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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
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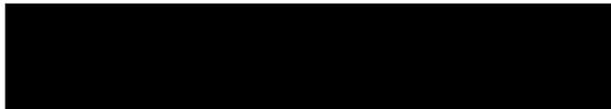
Office: NEBRASKA SERVICE CENTER

DATE: MAR 04 2011

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is a restaurant. It seeks to employ the beneficiary permanently in the United States as a waitress. 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 (the DOL). The director determined that the petition was submitted without all the required evidence. The director denied the petition accordingly.

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). 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 primary issues in this case are (1) whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and (2) whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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).

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 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 unavailable.

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

¹ According to the California Secretary of State's informational website site service accessed at [REDACTED] on February 9, 2011, the petitioner was organized as a California corporation on February 19, 1999, as The [REDACTED], and it is an active entity. According to the record, the business is also known as [REDACTED]

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).

Here, the Form ETA 750 was accepted on February 27, 2004. The proffered wage as stated on the Form ETA 750 is \$7.61 per hour (\$15,828.80 per year).

Among the documents submitted in the record are three pages downloaded from the informational [REDACTED] on November 17, 2008, concerning [REDACTED] Wage and Tax Statements (Forms W-2) issued by the petitioner allegedly to the beneficiary for years 2002² through 2007; and the petitioner's federal income tax returns (Forms 1120S) years 2002 through 2007.

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 1985 and to currently employ 100 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 24, 2004, the beneficiary did not claim to have worked for the petitioner or any employer.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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.

² Wage payments submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2002 and 2003 wage payments generally.

In this matter, the petitioner submitted IRS Forms W-2, Wage and Tax Statement, as evidence of wages paid to the beneficiary by the petitioner in 2002 through 2007. However, information contained in these Forms W-2 are inconsistent with claims made by the petitioner in the Form I-140 under penalty of perjury and, therefore, the Forms W-2 are not persuasive evidence of wages having been paid to the beneficiary. The Forms W-2 state that the wages were paid to a person having social security number 586-74-2483. The petitioner respond "NONE" to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, 586-74-2483 is the beneficiary's social security number. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms W-2 as persuasive evidence of wages paid to the beneficiary. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. See *Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

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 petitioner's tax returns³ demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S stated net income⁴ of <99,887.00>.
- In 2005, the Form 1120S stated net income of \$42,110.00.
- In 2006, the Form 1120S stated net income of \$118,608.00.
- In 2007, the Form 1120S stated net income of <\$97,691.00>.⁵

³ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2002 and 2003 federal income tax returns generally.

⁴ 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 17e (2004-2005) or line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 9, 2011) (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 credits and other adjustments shown on its Schedule K for 2004 through 2007, the petitioner's net income is found on Schedule K of its tax returns.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Therefore, for the years 2004 and 2007, the petitioner 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.⁶ 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 Form 1120S stated net current assets of <\$176,998.00>.
- In 2005, the Form 1120S stated net current assets of <\$183,098.00>.
- In 2006, the Form 1120S stated net current assets of <\$218,583.00>.
- In 2007, the Form 1120S stated net current assets of <\$619,333.00>.

Therefore, for the years 2004, 2005, 2006, and 2007, the petitioner did not have 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 ability to pay the beneficiary the proffered wage as of the priority date through an examination of reputed wages paid to the beneficiary,⁷ or its net income or net current assets in 2004 and 2007.

On appeal, the petitioner states, among other things, the petitioner's tax returns demonstrate its ability to pay the proffered wage. As stated above, the petitioner has not demonstrated its ability to pay the proffered wage in 2005 and 2006.

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.

⁶According 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.

⁷ If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th 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 petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 was established according to the petition in 1985 and to currently employ 100 workers. No payroll roster was submitted to substantiate that figure or to show that the employees were fulltime workers. The petitioner submitted its tax returns from 2002 through 2007. In 2002 the petitioner stated gross receipts of \$5,031,791.00, and in 2007, \$6,146,353.00. Despite these revenues, the petitioner's net current assets were negative in 2004 through 2007, and in only two years, 2005 and 2006, did the petitioner have sufficient net income to pay the proffered wage. As noted, under the circumstances of the case, the stated wages reputedly paid to the beneficiary are not persuasive evidence.

In addition, the petitioner has filed other Immigrant Petitions for Alien Worker (Forms I-140) for nine more workers as found in the electronic records of the USCIS at [REDACTED]

[REDACTED] Therefore, the petitioner must show that it had sufficient income to pay all the wages for all sponsored beneficiaries at the priority date, which has not been demonstrated.

Further, the petitioner has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. The petitioner has not provided evidence of a turn-around of the petitioner's business fortunes, or expectations of increased 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.

An additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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 Form ETA 750 states that the position requires three months job experience as a waitress.

The beneficiary under penalty of perjury failed to provide any statements of present or past employment in the offered job in the ETA Form 750B.

The Form ETA 750, Part A, Line 13, describes the job duties of waitress as follows:

Serves food to patrons at counters and tables of coffee shops, lunchrooms, and others [sic] dining establishments where food service is informal: Presents menu, answers questions, and makes suggestions regarding food and service.

Writes order on check or memorizes it. Relays order to kitchen and serves course [sic] from kitchen and service bars.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

On appeal, the petitioner submitted a letter dated December 2, 2008, from [REDACTED] of Watsonville, California, which states in its entirety:

To whom it may concern this letter is to confirm that [the beneficiary] was employed by this company [REDACTED] August 2001 – September 2002. [the beneficiary] was a great employee she left [REDACTED] in good standing to advance in her career at the [REDACTED]

The signature on the above statement is in cursive and illegible. There is no indication in the record who provided the job reference, what the beneficiary's job duties were, and there is no name,

address, and title of the beneficiary's trainer or employer at [REDACTED], or a description of the training received or the experience of the beneficiary. There is no other evidence in the record that the beneficiary had three months experience in the offered job. The sole statement submitted in the record concerning the beneficiary's qualifications received from [REDACTED] is insufficient evidence under the regulation at 8 C.F.R. § 204.5(1)(3) to demonstrate that the beneficiary is qualified to perform the duties of the offered position. There is no other evidence submitted concerning the beneficiary's qualifications to meet the requirements of the labor certification. The purported experience was also not listed in the labor certification, and therefore will not be considered. *See Matter of Leung*, 16 I&N Dec, 2530 (BIA 1976).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.