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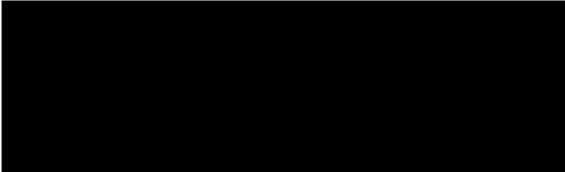
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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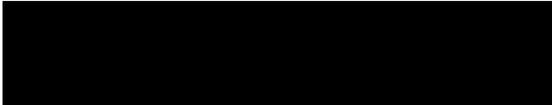
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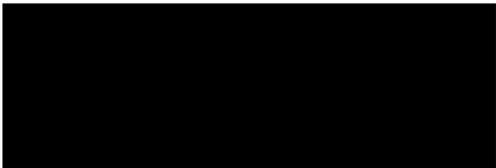
Petitioner:

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.

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 called 425 Bake Corp. It seeks to employ the beneficiary permanently in the United States as a cook, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(i).¹ 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 beneficiary's wage specifically from 2001 to 2004.

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.

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.²

As set forth in the director's March 3, 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

¹ The record shows that the petitioner originally requested a classification of an alien of extraordinary ability, pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A). However, upon receipt of the petition the director changed the classification to "any other worker (requiring less than two years of training or experience)." This modification by the director appears to be a clerical error as the application for alien employment certification (Form ETA 750) requires the applicant to have at least two years prior work experience in the job offered to qualify for the position. In his denial, the director stated that the petition was filed for a skilled worker pursuant to section 203(b)(3)(A)(i). We will continue to treat this petition as the petition filed for a skilled worker, pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

² 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).

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 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 petitioner submitted and the DOL accepted for processing the Form ETA 750 labor certification on May 3, 2001. The rate of pay or the proffered wage stated on that form is \$11 per hour or \$22,880 per year. The Form ETA 750 also states that the position requires a minimum of two years work experience in the job offered.

To show that the petitioner has the ability to pay \$11 per hour or \$22,880 per year beginning on May 3, 2001, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, of [REDACTED] for the years 2001 and 2002;
- IRS Forms 1120S of [REDACTED] for the years 2003 through 2007;
- The beneficiary's individual tax returns filed on IRS Forms 1040 for the years 2001 through 2007; and
- The certificate of incorporation of [REDACTED] dated June 21, 2002.

In his letter dated April 16, 2007, [REDACTED] states that [REDACTED] no longer exists and that the beneficiary is currently working at [REDACTED] as a full-time employee. He also claims that both [REDACTED] are under the same management.³

³ In a letter dated November 31, 2007 the petitioner's representative indicated that [REDACTED] is the parent company of [REDACTED]. The AAO notes that the 2001 tax return of Lex [REDACTED] pre-dates the [REDACTED] corporate filing date of June 21,

On October 29, 2007, the director issued a request for evidence (RFE), advising the petitioner to submit its federal income tax records, audited financial statements, or annual reports, and the beneficiary's Forms W-2 or 1099-MISC.

In response to the director's RFE, the petitioner's representative asserts that the beneficiary was self-employed and reported all of his income on his Forms 1040, U.S. Individual Income Tax Return. The representative submitted copies of the beneficiary's Forms 1040 for the years 2001 through 2007.

As a threshold issue, the evidence in the record of proceeding establishes that the petitioning company – [REDACTED] – is no longer in business. [REDACTED] states in his April 16, 2007 letter that [REDACTED] no longer exists.⁴ Where the petitioning business is no longer an active business, the petition and its appeal to this office have become moot, in which case, the appeal shall be dismissed as moot.⁶

Further, the record does not clearly establish the corporate identity of the petitioner. On the Form I-140 petition, the petitioner claimed to have the following IRS Tax number: [REDACTED]. The AAO notes, however, that that IRS Tax number does not belong to [REDACTED], but to [REDACTED]. The petitioner also claimed to have established its business on June 21, 2002. This is the date that [REDACTED] was established, as evidenced by the certificate of incorporation.⁷ Even if the AAO were to assume that [REDACTED] is the petitioner, the approved labor certification was not obtained by [REDACTED], as it did not incorporate until after the filing date of the labor certification application. There is no evidence in the record showing that [REDACTED] are the same entity or that [REDACTED] and became the successor-in-interest to the original petitioner.⁹

2002. The record does not include any corporate restructuring information whereunder [REDACTED] became the parent company of [REDACTED].

