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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: **FEB 17 2012** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). As required by statute, a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) accompanied the petition.

On January 14, 2008, the director denied the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage.

On appeal, the petitioner, through counsel, asserts that the petitioner has had the continuing ability to pay the proffered wage.

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 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.

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.

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).

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, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 4, 2004, which establishes the priority date.² The proffered wage as stated on the Form ETA 750 is \$11.00 per hour (\$22,880 per year). The Form ETA 750 states that the position requires the beneficiary to prepare Mexican dishes such as fajitas, burritos, and enchiladas. It also requires that the beneficiary have two years of employment experience in the job offered. Part B of the Form ETA 750, signed by the beneficiary on March 5, 2004, does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on April 3, 2007, it is claimed that the petitioner was established on August 1, 2003, reports a gross annual income of \$174,810 and currently employs five workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In support of its continuing ability to pay the proffered wage of \$22,880 per year, the petitioner has submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation³ for 2004,

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

³ Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they

2005, 2006, and 2007. They indicate that the petitioner's fiscal year is based on a calendar year. The tax returns contain the following information:

Year	2004	2005	2006	2007
Net Income	-\$23,780	-\$300	-\$22,593	-\$22,950
Current Assets	\$-0-	\$-0-	\$-0-	\$-0-
Current Liabilities	\$-0-	\$-0-	\$-0-	\$-0-
Net Current Assets ⁴	\$-0-	\$-0-	\$-0-	\$-0-

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁶ As shown above, the petitioner did not claim any assets or liabilities in any of the relevant years.

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 18 (2006, 2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 21 of page 1 of the 2004, 2005, 2006, and 2007 tax returns.

⁴As shown above, the petitioner did not claim any net current assets on Schedule L of the respective tax returns. It is noted that Schedule B questions a filer that if its total receipts and its total assets at the end of the tax year are less than \$250,000 then it is not required to complete Schedule L or Schedule M-1. In 2004 and 2005, the petitioner answered "no" to this question and did not report any current assets or current liabilities on Schedule L. In 2005 and 2006, the petitioner answered "yes" to this question and did not report any current assets or liabilities on Schedule L. Regardless of the petitioner's answer to the question posed in Schedule B, if no current assets or liabilities are claimed, then a calculation of the petitioner's net current assets cannot be performed and without an audited financial statement, the petitioner's ability to pay the proffered wage cannot be determined from its net current assets.

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

⁶ A petitioner's total assets and total liabilities are not considered in this calculation because they

In support of the petitioner's ability to pay the proffered wage, it has also submitted a copy of a 2004 rental binder and deposit receipt with both the principal shareholder's and the beneficiary's name on it.⁷ Also provided is a 2004 copy of a water service contract signed by the principal shareholder on the same location. It is noted that no legal authority is cited obliging USCIS to include such expenses paid as part of the beneficiary's wages. USCIS will not consider such expenses as part of the beneficiary's compensation paid by the petitioner.⁸ The proposed salary on an approved labor certification is expressed as U.S. currency and not as a formula including the value of other expenses paid on behalf of a beneficiary. It is based on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40 (2003). Additionally, the regulation at 20 C.F.R. § 656.20(c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

The director denied the petition on January 14, 2008. He noted that the tax returns failed to establish the petitioner's ability to pay through either net income or net current assets and also observed that while counsel had indicated that the petitioner currently employed the beneficiary, the record failed to show that the petitioner had been paying the beneficiary a salary equal to or greater than the proffered wage.

On appeal, counsel submits a sworn statement from the petitioner's principal shareholder affirming that he has employed the beneficiary since October 2003 and that the beneficiary has been earning \$450 per week. The AAO does not find this statement to be persuasive in demonstrating the petitioner's ability to pay the proffered wage. It is unaccompanied by any documentation of any actual payment of compensation to the beneficiary. It is noted that none of the tax returns reflect any salaries or wages (page 1, line 8) or cost of labor (Schedule A, line 3) deductions and indicate very modest undefined "outside services" expenses. Further, the

include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and would not, therefore, become funds available to pay the proffered wage.

⁷Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

⁸The IRS treats certain fringe benefits as taxable and non-taxable. An employer reports taxable fringe benefits in box 1 of an employee's IRS Form W-2. Nontaxable fringe benefits are excluded from box 1 of an employee's IRS Form W-2. Examples of nontaxable fringe benefits include, but are not limited to, certain accident and health benefits, dependent care assistance (up to certain limits), group-term life insurance coverage, and health savings accounts (up to certain limits). See I.R.C. §§ 105, 129, 106.

beneficiary omitted any mention of this employment on Part B of the Form ETA 750.⁹ Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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, as discussed above, the record does not persuasively establish that the petitioner has employed and paid the beneficiary at a salary equal to or greater than the proffered wage during any given period.

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). 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:

⁹ *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

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).

In this case, as shown above, in 2004, neither the petitioner’s -\$23,700 in net income nor its \$-0- in net current assets could cover the proffered wage of \$22,880 per year.

Similarly, in 2005, neither the petitioner’s -\$300 in net income, nor its \$-0- in net current assets provided sufficient funds to pay the proffered wage or establish its ability to pay in this year.

In 2006, neither the petitioner’s -\$22,593 in net income, nor its \$-0- in net current assets could cover the proffered wage or establish the petitioner’s ability to pay in this year.

Finally, in 2007, neither the -\$22,950 in net income as shown on its tax return, nor its \$-0- in net current assets could pay the proffered wage. None of the petitioner’s tax returns reflected sufficient net income or net current assets to pay the proffered wage in any of the relevant years. The petitioner has not demonstrated its continuing financial ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In some cases, as counsel indicates, 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. Comm. 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. 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, and the occurrence of any uncharacteristic business expenditures or losses.

In this case, it is noted that none of the petitioner's tax returns demonstrated an ability to pay the proffered wage out of net income or net current assets, both of which have been either reported as losses or have been not reported at all. The petitioner was established only eight months prior to filing the labor certification and its gross receipts have substantially declined from 2004 to 2007. As noted above, despite the petitioner's claim of five employees, the petitioner's tax returns do not show any wages paid, costs of labor, or any officer compensation paid. Further, the petitioner has submitted no analogous unique or unusual evidence comparable to that which prevailed in *Sonegawa*, from which to make a positive finding. Thus, assessing the overall circumstances, 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 pursuant to 8 C.F.R. § 204.5(g)(2).

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.