

(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

[Redacted]

Date: **MAR 30 2012**

Office: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

As set forth in the director's December 10, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on October 29, 2003. The proffered wage as stated on the Form ETA 750 is \$12.65 per hour (\$26,312 per year). According to Form ETA 750, the proffered position requires two years of experience in the job offered.

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

On appeal, counsel submits a brief; a report generated by the Massachusetts Cultural Resource Information System; a deed registry for the petitioner's property; a list of repairs which the petitioner's property requires with the associated costs; an undated letter signed by the petitioner, [REDACTED] to the [REDACTED] Building Department; a letter dated August 6, 2004 from the petitioner to [REDACTED] of the [REDACTED]; a letter dated August 21, 2006 from [REDACTED] Deputy Fire Chief, [REDACTED] Fire Rescue Department; a letter dated August 24, 2006 from [REDACTED] Chairman of the Automatic Sprinkler Appeals Board; a letter dated October 1, 2006 from the petitioner to the Massachusetts Fire Safety Commission; a letter dated October 4, 2006 from [REDACTED] a letter dated December 5, 2007 from the petitioner to electrician [REDACTED] a letter dated December 7, 2007 from [REDACTED] a partial letter dated August 18, 2008 from the [REDACTED] Fire Rescue Department; an undated letter from the [REDACTED] requesting that the petitioner complete an application for a Certificate of Inspection; three building permits dated December 10, 2007, October 20, 2003 and apparently erroneously May 19, 1900 respectively; a building inspection permit dated October 10, 2000; and an undated Building Inspector Statement.

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 1995 and currently to employ 33 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 October 16, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that [REDACTED] has been the owner of [REDACTED] restaurant for 14 years and, in that time, has always met his payroll obligations. Counsel also asserts that the petitioner has not reflected a net profit during the last several years due to "numerous substantial capitol [sic] repair projects." Counsel for the petitioner assures U.S. Citizenship and Immigration Services (USCIS) that though the repairs have adversely impacted the restaurant's annual net profit, they will not prohibit the petitioner from being able to pay the beneficiary the proffered wage as soon as she becomes "authorized to work on a full-time basis."

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 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, 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. In the instant case, the petitioner provided no evidence of having paid the beneficiary any wages in 2003. However, the petitioner provided W-2 statements which were issued to the beneficiary in 2004, 2005, 2006 and 2007. The beneficiary's IRS Forms W-2 show compensation received from the petitioner, as shown in the table below.

- In 2004, the Form W-2 stated compensation of \$16,930.00.
- In 2005, the Form W-2 stated compensation of \$15,465.00.
- In 2006, the Form W-2 stated compensation of \$11,666.00.
- In 2007, the Form W-2 stated compensation of \$13,781.00.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 or subsequently through 2007. For 2003, the petitioner must demonstrate the ability to pay the full proffered wage, \$26,312. However, since the petitioner paid wages to the beneficiary during 2004, 2005, 2006 and 2007, but at an amount less than the proffered wage, it must demonstrate the ability to pay the difference between the wages already paid and the proffered wage which is \$9,382, \$10,847, \$14,646 and \$12,531 respectively.

It must be noted that in the director's decision, he did not take into account the wages which the petitioner paid to the beneficiary. However, while erroneous, that fact does not detract from the final outcome of this matter as the AAO has properly considered those figures when tabulating the petitioner's ability to pay.

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 November 10, 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 2003 through 2007, as shown in the table below.

- In 2003, Schedule K of the Form 1120S indicated a net loss² of \$20,973.00.
- In 2004, Schedule K of the Form 1120S indicated a net loss of \$37,901.00.
- In 2005, Schedule K of the Form 1120S indicated a net loss of \$79,547.00.
- In 2006, Schedule K of the Form 1120S indicated a net income of \$24,362.00.
- In 2007, Schedule K of the Form 1120S indicated a net loss of \$25,923.00.

