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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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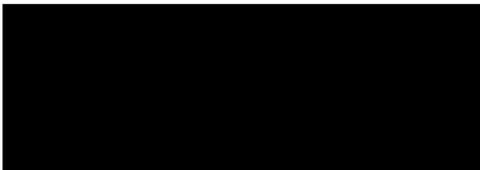
Date: JUN 10 2011 Office: TEXAS SERVICE CENTER

FILE: 

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company.¹ It seeks to employ the beneficiary permanently in the United States as a tile setter. 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage from the priority date.

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 October 16, 2008 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)(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.

Further, 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 According to the petitioner's website (<http://bayrestorationcorp.com>), Bay Restoration specializes in the exterior of commercial building restoration, providing, among other services, remediation to foundation waterproofing and liquid applied roofing.

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).

In the instant proceeding, the Form ETA 750 was accepted on April 30, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$17.68 per hour or \$36,774.40 per year. The Form ETA 750 states that the position requires a minimum of two (2) years of experience in the job offered.²

To show that the petitioner has the continuing ability to pay \$17.68 per hour or \$36,774.40 per year from April 30, 2001, the petitioner submitted the following relevant evidence:

- Copies of Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2001 through 2007;
- Copies of the beneficiary's Forms W-2 issued by the petitioner for 2006 and 2007;
- Copies of the petitioner's monthly bank statements from 2001 to 2003; and
- Copies of the petitioner's shareholder's statement of financial condition for the years 2002 through 2004.

The tax returns submitted show that the petitioner was initially incorporated on December 31, 1996; and as of December 1, 2001 it elected to be an S corporation, with [REDACTED] as the sole owner/shareholder.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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).

² The beneficiary's qualifications do not appear to be an issue in the instant proceeding. The record contains a letter from the beneficiary's former employer, certifying that the beneficiary was a tile installer from 1986 to 1993. The letter has the name, address, and title of the author (employer), and it sufficiently describes the beneficiary's experience during his employment there, in compliance with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).

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 this case, the record contains evidence indicating that the beneficiary was employed by the petitioner in 2006 and 2007.

Based on the Forms W-2 submitted, the petitioner paid the beneficiary the following wages in 2006 and 2007 (all in \$):

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2006	7,700	36,774.40	(29,074.40)
2007	19,250	36,774.40	(17,524.40)

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay the full proffered wage of \$36,774.40 per year from 2001 to 2005; \$29,074.40 in 2006; and \$17,524.40 in 2007. The petitioner can show the ability to pay these amounts indicated above through either its net income or net current assets.

If the petitioner chooses to use its net income to demonstrate the ability to pay, USCIS will 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).

The record before the director closed on August 19, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). 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. The petitioner’s tax returns demonstrate its net income (loss) for the years 2001 through 2007, as shown below:

- In 2001, the Form 1120S stated net income (loss)³ of (\$4,166).

³ 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) line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf> (accessed on May 18, 2011) (indicating that Schedule K is a summary schedule of all

- In 2002, the Form 1120S stated net income (loss) of \$6,186.
- In 2003, the Form 1120S stated net income (loss) of \$3,724.
- In 2004, the Form 1120S stated net income (loss) of (\$7,918).
- In 2005, the Form 1120S stated net income (loss) of \$65,574.
- In 2006, the Form 1120S stated net income (loss) of \$129,162.
- In 2007, the Form 1120S stated net income (loss) of \$90,254.

Therefore, the petitioner did have sufficient net income to pay the beneficiary's proffered wage in 2005, 2006, and 2007 but not between 2001 and 2004, as shown above.

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 (liabilities) for the years 2001 through 2007, as shown below:

- In 2001, the Form 1120S stated net current assets (liabilities) of \$13,643.
- In 2002, the Form 1120S stated net current assets (liabilities) of \$5,821.
- In 2003, the Form 1120S stated net current assets (liabilities) of \$6,584.
- In 2004, the Form 1120S stated net current assets (liabilities) of \$193.

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in any of the qualifying years, as shown above. Based on the net income and net current asset analysis above, the AAO concludes that the petitioner has failed to establish that it has the continuing ability to pay the proffered wage from the priority date.

On appeal, counsel for the petitioner urges USCIS to consider the petitioner's business bank statements and the owner's statement of financial condition as evidence of the petitioner's ability to pay.

shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income from 2001 to 2006 is found on line 21 of the petitioner's Form 1120S. The 2007 net income is found on line 18 of schedule K.

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

Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the the petitioner to submit or the director to accept additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for 2001-2007. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns or in the cash entry on Schedule L. Additionally, bank statements only show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and do not establish the petitioner's ability to pay.

The AAO also declines to accept the owner's statements of financial condition as evidence of the petitioner's ability to pay. USCIS may not pierce the corporate veil and look into the personal assets of the corporation's owner or shareholder. Because a corporation such as the one in this case is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." For these reasons, the AAO cannot accept and consider any of the statements of financial condition of the owner as evidence of the petitioner's ability to pay.

Finally, although not raised by either the petitioner or counsel on appeal, 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.

The AAO acknowledges that the petitioner is an ongoing business; however, the record is devoid of evidence regarding the petitioner's reputation. Unlike *Sonegawa*, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage, specifically between 2001 and 2004.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.