

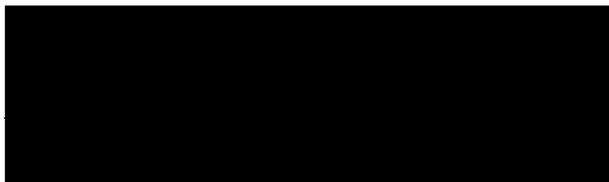
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



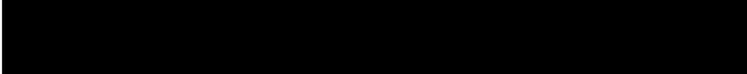
**U.S. Citizenship
and Immigration
Services**



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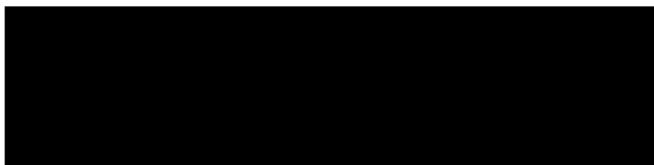
DATE: **APR 03 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center as abandoned. The director subsequently reopened the matter upon further determination that the Request for Evidence (RFE) was not sent, and issued an RFE. The visa petition was then denied by the director following consideration of the petitioner's response. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian style restaurant. It seeks to employ the beneficiary permanently in the United States as an Italian style specialty cook. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director initially concluded that the petitioner had failed to respond to an RFE and denied the petition due to abandonment on May 23, 2008. The director subsequently reopened the proceeding and issued another RFE. On December 29, 2008, the director determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage to the beneficiary from the priority date onward and denied the petition, accordingly.

On appeal, the petitioner, through counsel submits additional evidence and contends that the director erred in denying the petition.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.

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

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the priority date is February 6, 2004. For the certified position of an Italian style specialty cook, the Form ETA 750 requires no education, no training and two years of work experience in the job offered. The proffered wage is stated as \$755.60 per week, which amounts to \$39,291.20 per year.

On Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), filed on March 8, 2007, it is claimed that the petitioner was established on August 5, 1988, employs seven workers and reports gross annual income of \$287,000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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 support of its ability to pay the proffered wage of \$39,291.20 per year, the petitioner provided a copy of its 2007 Form 1120, U.S. Corporation Income Tax Return covering a fiscal year beginning on August 1, 2007 and ending on July 31, 2008. The petitioner also provided a copy of its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2005, covering a fiscal period beginning on August 1, 2004 and ending on July 31, 2005. The petitioner submitted partial copies of its 2005 Form 1120 covering a fiscal period beginning on August 1, 2005 and ending on July 31, 2006.

The tax returns covering the fiscal periods indicated also contain the following information:

Year Fiscal Year	2005 (8/01/04 to 7/31/05)	2005 (08/01/05 to 7/31/06)
Net Income ²	-\$ 3,816	\$ 2,551
Current Assets	\$ 17,874	\$ not provided
Current Liabilities	\$ 10,570	\$ not provided
Net Current Assets	\$ 7,304	\$ n/a

Year Fiscal Year	2006 (8/01/06 to 7/31/07)	2007 (8/01/07 to 7/31/08)
Net Income	\$ 4,447	\$ 3,929
Current Assets	\$ not provided	\$66,275
Current Liabilities	\$ not provided	\$-0-
Net Current Assets	\$ n/a	\$66,275

It is noted that the petitioner has failed to provide a federal tax return, audited financial statement or an annual report, consistent with the requirements of 8 C.F.R. § 204.5(g)(2), which covers the priority date of February 6, 2004 until the commencement of the period covered by the first 2005 tax return.³ It is also noted that the petitioner submitted a copy of a Form 1120-A, U.S. Corporation Short-Form Income Tax Return filed by [REDACTED] which covers a fiscal period from April 1, 2004 to March 31, 2005. The petitioner provided no explanation why this return belonging to a different entity than the petitioner with a different federal employer identification number (FEIN)⁴ was provided in

²The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

³The petitioner apparently used a 2005 Internal Revenue Service (IRS) income tax form for the two fiscal periods running from August 1, 2004 to July 31, 2006.

