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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**



*Be*

DATE: **AUG 16 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 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,  
*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and was again denied by the director on motion to reopen. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a vineyard. It seeks to employ the beneficiary permanently in the United States as an estate grape grower. 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 and 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 September 9, 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 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$47,174.00 per year. The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience in the related occupation of field crops -- fieldworker.

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

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1986 and to currently employ one worker. On the Form ETA 750B, which was signed by the beneficiary but not dated, the beneficiary claimed to work for the petitioner from February 1999 until April 2001.

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, the petitioner has only submitted checks issued to the beneficiary from February 2002 until August 2002 totaling \$7,496.90.<sup>2</sup> The AAO will consider the amounts as wages paid in 2002.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> These checks appear to be drawn from a personal checking account owned by the sole proprietor and her spouse, not from a business account. In fact, an April 4, 2009 declaration from the petitioner that is a part of the record of proceeding states that "I have not paid the beneficiary as an employee prior to this year."

The April 2009 declaration from the petitioner also states that housing (including utilities and telephone) would be provided to the beneficiary with an estimated value of \$1,200.<sup>3</sup> This declaration is not supported by evidence of the valuation for the housing nor has a contract between the owner and the employee been submitted. There is no evidence in the record that the housing was even provided to the beneficiary. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$47,174.00 from the priority date in 2001 onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner owns and operates a vineyard. Similar to a sole proprietorship, the petitioner's adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner's ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss from Farming, and are carried forward to the first page of the tax return. *See* <http://www.irs.gov/publications/p225/ch03.html>. Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor's tax returns reflect the following AGI:<sup>4</sup>

<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>
\$-9,750.00	\$-71,298.00	\$-91,549.00	\$-69,506.00	\$-16,189.00	\$1,615,942.00	\$140,162.00

In years 2001 through 2005, the sole proprietor's AGI was at a deficit and thus fails to cover the full proffered wage of \$47,174.00, or in 2002, the difference between the amounts paid and the proffered

<sup>3</sup> This housing allowance was not included in the ETA 750A.

<sup>4</sup> Form 1040, page one.

wage. It is improbable that the sole proprietor could support herself and her spouse<sup>5</sup> plus pay the proffered wage to the beneficiary on a deficit. Even though the director's June 11, 2009 decision concludes that without documentation of the petitioner's monthly household expenses, USCIS cannot ascertain the petitioner's ability to pay, on appeal, the petitioner did not submit any information or documentation in this regard.

The petitioner also failed to submit the complete federal tax returns as required by the regulations and requested by the director.<sup>6</sup> See 8 C.F.R. § 204.5(g)(2). The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage based on the net current assets test and net income test. USCIS may review the petitioner's net current assets as an alternate means of determining the petitioner's ability to pay the proffered wage, in cases where the petitioner is a corporation. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> 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 to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. However, in the present case, the petitioner is a sole proprietorship, not a corporation, such that the net current assets test is not applicable. The net income test is similarly not applicable as the petitioner, a sole proprietorship, has not filed corporate income tax returns with a net income figure. The Schedule F income or loss is carried forward to page one of the sole proprietorship's federal tax return and is considered as part of the AGI.

Counsel also contends that the director erred in failing to consider the net operating loss (NOL) carry forward deduction when calculating the petitioner's ability to pay. If an individual taxpayer's

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<sup>5</sup> The tax returns in the record for 2001 through 2005 were filed jointly by the owner and her spouse. The record indicates that the sole proprietor's husband died on June 29, 2007. In the 2007 federal tax return, the proprietor claimed three dependents: her daughter and two grandsons.

<sup>6</sup> The director's February 26, 2009 Request for Evidence specifically requested the petitioner's tax returns with all applicable schedules and attachments for the years 2001 through 2004, 2006, and 2007. The Schedule F from 2001 indicating the profit / loss from farming was not submitted. Also, there does not appear to have been any farm income or loss from that year, which raises the question as to whether the business was operating in 2001. No Schedule F was attached to the 2006 or 2007 returns, the years in which the proprietor filed as surviving spouse, again raising the question as to whether the business is still in operations as a vineyard.

<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

deductions for the year are more than its income for the year, the taxpayer may have an NOL. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. If a taxpayer is carrying forward an NOL, it shows the carry forward amount as a negative figure on the "Other Income" line of IRS Form 1040. However, because a petitioner's NOL is related to another year's outcome, it is omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. Therefore, the AAO rejects counsel's argument regarding the petitioner's NOL carryovers.

With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

Counsel further argues that the petitioner's bank statements and investment retirement accounts (IRA) should be considered. The record of proceeding contains some statements from the sole proprietor's personal banking and IRA accounts at Ameriprise Financial for December 2007, December 2008, January 2009, and August 2009,<sup>8</sup> as well as statements for a retirement account at Riversource Life Insurance Company for December 2007 and December 2008. Although the average

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<sup>8</sup> We note that the petitioner was over the age of 59 ½ in each relevant year and is therefore exempt from the 10% tax penalty for early withdrawal from a traditional IRA and the regular federal income or state income tax due on the withdrawal.

annual balances in the years covered by these statements, 2007-2009, may be sufficient to cover the full proffered wage of \$47,174.00 for those years, it does not establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2001 onwards. *See* 8 C.F.R. § 204.5(d). Moreover, there is some evidence of liquid assets from 2001 until 2005, but these cannot be used to establish the petitioner's ability to pay because the petitioner has failed to submit any evidence or calculations of her household expenses. 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)).

Counsel also argues that the petitioner's line of credit should be considered in assessing its ability to pay. In calculating the ability to pay the proffered wage, USCIS will not augment the petitioner's AGI by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5<sup>th</sup> ed. 1998). The line of credit is a "commitment to loan" and not an existent loan, so the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. No such evidence was submitted by the petitioner in this case. Finally, USCIS will give less weight to loans and debt as a means of paying salary because the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Regarding the sole proprietor's property values, real estate is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In support of the appeal, counsel relies on the opinions of [REDACTED] to argue that the petitioner has the ability to pay the proffered wage. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or documentation in the record or is in any

way questionable, USCIS is not required to accept or may give less weight to that evidence. Here, the opinions of Mr. [REDACTED] are not supported by the petitioner's complete tax returns,<sup>9</sup> audited financial statements, or annual reports for the years in question. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). Moreover, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner does not have an established historical growth or ability to pay the proffered wage. In years 2001 through 2005, the sole proprietor's AGI was negative. The petitioner has failed to submit any other evidence to explain its business losses for five out of the seven years in question, its reputation within the industry, or prospects for a successful business.<sup>10</sup> Moreover, the

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<sup>9</sup> As discussed earlier, the petitioner failed to submit the Schedule F form for 2001, 2006, or 2007, even though these had been requested by the director in the Request for Evidence issued on February 26, 2009, such that the tax returns in the record are not complete. The petitioner also failed to submit her household expenses, and thus we cannot determine whether she would have been able to support herself and her family in addition to the proffered wage.

<sup>10</sup> Although the petitioner's website remains active, it was last updated in 2005. The petitioner does not appear to have released any wine since 2005. It is also absent from several websites listing vineyards in the petitioner's geographical area.

petitioner stated on the ETA 750A that the beneficiary would supervise four to six employees as part of the job offered. Yet, there is no evidence in the record indicating that the petitioner ever had more than one employee. The petition states that the petitioner only has one employee. 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 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.