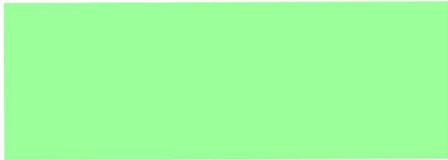




U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date:

**APR 26 2012**

Office: NEBRASKA SERVICE CENTER

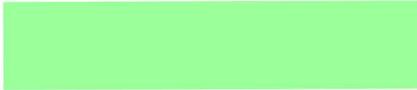
FILE:



IN RE:

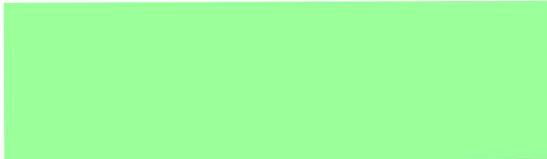
Petitioner:

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, Nebraska Service Center (the director), and is now 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 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 March 3, 2009 denial, the single 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 18, 2003. The proffered wage as stated on the Form ETA 750 is \$12.25 per hour (\$25,480 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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>

On appeal, counsel submitted a two-part letter dated March 27, 2009 from [REDACTED] President of [REDACTED]<sup>2</sup> a document labeled [REDACTED], copies of Forms W-2 issued to the beneficiary for 2003, 2004, 2005, 2006 and 2007; and the beneficiary's U.S. Individual Income Tax Return (Form 1040A) for 2003, 2004, 2005, 2006 and 2007:

The evidence in the record of proceeding does not indicate the nature of petitioner's corporate structure. On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$2,148,000, and currently to employ 65 workers. The petitioner provided no tax returns and, therefore, has not identified whether its fiscal year is based upon a calendar year. On the Form ETA 750B, signed by the beneficiary on February 28, 2003, the beneficiary claimed to have worked for the petitioner since June 2000.

On appeal, counsel provides documents which she states demonstrate the petitioner's ability to pay the beneficiary the proffered wage from the priority date through the date the beneficiary may obtain lawful permanent residence. Counsel further maintains that the documents show that the petitioner has net current assets and net income which are greater than the proffered wage [in each year] since the filing of the labor certification.

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

---

<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).

<sup>2</sup> Public records indicate that the petitioner, [REDACTED] Federal Employer Identification Number (FEIN): [REDACTED], is a trade name for [REDACTED] with the same FEIN number, as indicated on Forms W-2 issued to the beneficiary. The petitioner's name does not appear in the database of corporations operated by the California Secretary of State; the Secretary of State's database does contain the name of a corporation, [REDACTED] which uses the same business address as the petitioner. See, [REDACTED] (accessed March 30, 2012). Public records show that [REDACTED] the individual who signed Form I-140, is the Executive Officer of [REDACTED] and that [REDACTED] is a fictitious name associated with [REDACTED]

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'l Comm'r 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'l Comm'r 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 submitted Forms W-2 issued to the beneficiary by [REDACTED] in 2003, 2004, 2005, 2006 and 2007. The beneficiary's IRS Forms W-2 show compensation received from the petitioner, as shown in the table below.

- In 2003, the Form W-2 stated compensation of \$13,250.00.
- In 2004, the Form W-2 stated compensation of \$17,871.71.
- In 2005, the Form W-2 stated compensation of \$16,448.80.
- In 2006, the Form W-2 stated compensation of \$15,375.81.
- In 2007, the Form W-2 stated compensation of \$13,328.52.

Therefore, 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 2003 or subsequently through 2007. However, since the petitioner paid the beneficiary a portion of the proffered wage for each of the years from 2003 through 2007, it is only obligated to demonstrate the ability to pay the difference between the wages already paid and the proffered wage for those years, the difference being \$12,230.00 for 2003, \$7,608.28 for 2004, \$9,031.20 for 2005, \$10,104.19 for 2006 and \$12,151.48 for 2007.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

For a corporation, USCIS considers net income to be the taxable income before net operating loss deduction and special deductions, as shown on federal corporation income tax returns (e.g. Forms 1120 or 1120S). The record before the director closed on January 20, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 would have been the most recent return available. However, though requested to do so, the petitioner provided neither federal corporate income tax returns nor audited

financial statements for any of the years under consideration either in response to the director's request for evidence or on appeal.

Therefore, for the years 2003, 2004, 2005, 2006 and 2007, the petitioner has not shown sufficient net income to pay the difference between the wages paid and the proffered wage in any relevant year.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will 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 shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. Again, the petitioner provided neither federal corporate income tax returns nor audited financial statements for any of the years under consideration.

Therefore, for the years 2003, 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the difference between the wages paid and the proffered wage in any relevant year.

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 appeal, counsel references other documents provided which, she asserts, demonstrate that the petitioner had the ability to pay the proffered wage from the priority date through the date upon which the beneficiary would obtain lawful permanent residence.

