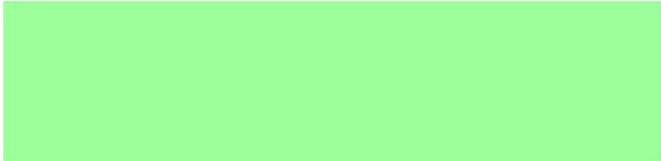


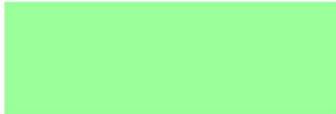


U.S. Citizenship
and Immigration
Services

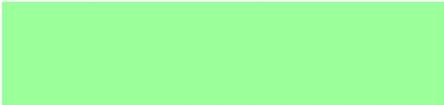
(b)(6)



Date: **JUN 08 2012** Office: TEXAS SERVICE CENTER



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,

Kerwin S. Bullock for
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 construction contractor. It seeks to employ the beneficiary permanently in the United States as a marble setter. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; that the petitioner had not established its intent to hire the beneficiary; and that the petitioner had not established the beneficiary had the required experience. 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 January 28, 2009 denial, there are three issues in this case: whether or not the petitioner established its continuing ability to pay the proffered wage as of the priority date; whether or not the petitioner established its intent to hire the beneficiary; and whether or not the petitioner established the beneficiary had the required experience.

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 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

Ability to Pay the Proffered Wage

The first issue 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.

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

¹The 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).

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$28.72 per hour (\$59,737.60 per year). The Form ETA 750 states that the position requires two years of experience as a marble setter.

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 1997 and to employ three 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 September 20, 2005, he did not claim to have worked for the petitioner.

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, or any wage, during any relevant timeframe, beginning with the priority date and subsequently.

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 December 5, 2008 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 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income² of -\$22,875.
- In 2002, the Form 1120S stated net income of \$12,898.
- In 2003, the Form 1120S stated net income of \$18,148.
- In 2004, the Form 1120S stated net income of \$10,659.
- In 2005, the Form 1120S stated net income of \$20,221.
- In 2006, the Form 1120S stated net income of \$11,784
- In 2007, the Form 1120S stated net income of -\$1,411.

Therefore, for each of the years 2001 through 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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

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 (2001-2003), line 17e (2004-2005), and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 13, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). For 2001, 2002, and 2007, the petitioner's net income is found on line 21 of page one of its tax return. For 2003, the petitioner's net income is found on line 23 of Schedule K. For 2004 and 2005, the petitioner's net income is found on line 17e of Schedule K. For 2006, the petitioner's net income is found on line 18 of Schedule K. It is also noted that the director misstated the petitioner's net income for 2003, 2004, 2005, and 2006, as the director did not consider the additional income reflected on Schedule K.

³ 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.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$319.⁴
- In 2002, the Form 1120S stated net current assets of -\$53,595.
- In 2003, the Form 1120S stated net current assets of -\$36,882.
- In 2004, the Form 1120S stated net current assets of -\$21,654.
- In 2005, the Form 1120S stated net current assets of -\$3,829.⁵
- In 2006, the Form 1120S stated net current assets of \$1,070.
- In 2007, the Form 1120S stated net current assets of \$1,009.

Therefore, for each of the years 2001 through 2007, 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.

On appeal, counsel asserts that officer's compensation should be considered as evidence of the petitioner's ability to pay the proffered wage, and that in 2007, the petitioner was succeeded by [REDACTED] and that [REDACTED] tax returns should be considered as evidence of the petitioner's ability to pay the proffered wage in 2007.

The sole shareholder of an S corporation has the authority to allocate corporate expenses for various legitimate business purposes, which includes reducing the corporation's taxable income. Officer compensation is an explicitly stated expense on the IRS Form 1120S tax return. While the petitioner's tax returns indicate that it is owned by a sole shareholder and that officer compensation was paid in each year from 2001 to 2006, the tax returns do not indicate who received officer compensation in any relevant year, and there is no evidence that the officer or officers who received compensation are willing and able to forego their officer compensation in any relevant year. 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)). 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). It is also noted that for the years 2001, 2003, 2005, 2006 and 2007, officer compensation would not be sufficient to pay the proffered wage.

Counsel also asserts that in 2007, [REDACTED] succeeded to the petitioner's business and that CFG's tax return should be considered in 2007. However, there is no evidence to establish that CFG is a successor-in-

⁴It is noted the director misstated the 2001 net current assets as a positive \$319.

⁵It is noted the director misstated the 2005 net current assets as a negative \$9,875.

interest to the petitioner. If [REDACTED] is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The record does not contain evidence that satisfies all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor; it does not demonstrate that the job opportunity will be the same as originally offered; and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.

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.

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, while the petitioner experienced growth in sales in both 2002 and 2004 over the preceding year, the petitioner experienced a downturn in sales in 2003, 2005, 2006, and 2007 over the preceding year. Thus the petitioner has not established its historical growth. While counsel asserts that 2001 was a “particularly difficult year for businesses in New York City” and that 2006 “was another bad year” for the petitioner due to the economy, the petitioner provided no evidence specifically connecting the petitioner's business decline to these events. The record contains no evidence of the petitioner's reputation throughout the industry, no evidence of any temporary and uncharacteristic disruption in its business activities, and no evidence that the beneficiary will be 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.

Intent and Desire to Employ the Beneficiary

The second issue in this case is whether or not the petitioner established its intent to hire the beneficiary. Only a United States employer intending and desiring to employ the beneficiary may file a Form I-140 seeking classification under section 203(b)(3) of the Act. *See* 8 C.F.R. §204.5(c).

The director, in his request for evidence, requested from the petitioner a letter of intent to hire the beneficiary. Although counsel asserts that such letter was submitted in response to the director's request for evidence, no such letter appears in the record of proceeding. Thus, the petitioner has not established that it intends and desires to employ the beneficiary.

Beneficiary's Qualifications for the Job Offered

The third issue in this case is whether or not the petitioner established that the beneficiary had the required experience. There is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary is qualified to perform the duties of the proffered position. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petition is for a skilled worker and the job requires two years of experience in the proffered position (marble setter), yet the record of proceeding does not contain evidence reflecting that the beneficiary has two years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). Although counsel asserts that an experience letter was submitted in response to the director's request for evidence, no such letter appears in the record of proceeding. Thus, the petitioner has not established that the beneficiary has the required two years of experience.

The evidence submitted does not establish that the petitioner (1) had the continuing ability to pay the proffered wage beginning on the priority date, (2) had the intent and desire to hire the beneficiary, or (3) established that the beneficiary had the required experience.

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