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

B6

Date: **NOV 28 2011**

Office: TEXAS SERVICE CENTER

File: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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,

Berry Rhew

Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 from the priority date onward nor did it establish that the beneficiary had the experience required by the terms of the labor certification. 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 September 10, 2008 denial, the issues in this case are 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 and whether the beneficiary has the experience required by the terms of the labor certification.

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 March 5, 2003. The proffered wage as stated on the Form ETA 750 is \$11.84 per hour (\$24,627 per year).¹ The Form ETA 750 states that the position requires two years of experience in the position offered as a Mexican cook.

The AAO conducts appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner stated that it was established in 1999 and currently employs four workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have begun working for the petitioner in September 1999.

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 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. The petitioner provided no evidence that it ever employed the beneficiary or paid him any wages.

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

¹ Form ETA 750 shows "white out" over the rate of pay and \$11.84 written on top. Box 15 "other special requirements" also contains white out over typewritten text. The changes are initialed by what appears to be petitioner's counsel and dated February 28, 2003. The Form ETA 750 does not contain a DOL approval stamp by the changes, which appear to have been made prior to submission.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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, 881 (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*, 696 F. Supp. 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, 558 F.3d at 116. "[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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed with the receipt by the director of the petitioner's response to the Notice of Intent to Deny (NOID) on September 4, 2008. As of that date, the most current tax return available was the petitioner's 2007 federal tax return. The petitioner submitted the following Forms 1120S:

- In 2003, the Form 1120S stated net income³ of -\$3,334.
- In 2004, the Form 1120S stated net income of -\$10,032
- In 2005, the Form 1120S stated net income of -\$5,451.
- In 2006, the Form 1120S stated net income of \$8,174.⁴
- In 2007, the Form 1120S stated net income of \$20,950.

Therefore, the petitioner demonstrated insufficient net income to pay the proffered wage in any year.

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 Forms 1120S stated:

- In 2003, the Form 1120S stated net current assets of -\$3,547.
- In 2004, the Form 1120S stated net current assets of -\$4,189.

³ 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), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 6, 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 no additional adjustments shown on its Schedule K for 2003, 2004, 2006, and 2007, the petitioner's net income is found on line 21 of its tax returns for those years; for 2005, its net income is found on Schedule K.

⁴ The petitioner submitted its 2006 Form 1120S on appeal as counsel states that the petitioner had not received the tax return from its accountant by the date of response to the NOID.

⁵ 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.

- In 2005, the Form 1120S stated net current assets of -\$208.
- In 2006, the Form 1120S stated net current assets of \$14,468.
- In 2007, the Form 1120S stated net current assets of \$3,530.

The petitioner's net current assets in each year are less than the proffered wage and are therefore insufficient to demonstrate the ability to pay the proffered wage in all of the years at issue.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

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, the tax returns demonstrate minimal or negative net income and net current assets in every year from the priority date onward. Although the petitioner claims to have four employees on its I-140 petition, the total wages paid on the tax returns are only marginally more than the total proffered wage in 2003, 2004, and 2005 and less than the proffered wage in 2006 and 2007.⁶ The

⁶ The tax returns state total salaries and wages paid of \$38,302 in 2003, \$35,355 in 2004, \$33,766 in 2005, \$19,690 in 2006, and \$23,409 in 2007. On appeal, counsel states that the petitioner demonstrated its ability to pay the proffered wage because it paid wages in excess of the proffered wage in 2003, 2004, and 2005. First, in general, wages paid to others are not available to pay the

petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. 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.

The director also denied the petition based on the petitioner's failure to demonstrate that the beneficiary had the required experience as of the priority date. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker 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.

The regulations for the skilled worker classification contain a minimum requirement that the position require at least two years training or experience. The Form ETA 750 requires two years of experience as a Mexican cook. The beneficiary stated on Form ETA 750B that he worked for the petitioner from September 1999 to the date of signing, April 24, 2001 as a Mexican cook and for [REDACTED] Restaurant in Naucalpa, Mexico (no exact street address identified) as a cook from June 1995 to April 1999. The beneficiary did not list any other experience on Form ETA 750B. In response to the director's NOID, the petitioner submitted a letter from [REDACTED] who stated that he worked with the beneficiary at [REDACTED] from June 1995 to April 1999. He states the location as "in the state of Huixquilucan." This letter was not submitted by an employer as required by 8 C.F.R.

proffered wage. Second, the total amount of wages paid in 2006 and 2007 to all employees was less than the proffered wage to the individual beneficiary even though the petitioner claimed to have four employees on its Form I-140. If the petitioner wishes to rely upon wages paid to the beneficiary as evidence of its ability to pay the proffered wage, it should submit evidence of the wages paid to this beneficiary in the form of Forms W-2, paystubs, or other similar evidence. The petitioner did not submit any such evidence despite the beneficiary's statement on Form ETA 750 that he has been employed with the petitioner. While counsel correctly notes that the petitioner is not required to pay the beneficiary the proffered wage until the beneficiary obtains permanent residence, 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its continuing ability to pay from the priority date onward.

§ 204.5(l)(3)(iii)(A) and was instead written by a co-worker. The director found the letter insufficient to establish that the beneficiary had the required experience for the position offered. On appeal, the petitioner submitted a letter from [REDACTED], who identified himself as the owner of [REDACTED] and stated that the beneficiary worked as a cook from June 1995 to April 1999. The Form ETA 750 states that the restaurant is located in Naucalpa, Mexico and [REDACTED] states that the restaurant is located in Mexico City, Mexico. Naucalpa appears to be a municipality located adjacent to Mexico City based on general information found online. The prior statement from [REDACTED] states the restaurant's location is in "Huixquilucan." It is unclear that "Huixquilucan," [REDACTED] and Mexico City represent the same location. Therefore, while the letter would be sufficient to establish the beneficiary's work experience, the petitioner should resolve the conflict related to [REDACTED] actual location in any further filings.⁷ "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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.

⁷ Additionally, we note that the petitioner initially indicated the restaurant was shut down and could, therefore, only obtain a letter from a co-worker. Counsel does not explain on appeal the later availability of the letter from the restaurant owner. The letter from the owner does not address when the restaurant closed and is signed by the "owner," which implies that it is still open or active. *See Matter of Ho*, 19 I&N Dec. at 591-592 (It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.) Accordingly, in any further filings, the petitioner should submit evidence of pay or relevant Ministry employment records to verify such experience.