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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
**U.S. Citizenship
and Immigration
Services**



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Office: TEXAS SERVICE CENTER

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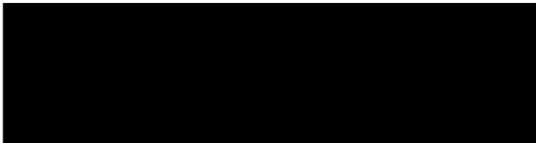
IN RE:

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: 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 nursery farm/greenhouse. It seeks to employ the beneficiary permanently in the United States as a horticultural specialist. 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 April 22, 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 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.02 per hour (\$35,401.60 per year). The Form ETA 750 states that the position requires two years experience in the proffered position.

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.¹

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 on January 1, 1967 and to currently employ 23 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 April 19, 2001, the beneficiary claimed to have worked for the petitioner since January 2004.²

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 Sonegawa*, 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. The petitioner did submit, however, W-2 Forms showing the beneficiary was paid wages as follows:

- 2007 - \$18,674.65
- 2006 - \$20,837.79

¹ 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).

² The beneficiary states on Form ETA 750 that she has been a "self-employed" horticultural specialist with the petitioner from March 2000 to January 2004.

- 2005 - \$17,692.90
- 2004 - \$16,072.36

The petitioner need only establish the ability to pay the difference between wages paid to the beneficiary and the proffered wage in those years. Those sums are as follows:

- 2007 - \$16,727.10
- 2006 - \$14,563.81
- 2005 - \$17,708.70
- 2004 - \$19,329.24

The petitioner must establish the ability to pay the full proffered wage in all other relevant years for 2001, 2002 and 2003.

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 Form I-140 was filed on July 25, 2007. As of that date, the most recent tax return available was for tax year 2006. The director did not request additional evidence subsequent to the filing of the petition. The petitioner’s tax returns demonstrate its net income for 2001 through 2007,³ as shown in the table below.

- In 2001, the Form 1120S stated net income⁴ of \$39,444.
- In 2002, the Form 1120S stated net income of \$16,037.
- In 2003, the Form 1120S stated net income of \$18,166.
- In 2004, the Form 1120S stated net income of \$7,116.
- In 2005, the Form 1120S stated net income of \$8,483.
- In 2006, the Form 1120S stated net income of \$9,384.
- In 2007, the Form 1120S stated net income of \$13,772.

³ The petitioner submitted its 2006 and 2007 tax returns on appeal.

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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (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 and/or other adjustments shown on its Schedule K for 2001 through 2007, the petitioner’s net income is found on Schedule K of its tax returns.

While the petitioner's 2001 tax return would show sufficient net income to pay the proffered wage, the tax returns for 2002 through 2007 do not show sufficient net income to pay the proffered wage or the difference between wages paid to the petitioner and the full 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.⁵ 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 for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$79,055.
- In 2002, the Form 1120S stated net current assets of \$59,542.
- In 2003, the Form 1120S stated net current assets of (\$598,023).
- In 2004, the Form 1120S stated net current assets of (\$198,023).
- In 2005, the Form 1120S stated net current assets of (\$3,341).
- In 2006, the Form 1120S stated net current assets of \$46,510.
- In 2007, the Form 1120S stated net current assets of (\$514).

Therefore, for the years 2001 and 2002, the petitioner's tax returns would show sufficient net current assets to pay the proffered wage for this beneficiary. As previously stated, however, the petitioner's 2001 tax return also established the ability to pay the proffered wage based upon net income. The petitioner's 2006 tax return would show sufficient net current assets to pay the difference between the proffered wage and wages actually paid to this beneficiary. The petitioner's tax returns for 2003, 2004, 2005 and 2007 do not show sufficient net current assets to pay the proffered wage or the difference between the proffered wage and wages paid to the beneficiary.

It is noted, however, that USCIS records indicate that the petitioner filed a Form I-140 for another worker in 2007. The petitioner would also be required to establish the ability to pay the proffered wage of this additional worker from the priority date until he or she adjusts status. Records reflect that the priority date for the second worker is April 30, 2001, with a wage of \$47,819 and that the second worker adjusted to permanent residence in December 2010. Therefore, the petitioner would be required to demonstrate its ability to pay for both the instant beneficiary and the second sponsored worker for the entire time period from 2001 onward. From the record, the petitioner has not

⁵According 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.

established that it has the continuing ability to pay the proffered wage of the instant beneficiary or that of the additional sponsored worker.

