

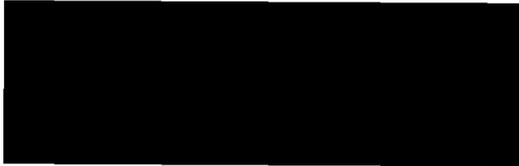
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



B6

DATE: NOV 14 2011 OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner:
 Beneficiary:



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

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The petitioner filed an appeal, which was rejected by the Director. The Director subsequently reopened the matter *sua sponte*, and forwarded the petition to the AAO for review. The appeal will be dismissed.

The petitioner is a restaurant that seeks to permanently employ the beneficiary as a cook and to classify him as a skilled worker 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). 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).

Section 203(b)(3)(A)(i) of the Act 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 Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage.

The record shows that the appeal is properly filed, timely, and makes 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 labor certification application (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). In this case, the labor certification application was accepted by the DOL on April 28, 2001. As indicated at item 12 on the form, the “rate of pay” for the proffered position is \$25,000 per year.

¹ 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). There is 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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, 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, U.S. 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).

The immigrant visa petition was filed on June 8, 2007, accompanied by a photocopy of the petitioner's federal income tax return (Form 1120S) for the year 2005, among other materials.

On June 14, 2007, the Director issued a Request for Evidence (RFE) to establish the petitioner's ability to pay the proffered wage. In particular, the Director requested copies of the beneficiary's Form W-2, Wage and Tax Statements, for each of the years 2001-2006, as well as the petitioner's federal income tax returns for each of the years 2001-2006. In addition, the Director requested a copy of the beneficiary's most recent pay voucher with specific information about the beneficiary's gross and net pay, income received to date in 2007, income tax deductions withheld, and the length of the pay period. The Director also requested the petitioner's latest annual report or audited financial statements (if such documents existed). The petitioner was given until September 6, 2007 to respond to the RFE. No response was received by that date.

On September 19, 2007, the Director denied the petition. After noting that the RFE was issued on June 14, 2007, and that no response had been received by the due date of September 6, 2007, the Director determined that the petitioner had failed to establish its ability to pay the proffered wage.

On October 17, 2007, the petitioner filed an appeal (Form I-290B) along with photocopies of its federal income tax returns (U.S. Income Tax Returns for an S Corporation, Form 1120S) for each of the years 2001-2006.

On October 25, 2007, the Director issued a decision rejecting the appeal. The Director stated that the petition had been denied due to abandonment which, under the regulations, precluded the petitioner from filing an appeal. The Director also reviewed the appeal to determine if it met the requirements of a motion to reopen, and determined that it did not.

On November 8, 2007, counsel wrote a letter to the Director objecting to his rejection of the appeal. Counsel contended that the denial decision on October 17, 2007 was based on the petitioner's failure to meet the burden of proof to establish its ability to pay the proffered wage, made no mention of abandonment, and specifically stated that the petitioner had the right to appeal. In a subsequent letter dated May 7, 2008, counsel reiterated its contention that the appeal should be decided on the merits.

On July 2, 2008, the Director issued a new decision stating that, after a complete review of the record of proceeding, he had concluded that the petition should be forwarded to the AAO for review. Accordingly, the appeal is now before the AAO and will be considered on the merits.

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines 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 this case, the record indicates that the beneficiary began working for the petitioner in February 1997, and continued in the petitioner's employment up through the filing of the instant petition and beyond. Despite the Director's specific request in the RFE for the beneficiary's W-2 forms for the years 2001 to 2006, however, no such forms were submitted by the petitioner. Nor did the petitioner submit a pay voucher for the beneficiary in 2007, as requested in the RFE, or any other documentation of the beneficiary's year-by-year compensation. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (April 28, 2001) up to the present by means of its actual compensation to the beneficiary over the years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. See *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. See *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 wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary 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 *R* 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 [sic] 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).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner’s net income. The petitioner’s federal income tax returns (Form 1120S) for the years 2001-2006 show the following figures for net income.²

2001:	\$ 7,566
2002:	\$ 7,752
2003:	\$ 8,466
2004:	\$30,290
2005:	\$27,510
2006:	\$18,038

For the years 2004 and 2005 the petitioner’s net income exceeded the proffered wage of \$25,000/year. That was not the case, however, in the years 2001-2003 or in 2006. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (April 28, 2001) up to the present based on its net income year by year.

