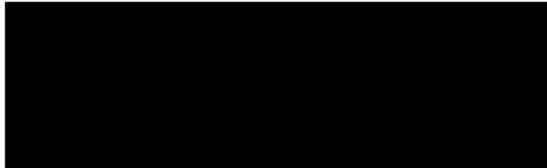


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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Date: **OCT 19 2011**

Office: TEXAS SERVICE CENTER FILE:

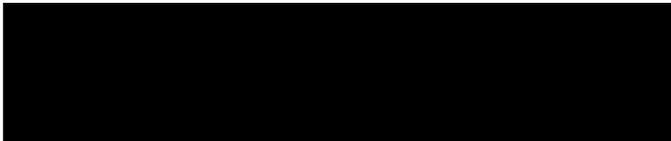


IN RE: Petitioner:  
Beneficiary:



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,

*Elizabeth McCormack*

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 medical clinic. It seeks to employ the beneficiary permanently in the United States as a receptionist. 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage, especially in 2001 and 2006.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The 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.<sup>1</sup>

As set forth in the director's May 27, 2008 denial, the only 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.

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<sup>1</sup> 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).

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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 filed and accepted for processing by the DOL on April 30, 2001.<sup>2</sup> The rate of pay or the proffered wage stated on that form is \$465 per week or \$24,180 per year. The position as set forth on the Form ETA 750 requires the beneficiary to have a high school diploma (4 years of high school education), three months of work experience in the job offered, and knowledge of [REDACTED], and English language[s]

To show that the petitioner has the ability to pay \$465 per week or \$24,180 per year beginning on April 30, 2001, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 2001 through 2007;
- Bank statements for the years 2001, 2003, 2004, and 2005; and
- A letter dated June 18, 2008 from Crescent Accounting & Tax Services, Inc. stating that the petitioner had a total accumulated depreciation in the amounts of \$23,541 in 2001; \$33,547 in 2002; \$43,553 in 2003; \$53,559 in 2004; \$60,815 in 2005; and \$65,501 in 2006, and that those amounts were available for paying the beneficiary's proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation with one shareholder, Dr. Batool Hussaini. On the petition, the petitioner claims to have been established on March 31, 1997, to currently employ 47 workers, and to have gross annual income of \$1 million.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 individual 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

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<sup>2</sup> The AAO notes that the DOL approved the labor certification filed on behalf of an alien beneficiary named [REDACTED]. The director accepted the substitution of the beneficiary when he adjudicated the petition. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution is permitted.

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 the instant case, no evidence has been submitted to show that the beneficiary has worked for the petitioner before or after the priority date. Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that it has the ability to pay \$465 per week or \$24,180 per year through either its net income or net current assets.

If the petitioner chooses to use its net income to pay 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 (1<sup>st</sup> 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).

The record before the director closed on April 16, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). As of that date, the petitioner’s 2007 federal income tax return is the most recent return available.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120 (net income before net operating loss). The petitioner’s tax returns demonstrate its net income for the years 2001 through 2007, as shown below:

- In 2001 the Form 1120 stated net income (loss) of \$12,597.
- In 2002 the Form 1120 stated net income (loss) of (\$66,850).
- In 2003 the Form 1120 stated net income (loss) of (\$45,662).
- In 2004 the Form 1120 stated net income (loss) of \$33,505.
- In 2005 the Form 1120 stated net income (loss) of \$0.
- In 2006 the Form 1120 stated net income (loss) of (\$22,250).
- In 2007 the Form 1120 stated net income (loss) of \$101,070.

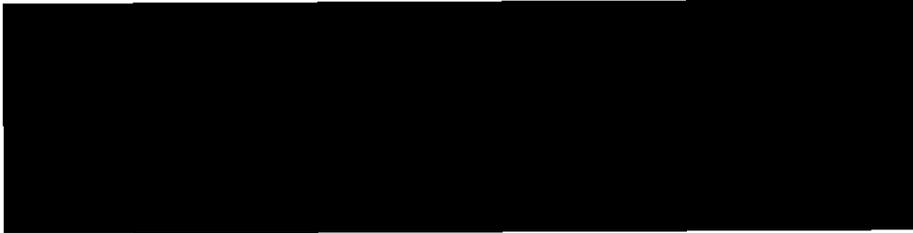
Based on the table above, the petitioner had the ability to pay the beneficiary’s wage of \$24,180 per year only in 2004 and 2007.

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.<sup>3</sup> A corporation’s year-end current assets are

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<sup>3</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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

shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. The petitioner's tax returns demonstrate its net current assets (liabilities) for the years 2001, 2002, 2003, 2005, and 2006, as shown in the table below:



The petitioner's net current assets in 2001 and 2006 were less than the proffered wage of \$24,180 per year. Therefore, the AAO agrees with the director that the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains permanent residence, specifically in 2001 and 2006.

On appeal, counsel, in essence, contends that the petitioner should be allowed to add back depreciation deduction to boost the company's net income.

The AAO declines to accept counsel's contention as persuasive, as the court in *River Street Donuts, supra* has held that a depreciation expense is a real expense, and for that reason, it should not be added back to boost or reduce the company's net income or loss.

On appeal, counsel for the petitioner also urges the AAO to consider the petitioner's business bank statements as evidence of the petitioner's ability to pay.

Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the petitioner to submit or the director to accept additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for 2001-2007. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns or in the cash entry on Schedule L. Additionally, bank statements only show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and do not establish the petitioner's ability to pay.

On appeal, counsel poses this question: How is it possible that the petitioner could not pay \$20,100 in 2001 and \$24,180 in 2006, when the fact shows that the petitioner spent \$771,211 in 2001 and \$2,088,815 in 2006 for salaries and wages of employees?

As noted above, USCIS and judicial precedent support the use of the net income figure on the petitioner's tax returns to determine the ability to pay. *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court ruled that the petitioner's net income, not gross income, should be the figure used to calculate the ability to pay as gross profits overstate the ability to pay by ignoring other expenses. Further, there has been no argument that the beneficiary will be replacing another worker on the payroll. Thus, the petitioner's payment of wages to others is not relevant to the discussion of its ability to pay the beneficiary. In conclusion, the record reflects that the petitioner did not have sufficient net income or net current assets to continuously pay the proffered wage from the priority date until the beneficiary receives her legal permanent residence.

Though not raised by counsel, 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 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, no evidence has been presented to show that the petitioning corporation has as sound and outstanding reputation as in *Sonogawa*. Unlike *Sonogawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 1997. Nor does it include any evidence or detailed explanation of its milestone achievements. The evidence submitted does not reflect a pattern of significant growth or the

occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from the priority date, specifically in 2001 and 2006.

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 tax returns and other evidence, this office is not persuaded that the petitioner has that ability.

Beyond the decision of the director, the AAO finds that this petition cannot be approved because the petitioner has not established that the petition is for a skilled worker. The approved Form ETA 750 shows that the petitioner only required the beneficiary to have a high school diploma and three months of work experience in the job offered. The petition should have been filed under the any other worker category classification, pursuant to section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

As noted earlier, 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 immigrants who have at least two years of experience or training in the job offered or in a related occupation.

Further, the regulation at 8 C.F.R. § 204.5(l)(2), in pertinent part, provides:

*Other worker* means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

In this case, the petitioner requested the skilled worker classification (**requiring at least two years training or experience**) on the Form I-140 petition. However, the Form ETA 750 labor certification indicates that the beneficiary must have a high school diploma and three months of experience in the job offered as of April 30, 2001. There is no provision in statute or regulation that compels USCIS or the AAO to accept a petition under a different visa classification. In addition, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). For this additional reason, the appeal must be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied 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.