

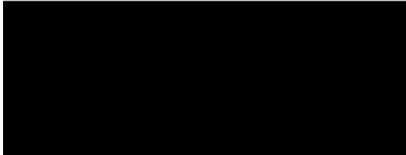
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: APR 13 2012 Office: TEXAS SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other 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. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen or reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a hairdresser pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL). The director denied the petition because the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward.

On December 3, 2009, the AAO dismissed the subsequent appeal, affirming the director's denial and noting that the petitioner failed to submit evidence of a permanent full-time job offer to the beneficiary and also failed to submit an original labor certification. The petitioner filed a motion to reopen and reconsider the AAO decision. The record shows that the motion is properly filed and timely and provides information concerning the issues raised by the decisions of the director and of the AAO.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, we will accept the motion to reopen the matter based on the new information submitted. The instant motion is granted.

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

With the motion to reopen, the petitioner submitted the labor certification as required by 8 C.F.R. § 204.5(l)(3) and 20 C.F.R. § 656.30(C)(2) containing the full requirements of the position and the signature of the employer attesting that the job offer is bona fide and available to the beneficiary. The petitioner also submitted the beneficiary's cosmetology certificate, a requirement for the position. As a result, the portion of the AAO's decision questioning the bona fides of the proposed employment and the lack of an original certified labor certification is

withdrawn. The petition may not be approved, however as the petitioner has not established on motion its ability to pay the proffered wage.

The regulation 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.

As noted in the AAO's prior decision, 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).

Here, the Form ETA 750 was accepted on February 13, 2004. The proffered wage as stated on the Form ETA 750 is \$16.10 per hour (\$33,488 per year). The Form ETA 750 states that the position requires four years of high school, two years of experience as a hairdresser, and eligibility for a cosmetology license.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. As the petitioner did not submit any new evidence concerning its financial position prior to 2007 with its motion to reopen, the AAO's prior analysis of the wages paid to the beneficiary, the corporation's net income, and the corporation's net current assets of 2004, 2005, and 2006 is affirmed. On motion, the issue is whether the new information submitted concerning the petitioner's financial position in 2007 and 2008 overcomes the AAO's prior decision, which also considered *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), but found the information insufficient to establish the petitioner's ability to pay based on the totality of the circumstances.

In the AAO's December 3, 2009 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary ([REDACTED] and [REDACTED] the petitioner's income tax returns and considered the petitioner's net income, net current assets, and the totality of the circumstances. The AAO decision also considered the total amount of wages paid as cited by the petitioner. The AAO noted that the petitioner sponsored one additional worker and must demonstrate its ability to pay all sponsored workers. In examining the petitioner's tax returns, the AAO determined that the petitioner's negative 2005 and 2006 net income and 2004 net income of [REDACTED] an amount less than the difference between the actual wage paid and the proffered wage, was incapable of demonstrating its ability to pay the proffered wage to the instant beneficiary or the other sponsored worker. The AAO considered counsel's arguments that the ratio of assets to liabilities demonstrates the petitioner's ability to pay the proffered wage, that the petitioner's total assets should be considered in determining its ability to

pay the proffered wage, and that the petitioner's special deductions and "credits" should be considered. These issues are not further developed by counsel on motion and will not be further discussed.

With its motion to reopen, the petitioner submitted its 2006, 2007, and 2008 Forms 1120; 2005, 2006, 2007, and 2008 personal tax returns for the beneficiary with corresponding Forms W-2 for 2006 and 2008; 2009 paystubs for the beneficiary; the beneficiary's cosmetology license; and a letter from the petitioner stating that the position was still available and that the company has the ability to pay the proffered wage.

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 2008 Form W-2 stated that the petitioner paid the beneficiary [REDACTED]. As this amount is less than the proffered wage, the petitioner must still demonstrate its ability to pay the difference between the actual wage paid and the proffered wage. The 2009 pay stubs demonstrate that the petitioner paid the beneficiary [REDACTED] in that year, an amount that exceeds the proffered wage. The petitioner thus established its ability to pay the proffered wage in 2009 alone.

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.

¹ Although the petitioner stated that the beneficiary's 2007 Form W-2 was included with the Form 1040, that Form was not submitted with the motion to reopen. The beneficiary's 2007 Form 1040 was submitted and indicates that he earned [REDACTED] in wages, but the Form 1040 does not state that the wages were paid by the petitioner and thus these wages will not be credited to the petitioner in the determination of its ability to pay the proffered wage. The 2005 and 2006 Forms W-2 were considered in the AAO's previous decision and will not be re-considered.

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, 558 F.3d 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*, 719 F.Supp. 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 2007 and 2008,² as shown in the table below.

- In 2007, the Form 1120 stated net income of [REDACTED]
- In 2008, the Form 1120 stated net income of [REDACTED]

Although the petitioner's net income in 2008 exceeds the difference between the actual wage paid and the proffered wage, as stated in the AAO's previous decision, the petitioner must demonstrate its ability to pay the proffered wage for all proffered workers. Despite being specifically advised regarding the need to submit evidence concerning its ability to pay all

² The petitioner's 2004, 2005, and 2006 Forms 1120 were considered in the AAO's previous decision.

sponsored workers, the petitioner did not submit any evidence concerning the proffered wage, priority date, or any other information concerning the other sponsored worker.

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.³ 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 2007 and 2008, as shown in the table below.

- In 2007, the Form 1120 stated net current assets of -
- In 2008, the Form 1120 stated net current assets of -

Negative net current assets are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner 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 in 2008 and 2009. Nevertheless, the petitioner has not established its ability to pay the beneficiary in 2007 or the other sponsored wage in any of the years 2007, 2008, and 2009.

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

³According 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.

reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

With the motion to reopen, counsel cites another AAO decision involving the same petitioner in which the decision stated that due to the totality of the circumstances including the length of time in business, a [REDACTED] profile, regular gross receipts, number of employees, and amount of officer compensation, the petitioner demonstrated its ability to pay the proffered wage. Here, the petitioner demonstrated its ability to pay the proffered wage in only two years of six and failed to submit evidence establishing the ability to pay the proffered wage to the other sponsored worker despite being specifically notified in the previous AAO decision of the necessity of that information. In addition, the petitioner has not provided evidence concerning the ability or desire of its officers to forego all or part of their compensation to meet the wage obligations of the sponsored workers. Although a report was submitted by the petitioner from [REDACTED] in response to the director's RFE which stated that the petitioner was at low risk for financial difficulty in the next 12 months, this report is not a conclusive statement of the petitioner's financial health. For the years discussed on motion, the petitioner's tax returns in the record show a negative or minimal net income for each year and negative net current assets in each year. The petitioner submitted no evidence that it had an unusual year or incurred any unusual expenses that would affect its business in the way demonstrated in *Sonegawa* nor did it submit evidence of its reputation. 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 from the priority date onwards.

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 motion to reopen is granted and the decision of the AAO dated December 3, 2009 is affirmed. The petition remains denied.