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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 24 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,

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 custom cabinet making business. 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, 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 21, 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.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$22.00 per hour (\$45,760 per year). The Form ETA 750 states that the position requires

two years experience in the proffered position or two years experience in a “similar industry or cabinet shop.”

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 is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1983 and to currently employ one worker. According to the tax returns in the record, the petitioner’s fiscal year runs from November 1st to October 31st. On the Form ETA 750B, signed by the beneficiary on April 20, 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 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 during any relevant timeframe including the period from the priority date in 2001 or subsequently. It is noted that the petitioner submitted copies of five checks made payable to the beneficiary in 2008 to show wages paid to the beneficiary (March 14, 2008 - \$528.00; March 21, 2008 - \$880.00; March 28, 2008 - \$580.00; April 4, 2008 - \$600.00; April 18, 2008 - \$600.00). The backs of the checks were not photocopied and it cannot, therefore, be determined that the checks were actually cashed by the beneficiary. The petitioner did not submit W-2 Forms showing wages were paid to the beneficiary in 2008 or any other evidence showing wages were paid in other years.

¹ 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).

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 (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 March 17, 2008 with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Deny (NOID). As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for years 2000² through 2006, as shown in the table below.

- In 2000, the Form 1120S stated net income³ of \$8,392.
- In 2001, the Form 1120S stated net income of \$6,254.
- In 2002, the Form 1120S stated net income of \$2,693.
- In 2003, the Form 1120S stated net income of (\$2,229).
- In 2004, the Form 1120S stated net income of (\$3,245).
- In 2005, the Form 1120S stated net income of (\$236).
- In 2006, the Form 1120S stated net income of \$6,852.

Therefore, for the fiscal years 2000 through 2006, the petitioner's tax returns do not state 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 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

²The petitioner's fiscal year, which includes the 2001 priority date, ran from November 1, 2000 through October 31, 2001. The 2000 tax return is, therefore, relevant to these proceedings.

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) and line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 16, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions and/or other adjustments shown on its Schedule K for all relevant years, the petitioner's net income is found on Schedule K of its tax returns.

⁴According 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.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for fiscal years 2000 through 2006, as shown in the table below.

- In 2000, the Form 1120S stated net current assets of \$21,330.
- In 2001, the Form 1120S stated net current assets of \$17,984.
- In 2002, the Form 1120S stated net current assets of \$53,231.
- In 2003, the Form 1120S stated net current assets of \$51,430.
- In 2004, the Form 1120S stated net current assets of \$48,599.
- In 2005, the Form 1120S stated net current assets of \$48,770.
- In 2006, the Form 1120S stated net current assets of \$56,652.

Therefore, for the fiscal years 2000 and 2001 (from the priority date through October 31, 2002), the petitioner's tax returns do not state sufficient net current assets to pay the proffered wage. Tax returns for years 2002 through 2006 state 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 petitioner has established its ability to pay the proffered wage from the priority date onward. Counsel states that the petitioner could have diverted officer compensation to pay the proffered wage in fiscal years 2000 and 2001 and that net current assets should be added to officer compensation and net income to arrive at a figure sufficient to pay the proffered wage. Counsel also states that in fiscal year 2001 a \$10,000 distribution to the petitioner's sole shareholder should be considered as an asset with which to pay the proffered wage.

With regard to the petitioner's assertion that officer compensation should be considered as a source of funds with which to pay the proffered wage, the AAO notes that 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 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may, in some circumstances, be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. In this instance, however, the record does not contain a statement from the petitioner's sole shareholder stating that he would be willing or financially able to forego officer compensation to pay the proffered wage, only the statement of the petitioner's counsel.⁵ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's

⁵ Officer compensation was minimal in all years (2000 - \$14,400; 2001 - \$12,200; 2002 - \$0; 2003 - \$10,800; 2004 - \$17,575; 2005 - \$15,725; 2006 - \$4,625) and significantly less than the proffered wage. Nothing shows that the owner could realistically forgo compensation in fiscal years 2000 and 2001.

burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not contain proof that the petitioner's sole shareholder actually received the compensation noted on the petitioner's tax returns, such as W-2 Forms or Forms 1099. It is further noted that even when adding officer compensation to the petitioner's net current assets (which exceed net income) the sum is insufficient to pay the proffered wage in 2000 and 2001.

Counsel asserts that net current assets should be added to the petitioner's net income when determining the ability to pay the proffered wage. The AAO does not agree. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

Counsel states that a \$10,000 distribution was made by the petitioner to its sole shareholder in fiscal year 2001, and that this sum should be considered as an asset with which to pay the proffered wage. The 2001 tax return indicates that a \$10,000 distribution was made from retained earnings. The AAO does not agree that this distribution should be considered when determining the petitioner's ability to pay the proffered wage. Retained earnings are a company's accumulated earnings since its inception less dividends. *Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

The petitioner submitted copies of its business checking account statements showing balances for

December 31, 2007, January 31, 2008 and February 29, 2008 in support of its ability to pay the proffered wage. Those statements cover only a two month period and do not provide information relevant to fiscal years 2000 and 2001. The bank records could not, therefore, establish the petitioner's ability to pay the proffered wage throughout the requisite period. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), 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 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 were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

Counsel acknowledges that the petitioner's tax returns do not establish the ability to pay the proffered wage in 2000 and 2001 based upon an analysis of its net income or net current assets but indicates that those years should be ignored and claims that the tax returns for later years establish the ability to pay. The AAO does not agree. A petitioner must establish its ability to pay from the time of the priority date, which in this matter is April 30, 2001. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Counsel further asserts that the beneficiary's ability to generate income for the petitioner should be considered.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented 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 (Reg. Comm. 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 is a small business with gross receipts of under \$100,000 and one employee as noted on the Form I-140. The petitioner's tax returns show gross receipts as follows: 2000 - \$83,546; 2001 - \$67,812; 2002 - \$47,605; 2003 - \$38,295; 2004 - \$38,795; 2005 - \$57,953; 2006 - \$65,231. The petitioner's total gross receipts in 2003 and 2004 were less than the proffered wage, in a number of other years, the petitioner's gross receipts were only slightly more than the total proffered wage. Its net income, from 2000 through 2006 never exceeded \$8,392 and was negative in 2003, 2004 and 2005. As previously noted, officer compensation was minimal in all years (2000 - \$14,400; 2001 - \$12,200; 2002 - \$0; 2003 - \$10,800; 2004 - \$17,575; 2005 - \$15,725; 2006 - \$4,625) and significantly less than the proffered wage. The petitioner's tax returns show \$0 in salaries or cost of labor paid in 2000, 2001, 2003, 2004, 2005 and 2006. In 2002 total salaries were paid in the amount of \$14,900, significantly less than the proffered wage.⁶ The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that it had the continuing ability to pay the proffered wage from the priority date onward. The record does not establish that the petitioner has a history of continued growth and profitability. 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 from the priority date onward.

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.

⁶ 20 C.F.R. § 656.3 requires the offered employment be a full-time position. From a review of the petitioner's 2000 through 2006 tax returns it is not clear that the petitioner's business will support another full-time employee.