As another alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets as reflected on its federal income tax return. Net

² 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. When an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, however, they are reported on Schedule K. If there are 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 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). In this case, the petitioner did not have any income reported on Schedule K for the years 2001-2006.

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.

As indicated on the federal income tax returns in the record, the petitioner's net current assets in the years 2001-2006 were as follows:⁴

2001:	\$19,462
2002:	\$25,039
2003:	\$37,817
2004:	\$48,803
2005:	\$38,634
2006:	\$16,857

While the petitioner's net current assets exceeded the proffered wage of \$25,000/year in the years 2002-2005, they did not do so in 2001 and 2006. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (April 28, 2001) up to the present based on its net current assets year by year.

The AAO also notes some inconsistencies on the Forms 1120S in the record. For the years 2001-2005 they identify the taxpayer as "Ocean 13 Incorporation" which is listed above [REDACTED]. The 1120S for 2006 does not include "Ocean 13 Incorporation" above [REDACTED]. The Forms 1120S for 2001-2003 identify the taxpayer's address as [REDACTED] R [REDACTED], which conflicts with the address on the Form ETA 750 (labor certification) filed in [REDACTED]. The 1120S for 2004 lists [REDACTED] as located in Collingswood (not Oaklyn), NJ. For 2005 and 2006 the Forms 1120S list the taxpayer's address as [REDACTED] which is consistent with the address on the Form I-140 petition filed in 2007 (as well as the Form ETA 750 filed in 2001), but not with the Forms 1120S for 2001-2004.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92

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.

⁴ Though the Schedule L is missing in the Form 1120S for 2001 and is indecipherable in the Form 1120S for 2005, the petitioner's net current assets as of the end of those years can be gleaned from the Schedules L of the Forms 1120S for 2002 and 2006, respectively, which list "beginning of tax year" current assets and current liabilities in column (b).

(BIA 1988). The petitioner has provided no explanation for the inconsistent addresses on its federal income tax returns. Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

In view of all of the evidentiary shortcomings discussed above, the petitioner has not established its continuing ability to pay the proffered wage from the priority date (April 28, 2001) up to the present – in particular during the years 2001 and 2006 – on the basis of wages actually paid to the beneficiary, the petitioner's net income, or its net current assets year by year.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612.⁵ USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner states that it began operations in 1975 and had 16 employees when the instant petition was filed in 2007. Measured by gross receipts, the restaurant showed significant growth in the five-year period of 2001-2006 – from \$506,937 in 2001, to \$595,514 in 2003, to \$710,875 in 2004, to \$795,219 in 2006. The business did not have a large profit margin, however, as indicated by its modest and uneven net income and net current assets over those years. The federal income tax returns show a sharp dropoff in net income from 2005 to 2006, and a precipitous dropoff in net current assets from 2004 to 2006. Aside from its federal income tax returns, no financial documentation has been submitted by the petitioner. Further undermining the petitioner's case is its failure to submit any evidence of the compensation it actually paid to the beneficiary over the years. That makes it incumbent upon the petitioner to show from the documentation in the record that it had the ability to pay the entire proffered wage every year, rather than the difference between the annualized proffered wage and any amounts already paid to the beneficiary year by year.

⁵ 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.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage to the beneficiary, in particular during the years 2001 and 2006.

Conclusion

For all of the reasons discussed in this decision, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date (April 28, 2001) up to the present. Accordingly, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is dismissed.