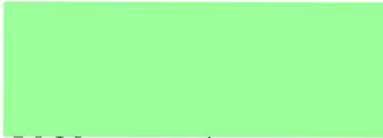




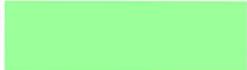
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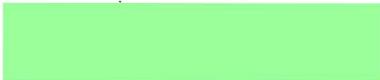


Date: JUN 08 2012

Office: TEXAS SERVICE CENTER

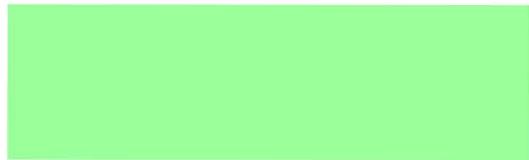
FILE: 

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 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 petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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.

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 director's April 27, 2009 denial identified one issue, whether or not the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal, the AAO identifies another issue, namely, whether or not the petitioner has established two valid successor-in-interest relationships.

Ability to Pay to 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

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). Although counsel requested and received an additional 30 days to submit a brief and additional evidence, no brief or additional evidence has been received.

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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 October 1, 2002. The proffered wage as stated on the Form ETA 750 is \$500 per week (\$26,000 per year). The Form ETA 750 states that the position requires two years of experience as a specialty cook.

The evidence in the record of proceeding indicates that the labor certification and the petition were filed in the name of [REDACTED] which is a restaurant that was owned and operated by three different entities from the time the labor certification was filed until the appeal was filed. From October 1, 2002 until September 22, 2003, the restaurant was owned and operated by [REDACTED] with federal employer identification number (EIN) [REDACTED] was structured as a C corporation and operated on a fiscal year ending August 31.² Foz filed the labor certification. From September 23, 2003 to December 31, 2005, the restaurant was owned and operated by [REDACTED] with [REDACTED] was a single member LLC and reported its income on Schedule C of the single member's IRS Form 1040. From January 1, 2006 through December 31, 2008, the restaurant was owned and operated by [REDACTED] (the petitioner) with EIN [REDACTED]. The petitioner is structured as an S corporation and operates on a calendar year. Fishermans Cove Corporation filed the petition and is the petitioner in the instant case.

On the Form ETA 750B, signed by the beneficiary on May 8 2002, the beneficiary did not claim to have worked at [REDACTED].

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

²According to [REDACTED] 2003 Form 1120, it sold the restaurant on September 22, 2003.

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 the beneficiary was employed at the restaurant and paid the full proffered wage during any relevant timeframe including the period from the priority date 2002 or subsequently.

If the petitioner does not establish that the beneficiary was employed and paid 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 April 20, 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 federal income tax return for 2008 is the most recent return available. The federal tax returns demonstrate net income for 2002 through 2008, as shown in the table below.

For Foz—³

- In 2002, the Form 1120⁴ stated net income of \$1,309. (Fiscal year ending August 31, 2003.)
- In 2003, the Form 1120 stated net income of \$42,297. (Fiscal year ending March 31, 2004.)⁵

It is noted that [REDACTED] 2003 tax return indicates that it sold the restaurant on September 22, 2003, and reported gross operating profit from September 1, 2003 to September 22, 2003 of \$497 and a gain of \$63,481 from the sale of its business assets, thus the stated income of \$42,297 reflects mostly the gain on the sale of its business assets. Therefore, it cannot be concluded that [REDACTED] with an operating income of \$497 during the period of September 1 through September 22, 2003, had the ability to pay for that period of time.

For Miracle—⁶

- In 2003, no Form 1040 Schedule C was submitted.
- In 2004, the Form 1040 Schedule C⁷ stated net income of \$56,940.
- In 2005, the Form 1040 Schedule C stated net income of -11,518.

³ The petitioner must establish that [REDACTED] had the ability to pay the proffered wage from October 1, 2002 until September 22, 2003.

⁴For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

⁵As the restaurant was sold, [REDACTED] filed its 2003 tax return, which was its final tax return, for the fiscal year ending March 31, 2004.

⁶ The petitioner must establish that [REDACTED] had the ability to pay the proffered wage from September 23, 2003 to December 31, 2005.

⁷For a single member LLC reporting income on IRS Form 1040, USCIS considers net income to be the figure shown on Line 31, of Schedule C of the single member’s Form 1040.

