

(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

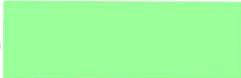


U.S. Citizenship
and Immigration
Services



Date: **JUN 04 2012**

Office: TEXAS 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 with the field office or service center that originally decided your case by filing a 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,

Perry Rhew
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 Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a sushi chef. 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 petitioner filed Form I-140 on August 16, 2007. The Director, Texas Service Center denied the petition on June 27, 2008. On July 22, 2008 the petitioner filed a motion to reopen and reconsider the decision. On November 25, 2008 the director granted the motion to reopen the petition. On December 1, 2008 the director again denied the petition on the merits. On December 29, 2008 the petitioner filed a second motion to reopen and reconsider the director's decision. On March 13, 2009 the Director, Texas Service Center found that the evidence submitted with the motion did not overcome the grounds set forth in the denial decision. The instant appeal was filed on April 15, 2009. Counsel indicated that a brief would be forthcoming within 30 days of the filing of the appeal. As of this date, over three years later, no further evidence was submitted.

As set forth in the director's decisions, 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.

Evidence Regarding the Petitioner's Ability to Pay the Proffered Wage

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$15 per hour (\$31,200 per year). The Form ETA 750 states that the position requires two years of experience as a sushi chef.

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 a C corporation. On the petition, the petitioner claimed to have been established on January 1, 2001, to have a gross annual income of \$129,618, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the Form ETA 750B, signed by the beneficiary on April 15, 2001, the beneficiary claimed to have worked for the petitioner since December of 2000 (prior to the petitioner's establishment.)

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. As referenced in the chart below, the petitioner submitted the following evidence regarding payments to the beneficiary:

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).

Tax Year	Wages Paid as Reflected on Form W-2	Difference between the W-2 Wages Paid and the Proffered Wage	Miscellaneous Income Reflected on subsequently submitted Form 1099
2001	\$27,880.00	\$3,320.00	\$3,500.00
2002	\$20,800.00	\$10,400.00	\$11,000.00
2003	\$27,276.75	\$3,923.25	\$4,500.00
2004	\$24,910.00	\$6,290.00	\$7,000.00
2005	\$24,440.00 ²	\$6,760.00	\$7,500.00
2006	\$24,440.00	\$6,760.00	\$8,000.00
2007	\$24,440.00	\$6,760.00	\$8,000.00

In the instant case, the Forms W-2 initially submitted with the petition established that the petitioner paid the beneficiary less than the proffered wage each year of his employment. In support of the December 29, 2008 motion, counsel submits IRS Forms 1099, Miscellaneous Income which are not previously mentioned, and which are not reflected in the petitioner's tax returns for the corresponding years. Additionally, they all appear to have been issued subsequent to July 2007, the month that the beneficiary moved to the address³ listed on the Forms 1099.

The submitted Forms 1099 will not be accepted as evidence of payments made to the beneficiary for services rendered to the petitioner for the following reasons:

- The amounts reflected in the forms are not reflected in Form 1120-A for each of the corresponding tax years;
- They were not submitted to USCIS at the same time as the Forms W-2 and Forms 1120-A;
- They were apparently created and/or issued subsequent to July 2007;
- For each tax year, the amount listed just satisfies the difference between the wage and what the beneficiary was paid; and
- There is no explanation as to why the beneficiary would be issued both Forms W-2 and 1099 in the same tax year.

² According to the submitted Form W-2c, Corrected Wage and Tax Statement, the petitioner initially reported that the beneficiary was paid \$13,000. The revised amount is reflected above.

³ According to Forms G-325, Biographic Form signed by the beneficiary under penalty of perjury on March 22, 1997 and July 31, 2007, respectively; the beneficiary's addresses listed on the Forms W-2 match the claimed addresses on the Forms G-325. According to the 2007 Form G-325, the beneficiary moved to [REDACTED] in July 2007. Each of the submitted Forms 1099 contains [REDACTED] as the beneficiary's address.

Given the above, the submitted Forms 1099 are not credible. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). Additionally, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date April 30, 2001. Therefore, the petitioner must establish that it can pay the difference between the wages paid as reflected on the Forms W-2 and the proffered wage in each relevant year.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of

funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return. The petitioner’s tax returns demonstrate its net income as shown in the table below.

Tax Year	Net Income
2001	\$1,265.00
2002	\$1,621.00
2003	\$1,944.00
2004	No tax return submitted.
2005	No tax return submitted.
2006 ⁴	\$7,261.00
2007	No tax return submitted.

Therefore, for the years 2001 to 2005, and 2007, the petitioner did not have sufficient net income to pay the difference between the wages paid as reflected on the Forms W-2 and the proffered wage. For 2006, the petitioner had sufficient net income to pay the difference between the wages paid as reflected on the Forms W-2 and the proffered wage. Furthermore, given the August 16, 2007 filing date of the petition, the petitioner failed to submit the required initial evidence for 2004 and 2005. *See* 8 C.F.R. § 204.5(g)(2), above.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the

⁴ IRS Form 1120X, Amended U.S. Corporation Income Tax Return, for tax year 2006 was filed on May 8, 2007.

difference between the petitioner's current assets and current liabilities.⁵ On Form 1120-A, a corporation's year-end current assets are shown in Part III, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 13 and 14. 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 as shown in the table below.

Tax Year	Current Assets Lines 1-6	Current Liabilities Lines 13 - 14	Calculation of Net Current Assets (Current Assets-Current Liabilities)
2001	\$807.00	\$9,010.00	-\$8,203.00
2002	\$758.00	\$6,129.00	-\$5,371.00
2003	\$0.00	\$9,364.00	-\$9,364.00
2004			Tax return not submitted.
2005			Tax return not submitted.
2007			Tax return not submitted.

Therefore, for the years 2001 to 2005, and 2007, the petitioner did not have sufficient net current assets to pay the difference between the wages paid as reflected on the Forms W-2 and the proffered wage.

Thus, 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 petitioner has submitted ample proof that the petitioner paid wages to the beneficiary. Additionally, counsel indicates that he would provide additional details and documentation within the next 30 days. As noted above, to date, no such information has been received.

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.

⁵According 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 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 was established in 2001 and employs two people. The petitioner failed to submit regulatory-prescribed financial information covering three years at issue in this case. The petitioner did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service.

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: Evidence of the Beneficiary's Qualifications

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 as a sushi chef. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a sushi chef at [REDACTED] in Seoul, Korea from March 1992 to October 1994.

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 a December 28, 2004 letter written by [REDACTED] Representative of [REDACTED] It states that the beneficiary was employment by [REDACTED] in Seoul, Korea as a sushi chef from March 1992 until October 1994.

However, the Form G-325, Biographic Information, signed by the beneficiary under penalty of perjury on March 22, 1997 states that from 1987 until January 1995 he was the President of [REDACTED] in Seoul, Korea. This form does not reflect employment as a sushi chef at [REDACTED] from 1992 until 1994. The record contains no explanation regarding this discrepancy in the record. *See Matter of Ho*, above. The petitioner has provided no independent, objective evidence to resolve the inconsistencies in the record.

Given the above, 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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.