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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 10 2011 Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is custom woodworking company. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. 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 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 March 7, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. It is noted that the AAO determined that the petitioner had demonstrated its ability to pay the proffered wage for 2005 and 2006, but had failed to show its ability to pay the proffered wage for 2001 through 2004. Therefore, on motion the issue is whether or not the petitioner has established its ability to pay the proffered wage for 2001 through 2004.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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 March 22, 2001. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour (\$22,880.00 per year). The Form ETA 750 states that the position requires two years of 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

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation from 2001 through 2005. On the petition, the petitioner indicates that it was established in 1984 and that it currently employs five workers. On the Form ETA 750, signed by the beneficiary on March 14, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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 petitioner did not provide any documentation demonstrating wages paid to the beneficiary in 2001, 2002, or 2003. The petitioner has provided a copy of an IRS Form W-2 for 2004 which shows wages paid to the beneficiary in the amount of \$4,826.00 (a deficiency of \$18,054.00).²

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).

² It is noted that on the Form W-2 for 2004 that was submitted by the petitioner and bearing the beneficiary's name as employee, the social security number (SSN) is [REDACTED]. However, on the Form I-140 petition dated November 2, 2006, the petitioner does not indicate any social security number for the beneficiary in the box designated for such. These inconsistencies call

If, as in this case, 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

into question the petitioner's claimed employment of the beneficiary in 2004 and the credibility of the Form W-2. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on 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, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Form W-2 as persuasive evidence of wages paid to the beneficiary. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. See *Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner’s 2006 federal income tax return was the most recent tax return before the director for review.³ It is noted that the petitioner submitted on appeal copies of its Forms 1120S and IRS Forms W-2 for 2007, 2008, and 2009. The AAO notes that the petitioner has established its ability to pay the proffered wage in 2007 (net current assets of \$22,941.00), in 2008 (net current assets of \$90,718.00), and 2009 (net current assets of \$104,589.00).

The proffered wage is \$22,880.00 per year. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120 stated net income of (\$11,155.00).
- In 2002, the Form 1120 stated net income of (\$0.00).
- In 2003, the Form 1120 stated net income of (\$13,500.00).
- In 2004, the Form 1120 stated net income of \$1,128.00.

Therefore, for the years 2001, 2002, 2003, and 2004, the petitioner did not establish that it had 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.⁴ A corporation’s year-end current assets are

³ Although the documentation is beyond the present inquiry, the AAO will generally consider the documentation in accessing the petitioner’s ability to pay the proffered wage.

⁴ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses

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 2001, the Form 1120 stated net current assets of \$10,144.00.
- In 2002, the Form 1120 stated net current assets of \$22,157.00.
- In 2003, the Form 1120 stated net current assets of \$1,895.00.
- In 2004, the Form 1120 stated net current assets of \$10,057.00.

The evidence demonstrates that for the year 2001, 2002, 2003, and 2004, the petitioner did not have 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.

On appeal, counsel asserts that the director erred in not properly taking into account the totality of circumstances and assessing the evidence which demonstrated the petitioner's ability to pay the proffered wage. Counsel further asserts that when taken into consideration, other sources of income such as officers' compensation amounts can be funds made available to pay the proffered wage; and that the shareholder's statement confers this claim.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120. For this reason, the petitioner's figures for compensation of officers may be considered in certain circumstances as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that in 2001 through 2003 [REDACTED] held 50 percent of the company's stock, and [REDACTED] held 50 percent of the company's stock; and in 2004, [REDACTED] held 100 percent of the company's stock. According to the petitioner's IRS Forms 1120, at Schedule E, Line 1 (Compensation of Officers), the petitioner elected to pay [REDACTED] compensation in the amount of \$20,768.00 in 2001, \$35,507.00 in 2002, \$35,000.00 in 2003, and \$60,000.00 in 2004. As evidence on appeal, the petitioner submitted a statement by [REDACTED] specifically expressing his willingness to forego his compensation in order to meet the prevailing wage amounts. The petitioner also submitted a copy of the shareholder's IRS Form W-2, Form 1040 personal income tax return for 2004, and a list of the shareholder's recurring monthly household expenses. The shareholder listed his recurring monthly expenses as: food \$600.00, insurance car and house \$215.00, gas and electric \$150.00,

(such as taxes and salaries). *Id.* at 118.

phone \$45.00, cell phone \$89.00, cable \$60.00, clothing \$300.00, school expenses \$100.00, oil \$178.00, and home maintenance \$75.00; totalling to \$21,744.00 per year. In order to determine the petitioner's ability to pay the proffered wage, the shareholder's monthly expenses must be subtracted from the officer compensation amounts issued to that shareholder. On his IRS Form 1040 tax return for 2004, the shareholder [REDACTED] indicated that he had four dependants; including two children. Although the record demonstrates the petitioner's ability to pay the proffered wage in 2004 based upon the officer compensation minus his household expenses and the proffered wage amount; in the instant matter, it does not appear that the shareholder listed all of his expenses.

For example, in review of the shareholder's IRS Form 1040 for 2004, he listed itemized deductions on page 2 in the amount of \$18,644.00, and on Schedule A, Line 6 real estate taxes in the amount of \$6,002.00, and Line 10 home mortgage interest in the amount of \$1,903.00 that he did not include in his list of expenses. In addition, the shareholder listed two children as dependants but failed to list medical insurance expenses and child care expenses. Finally, the shareholder omitted his charitable contributions from his list of recurring household expenses. Although such contributions are normally by their nature voluntary, the substantial size and consistency of these contributions call into question whether these are truly voluntary or represent an obligation that is more accurately classified as a recurring household expense. Accordingly, the list of the shareholder's household expenses is clearly inaccurate as it pertains to 2004 and, thus, the petitioner has failed to establish its ability to pay the proffered wage for that year and through the ability of the stockholder's wages.

In addition, the petitioner has failed to establish its ability to pay the proffered wage in 2001, 2002, and 2003. The petitioner did not provide personal income tax returns or Forms W-2 for [REDACTED] in 2001, 2002, and 2003. Even if the AAO were to take into consideration the officer compensation amounts for 2001, 2002, and 2003; they would be insufficient to provide for the shareholder's recurring household expenses and the beneficiary's wage amounts.

Therefore, the petitioner has failed to establish its ability to pay the proffered wage in 2001, 2002, 2003, and 2004.

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 or officer compensation.

Counsel infers on appeal that the petitioner's average monthly bank account balances represent cash on hand to pay wages. Although the record of proceeding contains copies of the petitioner's business bank account statements for 2002 and 2003, the petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2) and which the petitioner did not submit, required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable, unavailable, or otherwise paints

an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that have not been included in its Schedules L, which have already been considered in evaluating the petitioner's net current assets.

The assertions and the evidence 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.

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 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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2001, 2002, 2003, and 2004. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in 2001, 2002, 2003, and 2004. Counsel infers that the petitioner has been in business for over twenty years, that the petitioner has experienced growth in its income and that it has always maintained positive net current assets. Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Furthermore, the petitioner has not shown through professional prepared financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. The petitioner has not submitted evidence to establish that the

beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Finally, this is a recurring inconsistency in the record concerning the beneficiary's social security number as this is listed in the Forms W-2 and the petitioner's failure to identify the beneficiary's social security number in the Form I-140. This inconsistency undermines the credibility of the evidence as a whole. Overall, the record is not persuasive in establishing that the job offer was realistic from 2001 to 2004.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 remains dismissed.