1976 to October 1991 in the Philippines; [REDACTED] from March 1998 to January 1999 in Hong Kong; and [REDACTED], from March 1991 to March 1996 in Hong Kong. The record contains a letter from [REDACTED] certifying that she employed the beneficiary as a housekeeper for the last 15 years from 1976 until the beneficiary left in 1991.

USCIS should consider the petitioner's totality of circumstances, including, among other things, the petitioner's checking and savings accounts and their business gross receipts;⁴

- A letter from the petitioner's accountant and tax preparer stating that the law office of [REDACTED] has always paid its bills on time including wages paid to the beneficiary⁵ and has provided positive cash flow to cover the personal expenses of the [REDACTED]
- Various copies of checks issued to and invoices from multiple advertising agencies in 2004, 2005, and 2006;
- Various bank and money market statements belonging to the [REDACTED] and the law office of [REDACTED] for 2004 and 2005; and
- Copies of deeds granted to the [REDACTED]

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.⁷

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

⁴ Submitted with the letter is a revised list of monthly household expenses of the [REDACTED] for 2004 and 2005 and various financial statements prepared by [REDACTED] showing the [REDACTED] current assets and current liabilities, long-term debts, and accounts receivable as of the end of 2004. 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. In this case, none of the financial statements submitted is audited; therefore, we will not consider any of these statements as evidence of the petitioner's ability to pay the proffered wage.

⁵ The record does not reflect that the petitioner or the law office has paid any wages to the beneficiary.

⁶ The deeds and tax returns show that the [REDACTED] have two properties in [REDACTED] [REDACTED] on which they are paying mortgages.

⁷ 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).

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 first examines 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 record in the instant case contains no evidence indicating that the beneficiary was employed by the petitioner before or after the priority date.

When the petitioner fails to 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).

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).

In *K.C.P. Food*, 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).

Consistent with the court’s conclusion in *River Street Donuts*, *supra*, the AAO rejects the argument that the petitioner should be allowed to add back the depreciation expenses to the calculation of the petitioner’s net income. The court in *River Street Donuts* has held that a depreciation expense is a real expense, and thus, it should not be added back to boost or reduce the company’s net income or loss. Further, it has been the AAO’s policy since 2003 not to add amounts deducted for depreciation to net income to determine a petitioner’s financial capacity to pay the proffered wage. *Id.*

With respect to the argument concerning the availability of lines of credit in the amount of \$2 million to pay the beneficiary’s wage, the AAO agrees with the director in that a line of credit, if available, generally cannot be treated as cash or asset, since a line of credit is a “commitment to loan” and not an existent loan. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken the petitioner’s overall financial position. No such evidence has been submitted. Therefore, the claim that the petitioner can use the lines of credit to pay the beneficiary’s salary cannot be accepted.

Neither can the AAO accept the argument that [REDACTED] could have reduced the amounts of advertisement to pay for the beneficiary’s salary. Such an argument is speculative and based on conjecture. [REDACTED] may have been able to do things differently to increase his business profits and income. The AAO, however, reviews net income stated on the petitioner’s individual tax returns after deductions have been taken to determine whether the petitioner has the ability to pay, and does not analyze what the petitioner would have or could have done differently in the past in order to demonstrate the ability to pay the proffered wage.

Further, it is not likely that the [REDACTED] would sell their home or office building to pay for the beneficiary’s wage. Therefore, we also decline to accept the [REDACTED]’s real estate properties as evidence of their ability to pay the beneficiary’s wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop*,

Inc. v. Nelson, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner, as noted above, is a married couple who seeks to employ the beneficiary as a housekeeper.⁸ The petitioner in this case files taxes as married filing jointly on the U.S. Individual Income Tax Return (Form 1040) each year. Thus, to meet their burden of proving by a preponderance of the evidence that they have the ability to pay the proffered wage, the petitioner/proprietors must show that they can cover their personal expenses as well as pay the proffered wage out of their adjusted gross income or other available funds such as from their personal checking or savings accounts. They also must show they can sustain themselves and their dependents, if any.

According to the tax returns in the record, the petitioner is married with no dependents. A review of the couple's tax returns reveals the following information about their adjusted gross income and ability to pay the proffered wage, from 2004 to 2007:⁹

Tax Year	Adjusted Gross Income (AGI) ¹⁰ – in \$	Yearly Household Expenses ¹¹ – in \$	AGI less APW – in \$	Annual Proffered Wage (APW) – in \$
2004	93,557	145,404	(51,847)	18,096
2005	65,607	145,404	(79,797)	18,096
2006	381,139	145,404	235,735	18,096
2007	454,275	145,404	308,871	18,096

Therefore, the petitioner/proprietors have established their ability to pay in 2006 and 2007, but not in 2004 and 2005.

On appeal, counsel states that the director's analysis of deducting the petitioner's yearly household expenses are flawed, in that the petitioner's tax returns have already taken into consideration much of the petitioner's household living expenses, such as mortgage, property

⁸ The AAO notes that [REDACTED] owns a business (law office), of which he is the sole proprietor.

