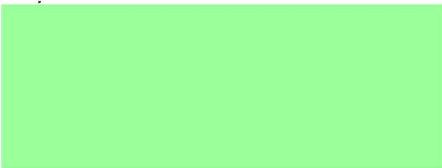


(b)(6)

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



DATE: OFFICE: TEXAS SERVICE CENTER

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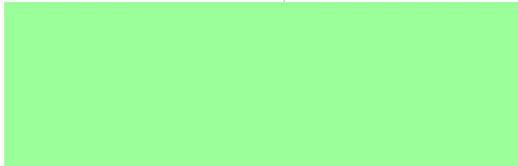


IN RE: Petitioner:
Beneficiary:



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,

A handwritten signature in black ink, appearing to be "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a self-service laundry. It seeks to employ the beneficiary permanently in the United States as a laundry machine mechanic. 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, 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 February 5, 2010 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 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 October 9, 2002. The proffered wage as stated on the Form ETA 750 is \$18.50 per hour, and 35 hours per week are required. This equals \$33,670 per

year. The Form ETA 750 also states that the position requires two years of experience in the job offered of laundry machine mechanic.

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 is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1994 and to currently employ four 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, but not dated, the beneficiary claimed to have worked for the petitioner from September 2001 to "Present."

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. No evidence of the wages paid to the beneficiary was submitted to the director. On appeal, the petitioner submitted the beneficiary's Forms 1099-MISC from the years 2005 through 2009. The Forms 1099-MISC show the beneficiary was paid the following amounts by the petitioner as nonemployee compensation:

- 2005 \$12,112
- 2006 \$13,312
- 2007 \$24,850
- 2008 \$25,425

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).

- 2009 \$25,200

Thus, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in October 2002 or subsequently from the years 2005 through 2009.

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 record before the director closed on June 19, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 was the most recent return available. However, the petitioner submitted only a balance sheet and a profit and loss statement for 2008, which do not appear to be audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant’s report accompanying these statements, the AAO cannot conclude that they are audited financial statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. On appeal, counsel failed to submit the petitioner’s annual reports, audited financial statements or tax returns for the years 2008 or 2009, which should have been available on the date that counsel submitted his brief and evidence on appeal, April 21, 2010. Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal.

However, even considering the submitted tax returns, the petitioner still failed to establish its ability to pay the proffered wage. The petitioner’s tax returns demonstrate its net income for 2002 through 2007, as shown in the table below.

- In 2002, the Form 1120S stated net income² of \$8,662.

² 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 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 2, 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 deductions, adjustments and other expenses shown on its Schedule K for 2002, 2004, 2005, 2006 and 2007, the petitioner’s net income is found on Schedule K of its tax returns for those years.

- In 2003, the Form 1120S stated net income of \$4,154.
- In 2004, the Form 1120S stated net income of (7,452).
- In 2005, the Form 1120S stated net income of \$27,507.
- In 2006, the Form 1120S stated net income of \$45,020.
- In 2007, the Form 1120S stated net income of \$16,678.

Therefore, for the years 2002, 2003, 2004 the petitioner's tax returns do not demonstrate that the petitioner had sufficient net income to pay the proffered wage. The beneficiary's compensation combined with the petitioner's net income demonstrates the ability to pay for the years 2005, 2006 and 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal 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 2002 through 2004, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of (\$19,984).
- In 2003, the Form 1120S stated net current assets of (\$26,519).
- In 2004, the Form 1120S stated net current assets of (\$31,613).

Therefore, for the years 2002 through 2004, the petitioner's tax returns do not demonstrate that the petitioner had 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.

On appeal, counsel asserts that the director erred as a matter of law in determining that the petitioner could not pay the proffered wage. Counsel points to depreciation amounts listed on the petitioner's tax returns and provided a letter from the petitioner's accountant to explain why "depreciation is not

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.

an actual expense.” Additionally, counsel submitted the petitioner’s bank statements from January 2002 through January 2006 as additional evidence that the petitioner had sufficient funds available to pay the proffered wage. Counsel cites the precedent decision of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967) to support his assertion that the evidence demonstrates a trend of increased net profit from the year 2005 forward and that the totality of circumstances demonstrates that the petitioner has the ability to pay the proffered wage. Finally, counsel argues that according to 20 C.F.R. § 656.10(c)(4), the petitioner is only required to demonstrate its ability to pay the proffered wage when the beneficiary becomes a lawful permanent resident.

Counsel’s assertion that the director erred by not considering amounts listed for depreciation on the petitioner’s tax returns is without merit. As explained above, “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. [The petitioner’s] argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang, supra*.

Counsel’s reliance on bank statements as evidence of the petitioner’s ability to pay the proffered wage is also unpersuasive. 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 returns, 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.

In his brief on appeal, counsel states, “the petitioner has submitted W2 forms from 2005-2009, showing that the beneficiary has been in the petitioner’s employ, as well as an affidavit from the owner of the petitioner, [REDACTED] stating that he has also paid the beneficiary’s living expenses, which when added to the income paid to the beneficiary, exceed the proffered wage.” The record on appeal contains the beneficiary’s Forms 1099-MISC for the years 2005 through 2009, however the beneficiary’s Forms W-2 are not found. There is also no affidavit from [REDACTED] describing living expenses paid to the beneficiary. 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).

Counsel also cites the decision in *Sonogawa*, and asserts that the totality of circumstances demonstrate that the petitioner has the ability to pay the proffered wage. 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. 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 *Sonegawa* was based in part on the petitioner's sound business 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.

In the instant case, counsel points to the petitioner's "increasing net income since 2005, well in excess of the proffered wage." As explained above, the petitioner is an S corporation with income, credits, deductions or other adjustments from sources other than a trade or business reported on Schedule K, and therefore, its net income is found on Schedule K of its Forms 1120S for the years 2002, and 2004 through 2007. Based on Schedule K, the petitioner's net income since 2005 has not consistently increased and is not well in excess of the proffered wage. Further, based on the petitioner's tax returns in the record, its gross sales fluctuated between the years 2002 and 2007 with no clear pattern of growth. The total amounts paid in officer compensation and payroll are marginal. There is no evidence in the record of uncharacteristic expenses or losses or of the business' reputation within its industry. 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.

On the Form I-290B, notice of appeal, counsel states that according to 20 C.F.R. § 656.10(c)(4)⁴, the petitioner is only required to demonstrate its ability to pay the proffered wage on or before the date of the beneficiary's proposed entrance to the U.S., "i.e. date of approval for residence." In his brief

⁴ 20 C.F.R. § 656.10 states in part:

(c) *Attestations.* The employer must certify to the conditions of employment listed below on the *Application for Permanent Employment Certification* under penalty of perjury under 18 U.S.C. 1621 (2). Failure to attest to any of the conditions listed below results in a denial of the application.

* * *

(4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States[.]

on appeal, counsel argues that the evidence shows the petitioner will meet the requirement of 20 C.F.R. § 656.10(c)(4) when a visa becomes available to the beneficiary.

The regulation cited by counsel, 20 C.F.R. § 656.10(c)(4), relates to the petitioner's attestations to the DOL during the labor certification process. The relevant regulation dealing with employment-based immigrant petitions before USCIS is 8 C.F.R. § 204.5(g)(2), which provides that the petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. 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, supra.*

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

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.