⁴FEINs are unique tax identifiers assigned by the IRS to tax return filers. A person, association, firm, or a corporation that is defined as an "employer" authorized to apply for a labor certification from DOL on behalf of a foreign worker, must possess a valid FEIN. 20 C.F.R. § 656.3(1).

support of the petitioner's ability to pay the proffered wage. Such evidence will not be accepted because it does not represent the petitioner's financial status. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is unclear why the petitioner did not provide a tax return, audited financial statement or annual report belonging to the petitioner if the petitioner had been established in 1988 as represented. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not established its ability to pay the proffered wage for this period.

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Part III of the Form 1120-A and on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 respectively, of Part III and Schedule L and current liabilities are shown on line(s) 13 to 14 of Part III and on line(s) 16 through 18 of Schedule L. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁶

The petitioner submitted copies of three 2004 bank statements covering the monthly periods ending with January 8th, February 6th, and November 5th; two 2005 bank statements covering the monthly periods ending with February 7th and October 7th; three 2006 bank statements covering the monthly period ending with August 7th, October 31st, and December 29th; two 2007 bank statements covering the monthly periods ending with August 31st and September 28th; and three 2008 bank statements covering the monthly periods ending with March 31st, June 30th, and July

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

31st. Copies of three additional bank statements were provided, but the dates and years were not legible. The bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) was not provided or otherwise provides an inaccurate financial portrait of the petitioner. The petitioner submitted selected bank statements from the 2004 to 2008 period of time. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Additionally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its corresponding tax return, if the petitioner had provided complete copies, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is already considered in reviewing net current assets.

The director denied the petition on December 29, 2008. He reviewed the petitioner's tax returns and bank statements that had been submitted had concluded that the petitioner had not established its continuing financial ability to pay the proffered wage from the priority date onward.

On appeal, counsel submits copies of the same evidence contained in the underlying record. He emphasizes the petitioner's positive cash flow and total assets and suggests adding back such items as depreciation or inventory to adjust the petitioner's net income, if necessary.

As noted above, using total assets figures in calculating a petitioner's net current assets rather than using the difference between current assets and current liabilities as shown on Part III or Schedule L of the respective corporate tax return is rejected by USCIS. A petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. As noted above, net current assets are derived from the difference of current assets shown on Part III or Schedule L of a petitioner's tax return and current liabilities as shown on Part III or Schedule L.

It is noted that if a 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given period, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

Although requested from the petitioner, the record contains no evidence that the petitioner has employed and paid the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure or net current assets reflected on the petitioner's federal income tax return or audited financial statements without consideration of depreciation or other expenses as suggested by counsel in this case. *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.

With respect to depreciation as claimed by counsel, 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 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The only year in which the petitioner had the ability to pay the proffered wage was shown on the 2007 tax return (fiscal 8/01/07 to 7/31/08) whereby its net current assets were \$66,275.

In the remaining period as noted above, the petitioner did not submit a federal tax return, annual report or audited financial statement which covered the priority date of February 6, 2004. For the remaining period, neither its net income of -\$3,816 nor its net current assets of \$7,304 could cover the proffered wage as shown on the 2005 tax return (covering fiscal 8/01/04 to 7/31/05).

As shown on the 2005 tax return (covering 8/01/05 to 7/31/06) the petitioner’s net income of \$2,551 was insufficient to cover the proffered wage of \$39,291.20. It submitted an incomplete tax return so net current assets could not be calculated. It failed to demonstrate an ability to pay the proffered wage during this year.

Similarly, as shown on the 2006 tax return (covering 8/01/06 to 7/31/07) the petitioner’s net income of \$4,447 was insufficient to cover the proffered wage of \$39,291.20. It submitted an incomplete tax return so net current assets could not be calculated. It failed to demonstrate an ability to pay the proffered wage during this year.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its *continuing* ability to pay the proffered wage. In this case, the petitioner has not demonstrated its continuing ability to pay.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, as noted above, the petitioner has not submitted complete tax returns. Only one of the four provided showed sufficient net current assets to cover the proffered wage. Further, it may not be concluded that such analogous factual circumstances to *Sonegawa* are present in this case that would overcome the evidence reflected in the tax returns. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* are present in this matter. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage. Additionally, the 2006 tax return reflects cumulative salaries paid that were less than the proffered wage and the 2005 tax return (covering 8/01/05 to 7/31/06) reflects no salaries and no cost of labor listed. All of the tax returns show minimal or negative net income.

For the reasons explained above, the petition may not be approved. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has 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.