⁹ Even though the [REDACTED] submitted a copy of their 2003 tax return, we will not consider this document since the [REDACTED] are only required to establish their ability to pay from the priority date (January 2, 2004).

¹⁰ The AGI is found in line 34 (2003), 36 (2004), or line 37 (2005-2007) of the Form 1040.

¹¹ This amount is based on the monthly household expenses that the [REDACTED] initially submitted when responding to the director's request for evidence. The [REDACTED] claimed that their monthly household expenses totaled \$12,117. To calculate the [REDACTED]' yearly household expenses, the director multiplied \$12,117 by 12 months, which equaled \$145,404.

tax, health insurance, insurance, utilities, and other deductible miscellaneous items (other than groceries and clothing). In essence, counsel contends that the director “double dipped” when he simply deducted the yearly household expenses from the petitioner’s adjusted gross income.

On appeal, counsel submits a revised list of yearly household expenses of the [REDACTED] for 2004 and 2005. A review of the couple’s tax returns reveals the following information about their adjusted gross income and ability to pay the proffered wage, specifically in 2004 and 2005:

Tax Year	Adjusted Gross Income (AGI) ¹² – in \$	Yearly Household Expenses ¹³ - in \$	AGI less APW – in \$	Annual Proffered Wage (APW) – in \$
2004	93,557	112,512	(18,955)	18,096
2005	65,607	118,320	(52,713)	18,096

Therefore, even considering the lower household expenses as revised by the petitioner on appeal, the petitioner/proprietors have not established their ability to pay the beneficiary’s wage in either 2004 or 2005.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the proprietors’ personal liquid assets such as money available in their savings, checking, certificates of deposit, and/or money market accounts. *See* 8 C.F.R. § 204.5(g)(2) (“In appropriate cases, additional evidence, such as ... bank account records or personal records, may be submitted by the petitioner or requested by the Service.”)

On appeal, the petitioner/proprietors submitted copies of their monthly personal and business bank statements for 2004 and 2005 to demonstrate that they have the financial ability to pay the proffered wage of the beneficiary in 2004 and 2005. The business bank accounts, however, cannot be considered, as these funds have most likely been included on schedule C of the petitioner’s tax returns as gross receipts or sales.¹⁴ The net profit (loss) shown on schedule C is carried forward to page one of the tax return and is included in the calculation of the petitioner’s AGI, and has been considered above. In calculating the petitioner’s personal liquid assets, the AAO will not again consider the same sums available to determine whether the petitioner has the ability to pay the proffered wage.

¹² The AGI is found in line 34 (2003), 36 (2004), or line 37 (2005-2007) of the Form 1040.

¹³ These amounts are based on the revised yearly household expenses that [REDACTED] submitted on appeal.

¹⁴ The following account numbers (last 3 digits) are considered business accounts, and thus, are not considered in the calculation of the petitioner’s personal liquid assets: [REDACTED]

A closer look at the petitioner's personal bank statements reveals the amounts available in the petitioner's bank accounts and the average balances for the years 2004 and 2005, as shown in the tables below:

	<u>Year 2004</u>		<u>Year 2005</u>	
	Ending or Current Balances for Account Number xxx-xxx-xxxx (last 3 digits) in \$			
	697 ¹⁵	702	697	702
January	84.41	7,053.06	-	17,471.64
February	84.44	18,176.36	-	17,471.64
March	84.48	18,176.36	-	18,074.64
April	84.51	18,201.36	-	14,719.64
May	84.55	18,201.36	-	12,719.64
June	84.58	18,951.36	-	9,719.64
July	84.62	18,951.36	-	7,719.64
August	84.65	18,951.36	-	5,819.64
September	84.69	19,081.36	-	202.98
October	-	19,331.36	-	202.98
November	-	19,127.64	-	602.98
December	-	17,471.64	-	3,202.98
Total	760.93	211,674.58	-	107,928.04
Average	63.41	17,639.55	-	8,994.00

Based on the table above, we conclude that the petitioner does not have sufficient liquid assets to pay the beneficiary's wage of \$18,096 per year in 2004 and 2005.

Finally, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Although [REDACTED] law office is profitable, the funds available in [REDACTED] business bank accounts cannot be considered as evidence of the petitioner's ability to pay, since these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts or sales. USCIS will not consider gross income without also considering the expenses that were incurred to generate that income. The net profit (loss) is \$126,894 in 2004; and \$123,031 in 2005. Both figures are carried forward to page one of the proprietors' Forms 1040 and are included in the calculation of the petitioner's AGI for 2004 and 2005, which, as shown above, is insufficient to establish the petitioner's ability to pay the proffered wage in both years. Therefore, even considering the overall magnitude of the petitioner's law firm activities, the AAO finds that the petitioner does not have the ability to pay the proffered wage in 2004 and 2005.

¹⁵ This account belongs to the [REDACTED] plus [REDACTED]

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO finds that the petitioner has not made a realistic job offer and has not established by a preponderance of the evidence that it has the financial ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. The petition is denied.