⁴ The New York Department of State's website reveals that [REDACTED] was no longer an active business due to dissolution by proclamation as of July 29, 2009. The corporation was initially established on March 16, 2000 (accessed February 24, 2001).

⁶ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

⁷ The New York Department of State website also indicates that [REDACTED]'s initial filing date was June 21, 2002. The [REDACTED], however, was initially established on March 16, 2000 (accessed February 24, 2001).

⁹ A valid successor relationship may only be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the

Thus, if [REDACTED] is the petitioner, there is no valid labor certification accompanying the petition. For this additional reason, the petition may not be approved.

On appeal, counsel for the petitioner contends that the director's decision that the petitioner does not have the ability to pay is erroneous. Counsel states that [REDACTED] is the sole proprietor of [REDACTED]

Counsel essentially claims that the director should have considered evidence from all of the business enterprises that [REDACTED] owns. The tax returns of [REDACTED] do not, however, reflect a financial relationship with the petitioning corporation.

Provided that [REDACTED] has an ownership interest in all of the entities mentioned above, the AAO still cannot pierce the corporate veil and look into the owner's personal assets or his other business enterprises. A corporation such as the one in this case is a separate and distinct legal entity from its owner and shareholder; the assets of its shareholder 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 petitioner has not established the ability to pay the proffered wage from the priority date.

As the director did not address the issues relating to the corporate existence and/or the corporate identity of the petitioner, the AAO will assume for purposes of the remaining ability to pay discussion, that the 2001 and 2002 tax returns of [REDACTED] and the 2003-2007 tax returns of [REDACTED] may be considered. With these considerations, the petition may not be approved, and the appeal shall be dismissed, as the petitioner has not established its continuing ability to pay the proffered wage from the priority date.

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

predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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.

Here, no evidence of the beneficiary's employment with the petitioner has been submitted. The beneficiary's individual tax returns do not show that the beneficiary was employed and paid by the petitioner. The record includes no copies of the beneficiary's Forms W-2 or 1099-MISC or other evidence such as payroll or accounting records, pay vouchers, or personnel records. It is not clear whether any or all of the income reflected on the beneficiary's schedules C came from either [REDACTED]

When 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 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 November 26, 2007, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, [REDACTED] 2007 federal income tax return was not yet due. Therefore, the [REDACTED] income tax return for 2006 was the most recent return available before the director. On appeal, the petitioner submitted the 2007 income tax return for the [REDACTED]. Both [REDACTED] are structured as S corporations. Their respective tax returns demonstrate net income for 2001-2007, as shown in the table below.

- In 2001, the [REDACTED] Form 1120S stated net income¹⁰ of \$90,279.

¹⁰ 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>

Therefore, for the years 2003 and 2004, the [REDACTED] did not have 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.¹² 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 [REDACTED] tax returns demonstrate its end-of-year net current assets for 2003 and 2004, as shown in the table below.

- In 2003 the Form 1120S stated net current assets (loss) of (\$36,588).
- In 2004 the Form 1120S stated net current assets (loss) of \$13,475.

Therefore, for the years 2003 and 2004, the [REDACTED] did not have sufficient net current assets to pay the proffered wage from the priority date.

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 the net income or net current assets of the [REDACTED]

(accessed *) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income*credits* deductions* other adjustments* shown on its Schedule K for *, the petitioner's net income is found on Schedule K of its tax return* tax returns*.

¹²According 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.

Though not raised on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the record includes no evidence of unusual circumstances that would explain the [REDACTED]'s inability to pay the proffered wage in 2003-2004. The petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

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 tax returns and other evidence, the AAO is not persuaded that the [REDACTED] has that ability.

Beyond the decision of the director, the AAO also finds that the beneficiary is not qualified to perform the duties of the position. As noted above, the position stated on the Form ETA 750 requires that the beneficiary have at least two years work experience in the job offered prior to the date of the filing of the labor certification. The petitioner claimed at part B of the Form ETA 750 that the beneficiary worked as a line cook at [REDACTED] from September 1999 to July 2000 and at [REDACTED] from August 2000. The beneficiary stated on his biographic information (Form G-325A) that he worked at [REDACTED] as a cook from July 2000.

The record, however, contains no documentary evidence indicating that the beneficiary worked at [REDACTED]. The AAO is not persuaded that the beneficiary had at least two years experience as a cook before May 3, 2001.

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.