Therefore, based upon consideration of the petitioner's net income, the petitioner demonstrated sufficient income to be able to pay either the full proffered wage or the difference between wages already paid and the proffered wage for 2006 only, notwithstanding the director's determination to the contrary. The petitioner did not have sufficient net income to pay the proffered wage for 2003, 2004, 2005 or 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003, 2004, 2005 and 2007, as shown in the table below.

- In 2003, Schedule L of Form 1120S showed net current liabilities of \$19,351.00.
- In 2004, Schedule L of Form 1120S showed net current liabilities of \$30,782.00.

² Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 15, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2003 - 2007, the petitioner's net income is found on Schedule K of its tax returns.

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

- In 2005, Schedule L of Form 1120S showed net current liabilities of \$123,930.00.
- In 2007, Schedule L of Form 1120S showed net current assets of \$46,598.00.

Therefore, based upon consideration of the petitioner's net current year-and assets, the petitioner demonstrated the ability to pay either the full proffered wage or the difference between wages already paid and the proffered wage for 2007. However, the petitioner has not established that ability for 2003, 2004 or 2005.

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 in 14 years of operation, the petitioner has always met his payroll obligations. Counsel also directs attention to the numerous repairs which the petitioner has been required to perform on his establishment and asserts that while the costs associated with these repairs have adversely impacted the petitioner's ability to achieve a net profit, he nevertheless will be able to pay the beneficiary the proffered wage of \$26,312. "once foreign national, [the beneficiary], received her Employment Authorization Document and becomes authorized to work on a full-time basis."

However, in the instant circumstance, the regulation requires that the petitioner demonstrate the ability to pay the proffered wage (\$26,312) from the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based upon the evidence provided, the petitioner has not demonstrated that ability. The petitioner must provide evidence in support of any assertions which serve to establish a material criterion of eligibility. Simply going on record without supporting documentary evidence does not meet 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)). Further, the petitioner's assertions do not constitute evidence. See *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 504 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

It should also be noted that counsel states that the beneficiary was hospitalized during 2007 and was only able to work on a part-time basis. However, again, whether the beneficiary worked for only a certain period or whether the petitioner only paid a certain portion of the proffered wage during a given period is not the issue. At issue is whether the petitioner can demonstrate the ability to pay the proffered wage from the filing of Form ETA 750 through the time that the beneficiary becomes a lawful permanent resident. The petitioner has not satisfied that burden of proof.

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 *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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner notes the fact that the structure in which it operates its restaurant was constructed in [REDACTED] and is listed in the [REDACTED] database as a historical property. However, the petitioner has operated this business from this location since 1995. The petitioner has provided no evidence demonstrating a remarkable business reputation or any marked acclaim received by this establishment since taking over the operation. Further, whereas the situation in *Sonegawa* reflected one uncharacteristically unprofitable year due to moving expenses incurred and the operation of two facilities, the petitioner has not demonstrated corresponding circumstances. The documentation submitted as evidence demonstrates that the structure from which the petitioner operates is in need of significant repair, that the cost of the repairs is great (\$119,550-\$215,550 compared with the purchase price of \$375,000) and that repairs were performed over a period of at least seven years. Further, though the evidence demonstrates that the petitioner completed repairs related to the fire detection and sprinkler system as well as to other systems required for safety and sanitation compliance, the evidence does not demonstrate that all of the required repairs, which the petitioner enumerated in an estimate, have been completed. Thus, the evidence suggests that the petitioner could yet incur additional repair costs subsequent to the date of the filing of the instant petition. With respect to the growth of the petitioner's business, since 2003 (the first year for which tax returns were provided), the petitioner has reported a steady decrease in gross receipts for each year through 2007 (the last year for which tax returns were provided). The petitioner's tax returns reflect the same decline in wages paid and officer compensation. The petitioner has provided no other countervailing evidence sufficient to overcome the deficiencies reflected in the tax documentation provided. Thus, in 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.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.