

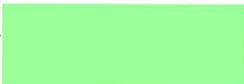
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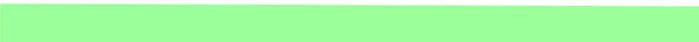
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

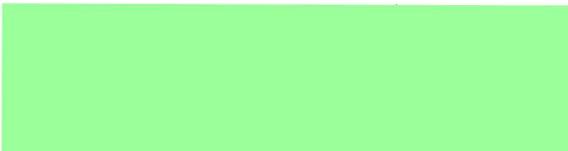
DATE: **AUG 07 2012** OFFICE: TEXAS SERVICE CENTER

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a hotel housekeeping supervisor. 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 February 4, 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).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$17,368 per year. The Form ETA 750 states that the position requires two years of experience in the offered position of hotel housekeeping supervisor or in the alternate occupation of hotel housekeeper.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$207,102, and to currently employ five workers. According to the tax returns in the record, the petitioner operates on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner since June 1998.²

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'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. In the instant case, although the beneficiary claims to have been working for the petitioner since before the priority date, the petitioner asserts that because the beneficiary did not have a social security number until September 2007, the beneficiary was being paid cash and the petitioner did not issue either an IRS Form W-2 or Form 1099 to the beneficiary until 2007.³

¹The 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).

²However, this starting date conflicts with [REDACTED] November 6, 2008 affidavit in which [REDACTED] states that she hired the beneficiary in 1999. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), which states it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies.

³See [REDACTED] November 6, 2008 affidavit.

The record of proceeding contains a notarized statement dated November 6, 2008, signed by both the beneficiary and the petitioner's President, [REDACTED] stating the beneficiary received a minimum bi-weekly salary equal to the proffered wage in cash from the time period January 2001 until September 2007.⁴ This statement is self-serving and does not provide independent, objective evidence of any salary paid by the petitioner or received by the beneficiary. *See Matter of Ho*, 19 I&N Dec. at 591-592. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings: *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, any payments made in cash to the beneficiary by the petitioner will not be considered in the determination of the petitioner's continuing ability to pay the proffered wage.

The record of proceeding contains copies of IRS Forms W-2 issued to the beneficiary by the petitioner for 2007 and 2008, which amounts are shown in the table below:

- In 2007, the amount in IRS Form W-2 Box 1 is \$4,350.
- In 2008, the amount in IRS Form W-2 Box 1 is \$18,125.

For the years 2001 through 2007, the petitioner did not establish it paid the beneficiary the full proffered wage. For 2001 to 2006, the petitioner must establish that it can pay the full proffered wage. In 2007, the petitioner must establish that it can pay the difference of \$13,018 between the wages paid to the beneficiary and the proffered wage. The petitioner established that it paid the beneficiary the full proffered wage in 2008.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *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

⁴The record of proceeding contains two notarized statements dated November 6, 2008. The first is an affidavit from [REDACTED] and the second is this statement signed by both [REDACTED] and the beneficiary. The record of proceeding also contains a second affidavit from [REDACTED] dated February 4, 2009.

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 C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$21,218.
- In 2002, the Form 1120 stated net income of \$29,540.⁵
- In 2003, the Form 1120 stated net income of \$13,399.
- In 2004, the Form 1120 stated net income of \$13,229.⁶
- In 2005, the Form 1120 stated net income of -\$4,700.⁷

⁵ The director incorrectly listed this amount as \$25,667.

⁶ The director incorrectly listed this amount as -\$4,700.

⁷ The director incorrectly listed this amount as \$13,229.

- In 2006, the Form 1120 stated net income of -\$1,887.⁸
- In 2007, the Form 1120 stated net income of \$8,483.

Therefore, for the years 2003 through 2006, the petitioner did not establish that it had sufficient net income to pay the proffered wage, and for 2007, the petitioner did not establish that it had sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage. For 2001 and 2002, the petitioner established that it had sufficient net income to pay the proffered wage.

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.⁹ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003 through 2007, as shown in the table below.

- In 2003, the Form 1120 stated net current assets of -\$3,923.
- In 2004, the Form 1120 stated net current assets of -\$8,150.
- In 2005, the Form 1120 stated net current assets of -\$155,412.
- In 2006, the Form 1120 stated net current assets of -\$143,965.
- In 2007, the Form 1120 stated net current assets of -\$133,209.

Therefore, for the years 2003, 2004, 2005, and 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage, and for 2007, the petitioner did not establish that it had sufficient net current assets to pay the difference between wages paid to the beneficiary and the proffered wage.

