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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090

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U.S. Citizenship  
and Immigration  
Services



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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 02 2011

IN RE: Petitioner: [redacted]

Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 restaurant/nightclub. It seeks to employ the beneficiary permanently in the United States as an assistant manager of the restaurant/nightclub. 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.

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 June 11, 2009 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 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 filed and accepted for processing by the DOL on April 30, 2001. The proffered wage stated on that form is \$20 per hour or \$41,600 per year. The position as set forth on the Form ETA 750 does not specifically require the beneficiary to have any prior

experience. It does, however require the beneficiary to have a Bachelor of Science degree in any field. The record shows that the beneficiary has a bachelor's degree in chemistry with a minor in mathematics conferred on June 22, 1991 from Brigham Young University-Hawaii. The Form ETA 750 was approved by the DOL on September 19, 2007.

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>1</sup>

To show that the petitioner has the ability to pay \$20 per hour or \$41,600 per year beginning on April 30, 2001, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 2001 through 2008; and
- [REDACTED] individual tax returns filed on Forms 1040, U.S. Individual Income Tax Return, for the years 2001 through 2008.

To show that the petitioning company is a closely held corporation, the petitioner submitted a copy of its articles of incorporation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation with three shareholders in 2001 and 2002 and two shareholders from 2003 henceforth.<sup>2</sup> On the petition, the petitioner claims to have been established on May 1, 1993 and to currently employ 44 workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 individual 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, 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).

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<sup>1</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>2</sup> In 2001 and 2002, [REDACTED] owned 37.5% of the corporation and [REDACTED] owned the rest (25%). From 2003 to 2005, [REDACTED] owned 75% of the corporation, while [REDACTED] had the rest (25%). From 2006 to 2008, [REDACTED] had 75% of the corporation and his wife, [REDACTED] had 25%

In the instant case, no evidence has been submitted to show that the beneficiary has worked for the petitioner before or after the priority date. 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 show that it has the ability to pay \$20 per hour or \$41,600 per year through either its net income or net current assets.

If the petitioner chooses to use its net income to pay the proffered wage during that period, 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 (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).

The record before the director closed on April 21, 2009 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 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120 (net income before net operating loss). The petitioner's tax returns demonstrate its net income for the years 2001 through 2007, as shown below:

- In 2001 the Form 1120 stated net income (loss) of \$19,972.
- In 2002 the Form 1120 stated net income (loss) of (\$5,050).
- In 2003 the Form 1120 stated net income (loss) of \$3,392.
- In 2004 the Form 1120 stated net income (loss) of (\$17,740).
- In 2005 the Form 1120 stated net income (loss) of \$67,743.
- In 2006 the Form 1120 stated net income (loss) of \$132,727.
- In 2007 the Form 1120 stated net income (loss) of \$42,011.
- In 2008 the Form 1120 stated net income (loss) of \$121,117.

Based on the table above, the petitioner had the ability to pay the beneficiary's wage from 2005 to 2008 but not from 2001 to 2004.

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.<sup>3</sup> 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. The petitioner's tax returns demonstrate its net current assets (liabilities) for the years 2001 through 2004, as shown in the table below:

- In 2001, the Form 1120 stated net current assets (liabilities) of (\$23,491).
- In 2002, the Form 1120 stated net current assets (liabilities) of (\$22,488).
- In 2003, the Form 1120 stated net current assets (liabilities) of (\$31,725).

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<sup>3</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.

- In 2004, the Form 1120 stated net current assets (liabilities) of (\$10,367).

The petitioner's net current assets from 2001 to 2004 were all less than the proffered wage. Therefore, the AAO agrees with the director that the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains permanent residence, specifically from 2001 to 2004.

