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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 23 2011**

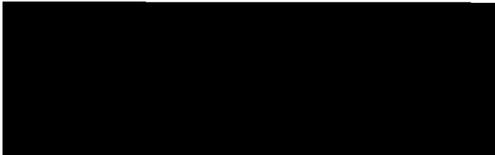
IN RE:

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

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

As set forth in the director's April 16, 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)(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 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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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 December 24, 2003. The proffered wage as stated on the Form ETA 750 is \$31,771 per year. The Form ETA 750 states that the position requires four years of high school<sup>1</sup> and two years of experience as a cake decorator.

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.<sup>2</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on June 22, 1990, to have a gross annual income of \$2,934,689, and to currently employ 75 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on November 24, 2003, the beneficiary claims to have worked for the petitioner from September 1991 to the present (November 24, 2003). In support of the beneficiary's claims, counsel has submitted copies of the 2003 through 2008 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary.

The 2003 through 2008 Forms W-2, Wage and Tax Statements, indicate that the beneficiary was paid \$32,887.33 in 2003, \$31,203.10 in 2004, \$34,236 in 2005, \$34,711.95 in 2006, \$34,501.45 in 2007, and \$33,232.32 in 2008, which are the sums of the wages identified in Box 1 (\$28,837.33 in 2003, \$27,303.10 in 2004, \$30,336 in 2005, \$30,811.95 in 2006, \$30,901.45 in 2007, and \$31,832.32 in 2008) and the income deferred by the beneficiary, and invested in a retirement account, identified in Box 12a (\$4,050 in 2003, \$3,900 in 2004, \$3,900 in 2005, \$3,900 in 2006, \$3,600 in 2007, and \$1,400 in 2008), which is designated as such by the use of Code D. *See Instructions to IRS Form W-2, Wage and Tax Statement, 2010*, [REDACTED] (accessed March 28, 2011). Therefore, the petitioner has established that it paid more than the proffered wage of \$31,771 in 2003, and 2005 through 2008.

However, the AAO notes that the petitioner has filed additional nonimmigrant and immigrant petitions with the same or subsequent priority date years or that were filed after the instant petition.<sup>3</sup> Therefore, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

<sup>1</sup> Part 15 of the ETA Form 750A under "Other Special Requirements" states that "the person must have a high school diploma or GED or foreign degree equivalent."

<sup>2</sup> 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).

<sup>3</sup> The AAO notes that the petitioner has filed at least 14 immigrant and nonimmigrant petitions from 2003, the priority date year of the instant petition.

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).

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 has not established that it employed and paid the beneficiary the full proffered wage in 2004.

The petitioner is obligated to show that it had sufficient funds to pay the proffered wage from the priority date of December 24, 2003 until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In the instant case, the petitioner has established its ability to pay the proffered wage in 2003 and 2005 through 2008 by actually paying the beneficiary more than the proffered wage of \$31,771 in those years. However, the petitioner must show that it had sufficient funds to pay the difference of \$567.90 between the proffered wage of \$31,771 and the wage paid to the beneficiary of \$31,203.10 in 2004. In addition, the petitioner is obligated to show that it had sufficient funds to pay the proffered wages of the additional sponsored beneficiaries with the same or subsequent priority date years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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, 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).

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 tax returns demonstrate its net income for 2004, as shown in the table below.

- In 2004, the Form 1120 stated net income of -\$371,857.

Therefore, for the year 2004, the petitioner did not have sufficient net income to pay the difference of \$567.90 between the proffered wage of \$31,771 and the wage paid to the beneficiary of \$31,203.10. In addition, no evidence was submitted that shows that the petitioner had sufficient net income to pay the proffered wages of the additional sponsored beneficiaries with the same or subsequent priority date years. The petitioner also has not submitted any evidence that it actually

paid the proffered wages to the additional sponsored beneficiaries with the same or subsequent priority date years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of -\$112,404.