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.

⁸ The director incorrectly listed this amount as -\$29,313.

⁹ 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.

On appeal, counsel asserts that officer compensation should be considered and cites two non-precedent decisions, namely, *Matter of --*, [REDACTED] (AAO May 20, 2005) and *In Re: X*, 9 Immig. Rptr. B2-143 (March 20, 1992). While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Therefore, the aforementioned cited non-precedent decisions are not binding on the AAO.

Counsel asserts that [REDACTED] is the petitioner's sole shareholder and president and that [REDACTED] is the only officer receiving wages. In her February 4, 2009 affidavit, [REDACTED] states that she is the petitioner's president.¹⁰ Compensation of officers is an expense category explicitly stated on the Form 1120 at page one, line 12. Page one, line 12 of the petitioner's IRS Forms 1120 for 2003 to 2007 indicate that the petitioner paid \$0 in officer compensation each year.¹¹ Therefore, the tax returns do not support counsel's assertion that the petitioner paid [REDACTED] officer compensation in any relevant year.

The petitioner submitted copies of the IRS Forms W-2 it issued to [REDACTED] for 2004 through 2007 and copies of Texas Workforce quarterly payroll tax returns for 2003. Based on this information, the AAO has determined that [REDACTED] received wages as listed in the table below.

- In 2003, the total listed on the Texas quarterly returns is \$24,000.
- In 2004, the amount listed on IRS Form W-2 Box 1 plus Box 12a¹² is \$24,000.
- In 2005, the amount listed on IRS Form W-2 Box 1 plus Box 12a is \$27,000.
- In 2006, the amount listed on IRS Form W-2 Box 1 plus Box 12a is \$36,000.
- In 2007, the amount listed on IRS Form W-2 Box 1 plus Box 12a is \$36,000.

According to [REDACTED] February 4, 2009 affidavit, she drew discretionary pay from the petitioner and it was she that determined those discretionary payments by estimating how much money would be left over after the petitioner's expenses were paid and that only after ascertaining the financial health and stability of the petitioner did she decide to draw a discretionary remuneration. However, based on the 2003 Texas Workforce quarterly payments, [REDACTED] drew an equal amount of wages each quarter of

¹⁰This affidavit is self-serving and does not provide independent, objective evidence of any salary paid or received. See *Matter of Ho*, 19 I&N at 591-592 which states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

¹¹ On IRS Form 1120, the instructions require the taxpayer to enter deductible officers' compensation on line 12. The taxpayer must enter at line 13 the total salaries and wages paid for the tax year, but it should not include salaries and wages deductible elsewhere on the return, such as amounts included in officers' compensation. See <http://www.irs.gov/pub/irs-pdf/i1120.pdf> (accessed July 30, 2012).

¹²Box 1 represents cash wages while Box 12a represents wages deferred to a retirement account.

2003, thus it appears that she was drawing steady wages throughout the year. Her wages stayed the same in 2003 and 2004, as well as in 2006 and 2007. This is inconsistent with her statement that she determined her discretionary payments by estimating how much money would be left over after the petitioner's expenses were paid and that only after ascertaining the financial health and stability of the petitioner did she decide to draw a discretionary payment.

The sole shareholder of a corporation has the authority to allocate corporate expenses for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. The petitioner's Form 1120 tax returns for 2003, 2004, 2005, and 2006 at Schedule K question 5 asks "At the end of the tax year, did any individual, partnership, corporation, estate or trust own, directly or indirectly, 50% or more of the corporation's voting stock?" which is marked "No" in all four years. Schedule K question 10 states "Enter the number of shareholders at the end of the tax year (if 75 or fewer)" and the response in all four years is "3". The petitioner's 2007 tax return indicates that [REDACTED] is the sole shareholder, and the petitioner's 2008 tax return indicates that [REDACTED] is the sole shareholder. Except for 2008, there is no independent evidence establishing [REDACTED] is a shareholder of the petitioner. Even if [REDACTED] was a shareholder of the petitioner in 2003, 2004, 2005, and 2006, she did not own a 50% or greater interest in those years and, therefore, she did not have the requisite sole authority to allocate expenses, including discretionary payments to herself.

Thus, officer compensation payments, and any other payments to [REDACTED] may not be considered as evidence of the petitioner's ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not 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, there is no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. The petitioner paid minimal salaries and wages and had minimal gross receipts in each relevant year. There is no evidence that the beneficiary will be replacing a former employee or an outsourced service. 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.

ORDER: The appeal is dismissed.