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For the petitioner—⁸

- In 2006, the Form 1120S stated net income⁹ of -\$90,986.
- In 2007, the Form 1120S stated net income of -\$143,306.
- In 2008, the Form 1120S stated net income of -\$76,840.

Therefore, the petitioner did not establish that [REDACTED] had sufficient net income to pay the proffered wage from October 1, 2002 until September 22, 2003. Further, the petitioner did not establish that [REDACTED] had sufficient net income to pay the proffered wage from September 23, 2003 to December 31, 2003, and from January 1, 2005 to December 31, 2005. The petitioner established that [REDACTED] had sufficient net income to pay the proffered wage in 2004. Finally, the petitioner did not establish that it had sufficient net income to pay the proffered wage for the years 2006, 2007, and 2008.

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.¹⁰ 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 tax returns in the record demonstrate end-of-year net current assets for 2002, 2003, 2005, 2006, 2007, and 2008, as shown in the table below.

For Foz—

⁸ The petitioner must establish its ability to pay the proffered wage from January 1, 2006 until the beneficiary obtains lawful permanent residence.

⁹ 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 18 (2006-2008) 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.). Because the petitioner had no additional income, credits, deductions, or other adjustments, the petitioner's net income is found on line 21 of page one of its IRS Forms 1120S for 2006, 2007, and 2008.

¹⁰ 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.

- In 2002, the Form 1120 stated net current assets of \$75,651. (Fiscal year ending August 31, 2003)
- In 2003, the Form 1120 stated net current assets of \$0. (Fiscal year ending March 31, 2004.)

For Miracle—

- In 2003, no net current assets reported.¹¹
- In 2005, no net current assets reported.

For the petitioner—

- In 2006, the Form 1120S stated net current assets of -\$7,163.
- In 2007, the Form 1120S stated net current assets of -\$5,463.
- In 2008, the Form 1120S stated net current assets of -\$11,408.

Therefore, the petitioner established that [REDACTED] had sufficient net current assets to pay the proffered wage from October 1, 2002 through August 31, 2003, but did not establish that [REDACTED] had sufficient net current assets to pay the proffered wage from September 1, 2003 until September 23, 2003. Additionally, the petitioner did not establish that [REDACTED] had sufficient net current assets to pay the proffered wage for the period of September 23, 2003 through December 31, 2003 and in 2005. Further, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage in 2006, 2007, and 2008.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, net income, or net current assets.

On appeal, counsel makes two assertions. The first assertion is that pursuant to the May 4, 2004 Yates memo¹², in certain instances, a petitioner may submit additional evidence such as (1) profit/loss statements, (2) bank account records, or (3) personnel records. The second assertion is that USCIS must consider the normal accounting practices of the company even if the ability to pay is not reflected in the tax returns, citing *Matter of X*, EAC01-018-50413 (AAO January 31, 2003).

The record of proceeding does not contain profit/loss statements or personnel records, but it does contain bank statements from the petitioner for 2006, 2007, 2008, and the first three months of 2009.

¹¹A single member LLC reporting income on Form 1040 Schedule C, does not report its net current assets on its federal income tax return. However, the petitioner provided no other regulatory-prescribed evidence of [REDACTED] net current assets for 2003 and 2005.

¹²Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

Counsel's reliance on the balance in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

As to counsel's second assertion, counsel refers to a decision issued by the AAO concerning ability to pay, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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, there is no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. There is no evidence of whether 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.

Successor-In-Interest Relationships

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner is a different entity from the employer listed on the labor certification. As noted above, although [REDACTED] is the name that appears on both the labor certification and the petition, the restaurant has had three different owners during the time the labor certification was filed until the appeal was filed. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then 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).

The labor certification was filed by [REDACTED] which was succeeded by [REDACTED] which was succeeded by [REDACTED] which filed the petition and is the petitioner. Thus the petitioner must establish two valid successor relationships.

A petitioner may establish a valid successor relationship 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 evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transactions transferring ownership of the predecessors, nor does it demonstrate the job opportunity will be the same as originally offered, nor does it demonstrate the claimed successors are eligible for the immigrant visa in all respects, including whether it and its predecessors possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is the successor to [REDACTED], and that [REDACTED] is the successor to [REDACTED] which originally filed the labor certification.

The petition will be denied for the above stated reasons, with each considered 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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.