Therefore, for the year 2004, the petitioner did not have sufficient net current assets to pay the difference of \$567.90 between the proffered wage of \$31,771 and the wage paid to the beneficiary of \$31,203.10. In addition, no evidence was submitted that shows that the petitioner had sufficient net current assets to pay the proffered wages of the additional sponsored beneficiaries with the same or subsequent priority date years. The petitioner also has not submitted any evidence that it actually paid the proffered wages to the additional sponsored beneficiaries with the same or subsequent priority date years.

With the initial petition, the petitioner submitted a declaration by [REDACTED], President and a shareholder of the petitioner that stated:

I will forego as much of my compensation as necessary in order to ensure that our company has the ability to pay [the beneficiary's] proffered salary of \$31,771 per year. [The beneficiary] has been employed by [the petitioner] as Master Cake Decorator in E-2 status since 1991.

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<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner submitted copies of [REDACTED] 2002 through 2006 Forms W-2 showing the wages paid to [REDACTED] by the petitioner in the pertinent years. For the year in question (2004), [REDACTED] was paid \$154,223.17 in officer's compensation.<sup>5</sup> Ordinarily, the AAO would have found it reasonable that [REDACTED] would be financially able to forego the small amount (\$567.90) required to pay the difference between the proffered wage of \$31,771 and the wages paid to the beneficiary of \$31,203.10 in 2004 as [REDACTED] would still realize \$153,655.27 in officer compensation after paying the difference of \$567.90 between the proffered wage and the wages paid to the beneficiary in 2004. However, there is no verifiable evidence of the proffered wages for the additional sponsored beneficiaries with the same or subsequent priority date years, and there is no verifiable evidence that the proffered wages were paid to the additional sponsored beneficiaries with the same or subsequent priority date years. Those proffered wages would include any wages paid to the sponsored beneficiaries in H-1B status. Therefore, the petitioner has not established that the petitioner has sufficient income to pay the proffered wage to the beneficiary and the proffered wages to the additional sponsored beneficiaries with the same or subsequent priority date years.

The AAO notes that on appeal, counsel states:

Such an inference is not necessary, however, as the petitioner submitted evidence of the resources available to it during the relevant time period: a Bank of America statement evidencing a \$100,000 line of credit opened 1/22/99; a Merrill Lynch Verification of Deposit evidencing Merrill Lynch account for Goldilocks Consolidated with a current value of \$174,178.21; and a statement by [REDACTED] President and General Manager of [REDACTED] indicating her willingness to reduce her officer's compensation to ensure the company's ability to pay the proffered wages.

\* \* \*

Here, petitioner [REDACTED] incurred unusual expenses and a drop in its net current assets when it opened a new store in Mountain View, California. As explained in the attached letter of petitioner's controller, the current assets of the company's original store were used to finance the construction of the new store, resulting in the dramatic reduction in net current assets between the company's 2003 and 2004 tax returns. See attached Letter of [REDACTED], Exhibit C, and 11/11/2003 Shopping Center Lease, Exhibit D.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular

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<sup>5</sup> This officer's compensation does not include the \$12,484.53 [REDACTED] deferred and invested in a retirement account. Total wages paid to [REDACTED] were \$166,707.70 in 2004.

borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. 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 its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

With regard to the verification of deposit, the information provided shows that the account was opened on July 29, 2008, and had a total portfolio value of \$174,178.21 as of March 27, 2009. The account was opened after 2004, the year in question; and therefore, has little probative value when determining the petitioner's ability to pay the proffered wage in 2004.

With regard to the petitioner's opening of another store in Mountain View, California, the petitioner has not submitted any evidence of its opening or provided any evidence showing the company's unusual expenses were specifically impacted by the opening. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The

petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's tax returns indicate it was incorporated on June 22, 1990. The petitioner has provided its tax returns for 2003 through 2007, with the 2004 tax return not establishing the petitioner's ability to pay the difference of \$567.90 between the proffered wage of \$31,771 and the actual wages paid to the beneficiary in 2004 and the proffered wages to the additional sponsored beneficiaries with the same or subsequent priority dates. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). In this case, the petitioner has not established that it had sufficient funds to pay the proffered wage to the beneficiary and the additional sponsored beneficiaries with the same and subsequent priority dates. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no probative evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The 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 is dismissed.