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 its net income or net current assets.

On March 1, 2011, the AAO issued a Request For Evidence (RFE) asking the petitioner to provide proof of wages paid to the second worker referenced above from 2001 onward, as well as copies of more recent tax returns for 2008 and 2009, the beneficiary's 2008, 2009 and 2010 W-2 Forms if available and information on officer compensation. The petitioner was given 45 days to respond. More than 45 days have passed since the RFE was issued and the petitioner has failed to respond. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, counsel asserts director erred in denying the petition, and did not properly consider all the evidence. Specifically, counsel states that the petitioner's sole shareholder is willing to forgo a sufficient portion of her officer compensation to pay the proffered wage or difference between the proffered wage and wages paid to the beneficiary in all relevant years. Although, counsel states on page six of her appeal brief that the petitioner is a closely held corporation with a "single shareholder" who is willing to forgo a portion of his or her officer compensation to pay the proffered wage, the petitioner's tax returns for 2001 through 2007 show that the petitioner had multiple shareholders during each of those tax years. The AAO requested information related to the shareholder's willingness to use officer compensation to pay the proffered wage. As noted above, however, the petitioner failed to respond. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner submitted a letter from [REDACTED] Vice President/Commercial Loan Officer, [REDACTED], which states that the petitioner has been in operation since the early 1960s and is well known to the [REDACTED] further states that the petitioner has maintained "a corporate and personal banking relationship [with her organization] for over 44 years." Per the statement of [REDACTED] the petitioner has maintained a working line of credit with the [REDACTED] since 1965, the credit line is reviewed on an annual basis based upon a review of the petitioner's corporate tax returns, its principal's personal tax returns, business and personal financial statements. The [REDACTED], as of June 6, 2007, had a line of credit commitment to the petitioner of \$950,000.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* Barron's Dictionary of Finance and Investment Terms, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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 (BIA 1967). 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.

In the instant case, although the petitioner has been in business for a substantial period of time (since 1967), the petitioner has sponsored two workers during the relevant time period. The petitioner's tax returns do not establish that it can pay both sponsored workers. The AAO sent an RFE seeking

additional information from the petitioner related to wages paid, more recent tax returns, officer compensation, and evidence of any temporary uncharacteristic business losses, but the petitioner failed to respond. As previously noted, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner on appeal submitted a published article which discusses the petitioner's business operations and notes that the petitioner began business in 1945 as an egg farm and began greenhouse production in the mid-1970s. [REDACTED] Although the petitioner has been in business for a substantial time period, the petition may not be approved, however, considering the totality of the circumstances for the reasons set forth above.

Based on the foregoing, the petitioner has failed to establish that it has the continuing ability to pay the beneficiary the proffered wage from the priority date onward.

Beyond the decision of the director, the petitioner has not established that the beneficiary has two years of experience in the proffered position as a "horticultural specialist – outside" as required by the Form ETA 750. As previously stated, the petitioner must 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). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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) (the AAO reviews appeals on a de novo basis).

Regarding the beneficiary's qualifications for the position, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

- (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.
- (B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it

impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

In its March 1, 2011 RFE, the AAO noted that the Form ETA 750 required two years of experience in the proffered position, and set forth the requirements of experience letters that may be submitted to establish the required experience. The AAO informed the petitioner that the experience letter submitted by [REDACTED] and [REDACTED] which stated that the beneficiary "worked in the greenhouses which I own [] from January 1997 to January 1999," was deficient in that it: did not state the beneficiary's exact title; did not provide specific employment dates to establish two years of work experience; and did not detail the duties performed by the beneficiary. Though given an opportunity to remedy the cited deficiency, the petitioner did not respond to the RFE or otherwise submit additional evidence of the beneficiary's work experience. Therefore, the evidence is insufficient to demonstrate that the beneficiary has the required experience to meet the terms of the certified labor certification. For this additional reason, the petition may not be approved.

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.