

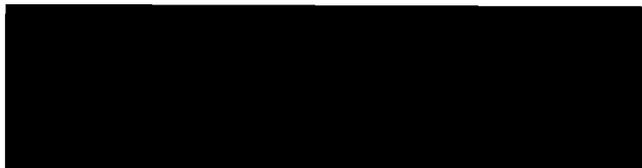
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

Date: **APR 03 2012** Office: TEXAS SERVICE CENTER

FILE:



IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and the petitioner appealed this denial to the Administrative Appeals Office (AAO). The AAO initially dismissed the appeal and then subsequently *sua sponte* reopened the matter. The matter is again before the AAO on appeal. The appeal will be dismissed.

The petitioner is a restaurant and caterer. It seeks to employ the beneficiary permanently in the United States as a specialty food 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 the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly.

The record reflects that the counsel appealed the denial of the petition to the AAO on the petitioner's behalf and the AAO summarily dismissed the appeal on September 1, 2009, based upon the erroneous determination that counsel had failed to address the reasons stated for the denial of the petition. This case was subsequently reopened pursuant to the regulations at 8 C.F.R. § 103.5(a)(5) which provide that the AAO may of its own volition (*sua sponte*) reopen or reconsider its own prior decision.

The AAO issued a Notice of Sua Sponte Reopening, Notice of Derogatory Information, and Request for Evidence (NSSR/ NDI/RFE) to counsel and the petitioner on December 23, 2011, informing the parties that a review of the website at <https://ourcpa.cpa.state.tx.us/coa/Index.html>, accessed on November 15, 2011, revealed that the petitioner, Falanthi, Inc., D/B/A Vasos Bar-B-Q, was not in good standing.

The AAO informed the parties that if the petitioner was no longer an active business, the petition and its appeal to this office have become moot.¹ In which case, the appeal would be dismissed as moot. Therefore, the AAO requested that the petitioner provide a current certificate of good standing or other evidence demonstrating that the petitioning business is not inactive and had current business activity. In addition, the AAO informed the parties that the record did not contain sufficient evidence demonstrating the petitioner's continuing ability to pay the proffered wage to the beneficiary since the priority date. The AAO noted that the petitioner had only submitted its Forms 1120, U.S. Corporate Income Tax Return, for 2001, 2002, 2003, 2004, 2005, 2006 and 2007, and requested that the petitioner provide its complete federal tax returns or audited financial statements for 2008, 2009, and 2010. The AAO also requested that the petitioner submit all Forms W-2, Wage and Tax Statement, or Forms 1099-MISC issued to the beneficiary in 2008, 2009, and 2010.

¹ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill a position listed in such a petition has become moot. Additionally, even if an appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

In response, the petitioner submits sufficient evidence, including a certificate of good standing from the state of Texas and tax documents, to establish that it is currently an active business. The petitioner also submits its Form 1120 tax return for 2010, Form W-2 statements issued by the petitioner to the beneficiary in 2008, 2009, 2010, and 2011, and the beneficiary's Forms 1040, U.S. Individual Income Tax Return, for 2008, 2009, and 2010.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 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 accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is 500.00 per week or \$26,000.00 per year. The Form ETA 750 states that the position requires no education, no training, and no experience in the offered job of specialty cook.

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

The evidence in the record of proceeding reveals that the petitioner is a C corporation. The petitioner indicated on the Form I-140 petition at part 5, section 2 that it was established on September 7, 1989, currently employs 6 workers, and has listed gross annual income in excess of \$500,000.00. According to the tax returns in the record, the petitioner's fiscal year runs with the calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner since April 1997.

On appeal, counsel asserted that the director examined only the petitioner's net income and net current assets as reflected in its tax returns to determine whether the petitioner demonstrated its continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel contended that the director could have considered tax returns and additional evidence such as bank records, personnel records, and profit/loss statements in taking a totality of the circumstances approach to analyzing the petitioner's continuing ability to pay the proffered wage. Counsel noted

that the decisions in *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), an unpublished AAO decision, and AAO precedent decisions supported this approach to the instant case. Counsel indicated that the petitioner had employed the beneficiary and paid him in cash up through 2007 because the beneficiary did not yet possess a valid Social Security number.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 Sonegawa*, 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.