On appeal, counsel asserts that the petitioner should be allowed to add back depreciation deduction and compensation of officers to boost the company's net income. In making this argument, counsel cited and submitted a part of chapter 16 from the *Immigration Procedures Handbook, 2006 Edition*; authored by Austin T. Fragomen, Jr., Alfred J. Del Rey, Jr., and Steven C. Bell, stating that USCIS allows employers to add back depreciation deduction to their taxable income in determining their ability to pay the proffered wage. See *Immigration Procedures Handbook, 2006 Ed.* Thompson West Publishing, § 16:9, at p. 16-11.

In addition, citing *In re Matter of X*, EAC 00-088-52775 (Vermont Service Center, Oct. 1, 2001), *In re Matter of X*, [REDACTED] (California Service Center, June 14, 2005), counsel contends that where a company is a closely held corporation, as in this case, the petitioning company may use its officers compensation to demonstrate that it has the ability to pay the proffered wage from the priority date.

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

The petitioner's reliance on the officers' compensation is misplaced. Even though the case cited above allows the petitioner to augment its net income by its officer's compensation, that case involves totally different circumstances from the case here. The petitioning entity in that case is a personal service corporation, where the sole owner is taxed at a 35% tax rate. Because of the high 35% flat tax on the corporation's taxable income, the petitioner in that case tries to distribute all profits in the form of wages to him or herself. In turn, the sole owner pays personal taxes on his or her wages and thereby avoids double taxation. This in effect reduces the negative impact of the flat 35% tax rate.

Here, evidence of record does not suggest that the petitioning company is a personal service corporation. As noted above, the petitioner is a restaurant/nightclub. Its business is in selling products. In addition, the petitioning company in this case does not reflect a large compensation package for its stockholders or officers that could have been dedicated to paying the proffered wage. In 2001, for instance, the officers' compensation was \$115,800. There were three shareholders at that time: [REDACTED] and [REDACTED], who both owned 37.5% of the corporation; and [REDACTED] who owned 25% of the corporation. Based on their percentage of ownership in the corporation, both [REDACTED] and [REDACTED] received \$43,425, and [REDACTED] received \$28,950. While all three shareholders received income from their business and might forego their compensation from the petitioner to pay the beneficiary's wage

in 2001, it is unlikely that [REDACTED] would forego all of their combined compensation to pay the beneficiary's wage of \$41,600 in that year. From 2002 to 2004, the officers' compensation was even less than in 2001. No evidence of record supports the petitioner's argument that the shareholders – [REDACTED] and/or [REDACTED] – would forego all or part of their compensation to pay the beneficiary's wage from 2002 to 2004. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The record also contains copies of [REDACTED] personal tax returns for 2001-2008. As noted by the director in his decision, since the petitioner in the instant case is a corporation, the AAO cannot pierce the corporate veil and look into the owner's personal assets. 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 or corporations 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 will not consider copies of Mr. [REDACTED] individual tax returns as evidence of the petitioner's ability to pay.

Finally, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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, no evidence has been presented to show that the petitioning corporation has as sound and outstanding reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1993. Nor does it include any evidence or detailed explanation of its milestone achievements. The evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from the priority date, specifically between 2001 and 2004.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, this office concludes that the petitioner has not established that it had the ability to pay the salary offered as of the priority date and continuing to present.

Beyond the decision of the director, the AAO finds that this petition cannot be approved because the petitioner has not established that the petition is for an unskilled worker, especially when the evidence submitted (the approved Form ETA 750) shows that the petitioner required the beneficiary to have at least a bachelor's degree in any field before the date of the filing of the Form ETA 750 labor certification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Further, the regulation at 8 C.F.R. § 204.5(1)(2), in pertinent part, provides:

*Other worker* means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

In this case, the petitioner requested the unskilled worker classification (**less than two years of experience**) on the Form I-140 petition. However, the Form ETA 750 labor certification indicates that the beneficiary must have at least a bachelor's degree in any field as of April 30, 2001. There is no provision in statute or regulation that compels USCIS or the AAO to accept a petition under a different visa classification. In addition, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in

the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.