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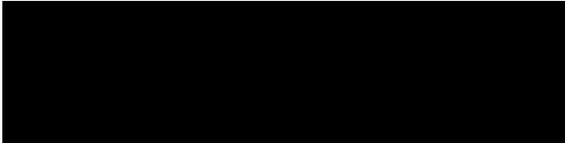
**PUBLIC COPY**

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



FILE:

Office: NEBRASKA SERVICE CENTER

Date:

MAR 04 2011

IN RE: Petitioner:   
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery and cafe. It seeks to employ the beneficiary permanently in the United States as a baker. 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 June 8, 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).

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>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The petitioner states on the petition that the company was established in August 1996 and currently employs 23 workers. The Form ETA 750 was accepted on February 13, 2004. The proffered wage as stated on the Form ETA 750 is \$13.75 per hour for a 35-40 hour work week. This wage equates to \$25,025 per year based on a 35-hour week or \$28,600 per year based on a 40-hour week.<sup>2</sup>

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 (pw). In the instant case, the petitioner provided Forms W-2 showing the wages paid to the beneficiary for part-time work during the time periods shown in the table below.

<u>Year</u>	<u>Wages Paid</u>	<u>Amt needed to reach pw (40 hr-wk)</u>	<u>Amt. needed to reach pw (35 hr-wk)</u>
2004	\$5,865.30	\$22,734.70	\$19,159.70
2005	\$6,206.66	\$22,393.34	\$18,818.34

<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 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> DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

2006	\$6,327.30	\$22,272.70	\$18,677.70
2007	\$3,831.40	\$24,768.60	\$21,193.60

Accordingly, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for the years 2004 through 2007. The petitioner must show that it can pay the remaining wages for the years 2004 through 2007.

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. 813, 881 (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*, *supra* (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 November 12, 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 was the most recent return available before the director. In his RFE, the director stated that the evidence did not establish the petitioner had the ability to pay the proffered wage. The director requested that the petitioner submit additional evidence in support of the petition. In response, counsel resubmitted federal tax returns 2004 through 2006 and submitted its 2007 tax return and the beneficiary's Forms W-2 for the years 2004 through 2007. On appeal, the petitioner submitted its 2008 tax return. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the petitioner's Form 1120S stated net income of \$16,174.<sup>3</sup>
- In 2005, the petitioner's Form 1120S stated net income of -\$1,334.
- In 2006, the petitioner's Form 1120S stated net income of \$557.
- In 2007, the petitioner's Form 1120S stated net income of -\$32,129.
- In 2008, the petitioner's Form 1120S stated net income of \$1,286.

Based on the figures in this table, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage of from \$25,025-\$28,600 for the years 2004 through 2008. When the wages paid the beneficiary are combined with the petitioner's net income, the petitioner has not established its ability to pay the remaining wages for the years 2004 through 2007.<sup>4</sup>

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<sup>3</sup> The director erred in listing that the petitioner's net income was \$18,120 in 2004. 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) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed as of December 22, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). The director also erred, stating that the petitioner's net income was -\$1,399 in 2005; \$16,100 in 2006; and -\$32,164 in 2007. Therefore, these specific findings in the director's decision are withdrawn.

<sup>4</sup> The petitioner did not provide the beneficiary's 2008 Form W-2 and based solely on its net

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>5</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. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the petitioner's Form 1120S stated net current assets of -\$2,553.
- In 2005, the petitioner's Form 1120S stated net current assets of \$15,438.
- In 2006, the petitioner's Form 1120S stated net current assets of \$4,618.
- In 2007, the petitioner's Form 1120S stated net current assets of -\$76,199.
- In 2008, the petitioner's Form 1120S stated net current assets of -\$109,986.

The petitioner could not have paid the difference between the beneficiary's proffered wage of from \$25,025-\$28,600 and the amount already paid to the beneficiary from its net current assets for the years 2004 through 2007. In 2008, the petitioner has not established its ability to pay the proffered wage from its net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns and Forms W-2 as submitted by the petitioner that demonstrate that the petitioner could not pay the difference between the wages paid by the petitioner from 2004 through 2007 and the proffered annual salary range.

Counsel cites several previous decisions issued by the AAO in support of its argument that the totality of the circumstances establish that the petitioner has the ability to pay. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 (BIA 1967). 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

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income, the petitioner has not established its ability to pay the proffered wage in 2008.

<sup>5</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 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 Form I-140 states that the company was established in August 1996 and currently employs 23 individuals. The petitioner provided its Profit and Loss Previous Year Comparison Charts for the years 2005 through 2008 where it shows an increase in gross sales, income and profit, and net income increase from the previous years of 3.7% in 2005; 7.6% in 2006; 13.3% in 2007; and 26.1% in 2008. However, the petitioner's tax returns show fairly low and negative net incomes for the years 2004 through 2008. The petitioner's tax returns also show fairly low and negative net current assets for the years 2004 through 2008. 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). The petitioner cites *O'Conner v. Attorney General of the United States*, 1987 WL 18243 (D.Mass., September 29, 1987) in support of its argument that the tax returns are not the only evidence of ability to pay if there is the potential for growth as reflected by longevity, reputation and continued improvement of financial conditions. The petitioner submits evidence that it has taken out four business loans to expand its business between 2006 and 2007 and is spending approximately \$6,174 a month in loan repayments, which includes the \$995.75 per month it expends for equipment rental. The balance owed by the company amounted to \$90,072 as of August 2009. The petitioner argues that its expansion has been expensive but that despite the increased cash outlays, it continues to increase its profitability, as indicated in the previous year comparison charts.

In the instant case, the petitioner has not shown how its plans for expansion increased its profitability. The petitioner provided two articles about the restaurant in the hometown newspaper but has not provided evidence of its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its

ability to pay the proffered wage. The petitioner has not shown that its business expansion, loans or the existence of extraordinary or unusual circumstances might have interfered with its ability to pay the proffered wage in the years 2004 through 2008.

The petitioner's federal income tax returns for the years 2004 through 2007 indicate that its two officers were compensated a combined amount of \$84,200, \$89,600, \$94,500 and \$67,965, respectively. However, the petitioner did not submit evidence that its officers were willing and able to forgo officer compensation to pay the beneficiary's proffered wage. The officers would need to include documentation of their shareholder status, a notarized statement that they were able and willing to forego compensation to pay the beneficiary's proffered wage from the priority date through permanent residency and evidence that they can realistically forgo the amount of compensation designated. Nothing in the record currently reflects that the officers were willing and able to forgo some of their compensation in 2004 and onwards to pay the beneficiary's proffered wage. 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)).

The petitioner paid salaries and wages of \$218,797, \$210,346, \$214,694, \$260,414, and \$329,980 from 2004 through 2008, respectively.<sup>6</sup> In general, wages paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel's assertions on appeal do not outweigh the evidence presented in the tax returns that demonstrate that the petitioner could not pay the proffered wage for the instant beneficiary for the years 2004 through 2008 and continuing until the beneficiary obtains lawful permanent residence.

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.

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<sup>6</sup> On the petition, the petitioner claimed to employ 23 workers. Using the salaries and wages reported on the petitioner's tax returns, the average salary per worker would be from approximately \$9,300.00 to \$14,300.00 per worker.