While the beneficiary claimed that he had been employed by the petitioner, the Form ETA 750B and the record contain no evidence that the beneficiary has worked for any other employer other than the petitioner, the petitioner failed to provide any evidence reflecting the payment of employee compensation to the beneficiary in the period from 2001 to 2007. Further, counsel has acknowledged that the petitioner does not possess any payroll records reflecting the beneficiary's employment with the petitioner from 2001 to 2007 because the beneficiary had been paid in cash during this period. 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)).

Nevertheless, the record contains Form W-2 statements reflecting employee compensation paid to the beneficiary by the petitioner as follows:

- 2008 – \$15,600.00 (\$10,400.00 less than the proffered wage of \$26,000.00)
- 2009 – \$13,400.00 (\$12,600.00 less than the proffered wage of \$26,000.00)
- 2010 – \$7,500.00 (\$18,500.00 less than the proffered wage of \$26,000.00)
- 2011 – \$10,200.00 (\$15,800.00 less than the proffered wage of \$26,000.00)

The petitioner has not established that it paid the beneficiary any wages from the priority date of April 27, 2001 through 2007. In addition, the petitioner failed to establish that the petitioner paid the

beneficiary the full proffered wage of \$26,000.00 in 2008, 2009, 2010, and 2011. Although the petitioner must demonstrate the ability to pay the full proffered wage from 2001 to 2007, it must be noted that the petitioner is only obligated to show that it can pay the difference between the proffered wage and wages already paid in 2008, 2009, 2010, and 2011.

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 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 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 petitioner's Form 1120 tax returns list its net income as shown in the table below.

- In 2001, the Form 1120 stated net income¹ of <\$11,514.18.>²
- In 2002, the Form 1120 stated net income of <\$12,002.08.>
- In 2003, the Form 1120 stated net income of <\$2,462.84.>
- In 2004, the Form 1120 stated net income of <\$7,704.46.>
- In 2005, the Form 1120 stated net income of <\$190.10.>
- In 2006, the Form 1120 stated net income of <\$7,585.13.>
- In 2007, the Form 1120 stated net income of <\$1,152.90.>
- No Form 1120 provided for 2008.
- No Form 1120 provided for 2009.
- In 2010, the Form 1120 stated net income of \$71,059.49.

The petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, and 2007. Further, it is not possible to determine whether the petitioner possessed sufficient net income to pay the difference between the proffered wage and wages already paid in 2008 and 2009 as the petitioner failed to provide its Form 1120 tax returns for these years despite the AAO's specific request to provide such tax returns in the notice dated December 23, 2011. Nevertheless, the petitioner has demonstrated that it possessed sufficient net income in 2010 to pay the difference between the proffered wage and wages paid in that year.

As an alternate means of determining the ability of the petitioner to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a corporate entity's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal

¹ 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.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

to or greater than the proffered wage, the corporation is expected to be able to pay the proffered wage using those net current assets. The tax returns of the petitioner demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the Form 1120 stated net current assets of <\$16,111.35.>
- In 2002, the Form 1120 stated net current assets of <\$29,636.70.>
- In 2003, the Form 1120 stated net current assets of <\$12,324.13.>
- In 2004, the Form 1120 stated net current assets of <\$31,136.82.>
- In 2005, the Form 1120 stated net current assets of <\$22,870.50.>
- In 2006, the Form 1120 stated net current assets of <\$30,631.02.>
- In 2007, the Form 1120 stated net current assets of <\$22,785.63.>
- No Form 1120 provided for 2008.
- No Form 1120 provided for 2009. However the petitioner's net current assets of <\$20,129.32> can be gleaned from the petitioner's 2010 Form 1120, Schedule L, Column (b).

Clearly, the petitioner did not have sufficient net current assets to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2009. Once again, it is not possible to determine whether the petitioner possessed sufficient net current assets to pay the difference between the proffered wage and wages already paid in 2008 as the petitioner failed to provide its 2008 Form 1120 for these years despite the AAO's specific request to provide its tax returns in the notice dated December 23, 2011.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL on April 27, 2001, 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.

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 petitioner has a sound and outstanding business reputation as in *Sonegawa*. Nor has the petitioner included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owner is willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary since the priority date. 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.

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.