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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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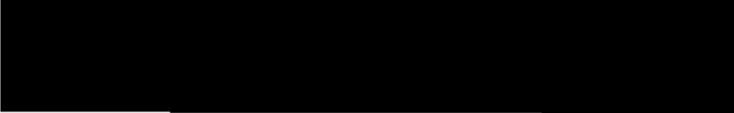
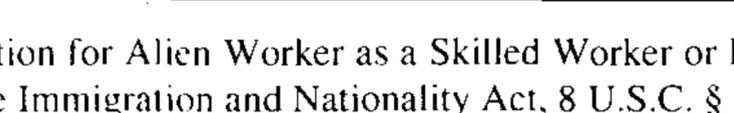


**U.S. Citizenship
and Immigration
Services**



B6

DATE: **AUG 20 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 employment-based visa petition was denied by the Director, Nebraska Service Center, (director) and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and catering business. It seeks to employ the beneficiary permanently in the United States as a "COOK, Italian Specialty." 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.

This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted. The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 6, 2009, denial, at issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification,

was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024 per year). The Form ETA 750 states that the position requires two years of experience in the offered job, or three years of experience as a "Prep and/or line cook, Italian."

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

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in 1998 and 1999, and as an S corporation since 2000. On the petition, the petitioner claimed to have been established on January 1, 1985, and to currently employ 50 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary claimed to have worked for the petitioner since January 1995.

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

¹ 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).

petitioner's ability to pay the proffered wage. In the instant case, the petitioner claims to have employed and paid wages to the beneficiary since January 1995. However, the petitioner has not submitted any evidence of wages paid to the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the petitioner must establish the ability to pay the full proffered wage of \$24,024 as of the priority date.

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 tax returns reflect the following net income:

1998	\$20,845 ²
1999	\$123,829
2000	\$-138,620 ³
2001	\$-75,183
2002	\$-19,909
2003	\$4,136
2004	\$34,567
2005	\$12,935
2006	\$9,412
2007	\$32,702

Therefore, while the petitioner established sufficient net income to pay the proffered wage in 1999, 2004 and 2007, the petitioner did not establish sufficient net income to pay the proffered wage for the years 1998, 2000, 2001, 2002, 2003, 2005, and 2006.

² 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.

³ Forms 1120S, U.S. Income Tax Return for an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2002-2003), line 17c (2004-2005), or line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 14, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedules K, the petitioner's net income is found on Schedule K of its tax returns from 2002 through 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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. The petitioner's tax returns demonstrate the following end-of-year net current assets:

1998	\$-10,585
2000	\$-18,198
2001	\$-90,839
2002	\$-100,702
2003	\$-74,369
2005	\$6,118
2006	\$37,511

For the years 1998, 2000, 2001, 2002, 2003, and 2004, the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. *As in Sonegawa*,

⁴According 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.

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.

On appeal, counsel provided copies of the petitioner's year end bank statements for 2002 through 2007 and asserted that the statements "reflect the true financial ability of [the petitioner]." However, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, 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) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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 tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

Counsel also asserts on appeal that the petitioner's failure to establish the ability to pay the proffered wage was due, in large part, to a disruption in business in 2000 and 2001 because of major rehabilitative construction on the sidewalks and streets surrounding the restaurant. While counsel contends that the restaurant was "largely inaccessible" to patrons during this period, it is noted that the petitioner's gross revenues reflect only a 20% decline from 1999 to 2000 and an increase in gross revenues from 2000 to 2001. While the petitioner's gross receipts have continued to climb since 2001, the petitioner's net income has fluctuated significantly during these subsequent years and has only been sufficient to pay the proffered wage in only two of those years. Moreover, this explanation does not explain the petitioner's failure to establish the ability to pay the proffered wage in 1998 through either its net income or its net current assets.

Counsel also submits on appeal a letter from [REDACTED], CPA, who describes the relationships and practices within the network of businesses (including the petitioner) with common ownership. Mr. [REDACTED] concludes that intercompany transfers in 2000, 2001, 2002, 2003 and 2005 should not be considered "debts" and that the transferred funds should have been considered as part of the petitioning company's net current assets. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial

resources of individuals or entities who have no legal obligation to pay the wage.” Furthermore, Mr. [REDACTED] does not indicate that any of these intercompany transfers occurred in 1998; therefore, this explanation also fails to explain the petitioner’s failure to establish the ability to pay the proffered wage in 1998 through either its net income or its net current assets.

In addition, the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for at least one other beneficiary. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner’s revenues, payroll, officer compensation and other financial information contained on its tax returns are not sufficient to establish its ability to pay the wage offered to each beneficiary despite its shortfall in net income and net current assets. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm’r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the offered job or three years of experience as a “Prep and/or line cook, Italian.” On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a “Line Cook/Sautee Cook” for the Cheesecake Factory in Beverly Hills, California, from June 1995 through May 2000, and experience as a “Sous Chef” for Bonaventure Brewing Company in Los Angeles, California, since February 1998. The beneficiary also claimed employment as a “Cook, Sautee, Pantry, Asst. Sous Chef” at Matteo’s Italian Restaurant in Los Angeles, California.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains no evidence to corroborate the beneficiary's claimed qualifying employment with the Cheesecake Factory or with the Bonaventure Brewing Company. The record does contain a November 11, 2001, employment letter from the [REDACTED] Italian Restaurant. However, this letter simply states that the beneficiary worked there from 1989 to 1995 and that the beneficiary "worked as a pantry person working up to saute' and sous chef helper." This statement is not sufficient to establish that the beneficiary possessed at least three years of experience as a "Prep and/or line cook, Italian" as was specifically required under the terms of the labor certification.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.⁵ 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.

⁵ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683.