Although the petitioner claims to have submitted its Quarterly Wage and Withholding Reports (Form DE 6), it submitted its Sales and Use Tax Returns (Form BOE 401 EZ) for the State of California for the first, second, third and fourth quarters of 2005 and the first, second and third quarters of 2006. These forms show the company's gross sales for the period with the amount of tax due. However, no other financial information is provided by or with these documents.

---

<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 (such as taxes and salaries). *Id.* at 118.

As indicated above, counsel's reliance on gross sales is misplaced. 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).

Counsel also references the "Comprehensive Insight Plus Report" which was generated by [REDACTED]. According to the report, this document provides a summary of the petitioner's financial status. The report includes a business summary, a "creditworthiness" rating, a history of the petitioner's public filings (e.g. court actions, government activity), a history of the petitioner's operations and a banking and finance report.

According to [REDACTED], as articulated on the report:

[REDACTED] offers guidance on credit limits for this company based on its profile as well as profiles of other companies similar in size, industry, and credit usage.

In addressing the petitioner's history and operations, [REDACTED] states:

Ownership information provided verbally by [REDACTED] Owner, on Mar 21, 2007.

The petitioner has provided no evidence indicating that this information was audited or verified.

Regarding the petitioner's banking and finance history, [REDACTED] states:

[REDACTED] has been unable to obtain sufficient financial information from this company to calculate business ratios. Our check of additional outside sources also found no information available on its financial performance.

The regulation at 8 CFR § 204.5(g)(2) requires the submission of one of three types of documentation for purposes of demonstrating the ability to pay: 1) annual reports, 2) federal tax returns, or 3) audited financial statements. The [REDACTED] from [REDACTED] corresponds with none of these three types of evidence. Rather, the report represents an opinion regarding the petitioner's status for purposes of extending credit to the organization.<sup>4</sup> As this evidence does not conform to the regulatory requirements cited above, and further does not reflect net income or net current assets sufficient to pay the difference between the wage paid and the proffered wage, the [REDACTED] report does not establish the petitioner's ability to pay..

Counsel makes reference to the beneficiary's U.S. Individual Income Tax Returns (Form 1040A) for 2003, 2004, 2005, 2006 and 2007. However, as counsel also notes, the beneficiary receives income

<sup>4</sup> See the [REDACTED] which forms part of the [REDACTED] packet.

from two sources, only one of which is from the petitioner.<sup>5</sup> Other income reflected on the beneficiary's personal income tax return would not be demonstrative of the petitioner's ability to pay the proffered wage. The AAO has already taken into consideration the amounts reflected on the Forms W-2 which the petitioner issued to the beneficiary during each of the years under consideration. These amounts were less than the proffered wage for each year from the priority date through the date of the adjudication of the I-140 petition.

In its appeal, the petitioner also provided a letter dated March 27, 2009 from [REDACTED]

[REDACTED] In his letter, [REDACTED] explains:

[REDACTED] is financially sound and able to meet our obligations to [the beneficiary]. The current recession is a challenge for every type of business, restaurants are no exception, but at this date in time we are holding our own and forecasting a profitable 2009.

[REDACTED] also notes that up until the present, [REDACTED] has employed the beneficiary on a part-time basis but plans to employ him on a full-time basis as soon as "his application [sic] has been approved."

The regulation at 8 CFR § 204.5(g)(2) states, in pertinent part:

In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The letter from [REDACTED] does not satisfy the regulatory requirements for this alternate form of evidence. The petitioner has asserted, in Part 5 of Form I-140, that it employs 65 workers, not 100. Further, while [REDACTED] identifies himself as the president of the petitioner he does not claim to be the financial officer of the organization. The acceptance of this alternative form of evidence of ability to pay is discretionary under the regulation.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns or audited financial statements for the years 2003 through 2007. The tax returns or audited financial statements would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. 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).

---

<sup>5</sup> The beneficiary receives income from the petitioner and [REDACTED] as indicated through the submission of W-2 statements.

(b)(6)

Counsel's assertions on appeal cannot be concluded to overcome the lack of regulatory evidence and, therefore, the petitioner's failure to demonstrate the ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

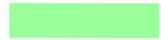
USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely 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 petitioner has submitted sales and use tax reports for the four quarters of 2005 and 2006. For the first three quarters of 2006, the petitioner reported to the State of California that it had generated gross sales of \$1,565,805. For the four quarters of 2005, the petitioner reported to the State of California that it had generated gross sales of \$2,130,448. Thus, gross sales remained consistent for the two years for which documents were provided. The petitioner provided no other objective, verifiable documentation which would demonstrate its history of profitability, officer compensation, wages, unusual circumstances or any other information which could be taken into consideration for purposes of evaluating the totality of the petitioner's circumstances. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

(b)(6)



Page 10

**ORDER:** The appeal is dismissed.