

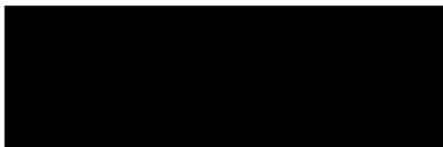
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

Date: **MAY 03 2011** Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On November 29, 2002, United States Citizenship and Immigration Services (USCIS), Vermont Service Center (VSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the VSC director on September 22, 2004. However, the Director of the Texas Service Center (TSC) revoked the approval of the immigrant petition on May 12, 2009, and the petitioner subsequently appealed the director's decision. On appeal, the Administrative Appeals Office (AAO) issued a Request for Evidence and Notice of Derogatory Information (RFE/NDI). The petitioner responded in part. The appeal will be dismissed. The AAO will also invalidate the Alien Employment Certification, Form ETA 750.

The petitioner is a restaurant, seeking to permanently employ the beneficiary 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 submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The director determined that the Form ETA 750 was obtained by fraud or willful misrepresentation of material facts. Accordingly, the petition was revoked.

On appeal to the AAO, counsel for the petitioner asserted that the director improperly revoked the petition. The revocation, according to counsel, was solely based upon an alleged failure to follow recruitment requirements and was not supported by any evidence in the record. Further, counsel stated that the fact that the Department of Labor (DOL) had approved the labor certification showed that the petitioner and the beneficiary had conformed to and met all of the DOL recruiting requirements. Counsel also indicated that the director's notice of intent to revoke (NOIR) contained vague information relating to the petitioner in the instant case. Specifically counsel stated that the NOIR did not provide a clear explanation of the problem with the petition and did not request the petitioner to produce specific evidence to overcome the grounds of revocation. The director's decision to revoke the previously approved petition, according to counsel, was not based on good and sufficient cause, as required by 8 U.S.C. § 1155, section 205 of the Act.

The record shows that the appeal was properly filed and timely and made a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon *de novo* review, the AAO finds that the director's decision finding fraud or willful misrepresentation against the petitioner is erroneous and shall be withdrawn. The basis of the director's decision revoking the approval of the petition was the fact that the petitioner failed to submit copies of the in-house postings in connection with the application for labor certification. In response to the director's NOIR, the petitioner submitted copies of recruitment documents, including proof of advertising for the position in a newspaper of general circulation. There are no inconsistencies of record between the employer's recruitment efforts and the labor

¹ Section 203(b)(3)(A)(i) of 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.

certification application. The record does not support the director's conclusion that the petitioner did not follow DOL recruitment requirements. For these reasons, the director's finding of fraud or willful misrepresentation against the petitioner is withdrawn.

Nevertheless, as noted by the AAO in the RFE/NOID dated November 19, 2010, the petition was not properly approved, as the petitioner has not shown by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date. As noted above, the AAO has *de novo* authority to review the matter properly forwarded by the director. *See id.*

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).

Here, the record shows that the Form ETA 750 was received for processing on November 13, 2001 and approved on October 24, 2002 by the DOL. The rate of pay or the proffered wage as indicated on the Form ETA 750 is \$13.01 per hour or \$23,678.20 per year (based on a 35-hour work per week).² The beneficiary claimed on the Form G-325 that he had worked for the petitioning organization since 1996.

To show that the petitioner has the ability to pay the beneficiary's wage from November 13, 2001, the petitioner submitted a copy of the beneficiary's Form W-2 for 2001. The W-2 shows that the beneficiary received from the petitioner \$25,525.94 in 2001 as wages.

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

² The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The 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).

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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the beneficiary's W-2 for the year 2001 is considered *prima facie* evidence of the petitioner's ability to pay the proffered wage in 2001. However, since no other evidence of payment of wages was submitted, the AAO cannot conclude that the petitioner has that ability throughout the rest of the qualifying period.

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 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).

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.³ 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.

In this case, no federal tax return, annual report, or audited financial statement or balance sheet for any of the years during the qualifying period has been submitted. Without further information or evidence, this office cannot determine whether the petitioner has the continuing ability to pay the proffered wage from the priority date.

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

³ According 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.

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 record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage particularly from 2002 thereon. Unlike *Sonegawa*, the petitioner in this case 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 business' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the business' 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 petitioner's evidence, the AAO is not persuaded that the petitioner has that ability.

In addition, upon review, the AAO notified the petitioner and the beneficiary in the RFE/NDI that the petitioner's signatures found on the Immigrant Petition for Alien Worker (Form I-140) and on the Notice of Entry of Appearance as Attorney or Representative (Form G-28) dated August 21, 2002 did not match the signatures on the Form ETA 750, and that the beneficiary's signatures varied on several forms.⁴ The AAO also noted that the beneficiary did not appear to be working for the petitioner any longer.⁵

⁴ The beneficiary's signature on the Application to Register Permanent Residence or Adjust Status (Form I-485) looks different from his signature on the Biographical Information (Form G-325) and from his signature on the Form ETA 750, part B.

⁵ The record includes a letter dated December 12, 2009 from [REDACTED], who claimed that the beneficiary had been employed by [REDACTED] since December 2006.

On November 19, 2010, the AAO issued a RFE/NDI to both the petitioner and the beneficiary and advised them both to explain why their signatures varied. The AAO also advised the petitioner to submit additional evidence to demonstrate its continuing ability to pay the proffered wage from the priority date. In the RFE/NDI to the beneficiary, the AAO specifically instructed the beneficiary to explain when he left the petitioner to work for [REDACTED] and to provide a description of his job duties at [REDACTED].

In response to the AAO's RFE/NDI, the owner of the petitioner [REDACTED] stated that he sold his business in November 2006 and that the signatures on the Form ETA 750 and Form G-28 are not his.⁶ No other evidence or response was submitted. The beneficiary did not provide or submit any response.

The owner's admission that his business was sold in 2006 could have the same effect as if the business were dissolved and would have automatically revoked the petition by operation of law if it were not revoked by the director on May 12, 2009. *See* 8 C.F.R. § 205.1(a)(iii)(D). The record contains no evidence showing that the job offer as a cook is still available to the beneficiary or that the acquiring business (that is, the business that purchased the petitioner's restaurant) intends to continue the petition process and to employ the beneficiary as a cook.⁷ Absent evidence to show otherwise, the petition can also be dismissed as moot.⁸

Moreover, by stating that none of the signatures on the approved Form ETA 750 and Form G-28 was his signatures, [REDACTED] implicitly has stated that his signatures on those forms were forged. Hence, the AAO finds that the petition is defective in that the approved Form ETA 750 and the Form G-28 accompanying the Form I-140 petition contained forged signatures. Further, since the approved Form ETA 750 contained a forged signature, the AAO will invalidate the Form ETA 750, pursuant to 20 C.F.R. § 656.30(d). Finally, because the labor certification is invalid – both by the AAO's invalidation of the certification and on its face due to the forged signature – the appeal is also dismissed because the petition is not accompanied by a valid labor certification. 8 C.F.R. § 204.5(l)(3)(i).

⁶ [REDACTED] highlighted the signatures that are not his.

⁷ To establish a valid successor-in-interest relationship for purposes of the Act, the petitioning successor must fully describe and document the transaction transferring ownership of the beneficiary's predecessor employer, demonstrate that the job opportunity is the same as the one originally offered on the labor certification, and prove by a preponderance of the evidence that the successor employer is eligible for the immigrant visa in all respects. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

⁸ 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.

The petition will remain revoked 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. The petition remains revoked.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number P2002-MA-01325975, is invalidated.