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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

**PUBLIC COPY**



U.S. Citizenship  
and Immigration  
Services



B6

DATE: **MAR 19 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:

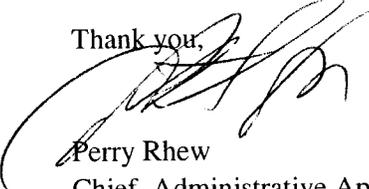


INSTRUCTIONS:

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 law was inappropriately applied by us in reaching your 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 software development and computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a network analyst. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>1</sup>

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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<sup>1</sup>The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that the beneficiary possessed the requisite education and experience as set forth on the Form ETA 750.. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on March 31, 2003.<sup>2</sup> The proffered wage is stated as \$80,000 per year.<sup>3</sup> Part B of the ETA 750, which was signed by the beneficiary<sup>4</sup> on July 9, 2007, does not indicate that the petitioner has employed the beneficiary as of the date of signing. Additional information indicates that the petitioner employed the beneficiary beginning in 2008.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on July 16, 2007. Part 5 of the petition indicates that the petitioner was established on July 9, 1997, claims a gross annual income of \$900,000 and employs eight workers.

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

<sup>3</sup>The director had asked in his RFE regarding the difference in location for the petitioner stated on the Form ETA 750 of Wilmington, Delaware and on Form I-140 as Edison, New Jersey. In response, the petitioner asserts that as the labor certification states the work location as "and other various unanticipated locations," that the petitioner's location was not an issue. However, as the labor certification states that "Delaware" is the main location, if the petitioner's headquarters have changed to New Jersey, it is not clear that the wage would remain the same and remain valid for the position offered. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

<sup>4</sup> The current beneficiary was submitted as a substitution for the original beneficiary specified on the labor certification. The current regulation at 20 C.F.R. § 656.11 states the following:

Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Because this request for substitution was submitted as of July 16, 2007, it was permitted.

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

Further, where multiple petitions are filed, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Additionally, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. In this case, USCIS electronic records indicate that the petitioner had filed over 70 petitions, including at least three other Form I-140s.

In support of its ability to pay the proffered wage of \$80,000 per year in this case, the petitioner provided partial copies of its 2003, 2004, 2005, 2006 and 2007 Form 1120S, U.S. Income Tax Return for an S Corporation to the underlying record. They reflect that its fiscal year is a standard calendar year. The tax returns contain the following information:

Year	2003	2004	2005	2006
Net Income <sup>5</sup>	\$-0-	\$-0-	\$-0-	\$-0-
Current Assets	\$12,736	\$15,338	\$1,196	\$44,741
Current Liabilities	\$22,761	\$25,363	\$11,221	\$54,766

<sup>5</sup>Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they 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 (2003) line 17e (2004, 2005) or line 18 (2006, 2007) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 21 of page one of all the submitted tax returns.

Net Current Assets	- \$10,025	-\$10,025	-\$10,025	-\$10,025
Year	2007			
Net Income	\$ -0-			
Current Assets	not submitted			
Current Liabilities	not submitted			
Net Current Assets	n/a			

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>7</sup>

In support of the ability to pay the proffered wage of \$80,000 per year, the petitioner has also submitted copies of two letters authored by their accountant, [REDACTED]. In both letters, he states that the petitioner has used outside labor in its normal course of business and that the total payment for outside services divided by the proffered wage would cover 6.7 workers in 2003 to 1.3 workers in 2007.

The petitioner also submitted a copy of a 2008 payroll record for the beneficiary. It subsequently submitted an additional 2008 payroll record on appeal showing that the petitioner had paid the beneficiary \$58,054.40 as of October 10, 2008.

The director concluded that the petitioner had failed to establish its ability to pay the proffered wage in view of the zero net income and negative net current assets reported by the petitioner

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>7</sup> A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

in every year from 2003 to 2006 and the lack of Schedule L for 2007<sup>8</sup> that would have shown net current assets. The director also noted that the with respect to outside services used by the petitioner, the petitioner provided no specific evidence relevant to such payment such as duties, qualifications, and documentation of actual contracts.

On appeal, the petitioner provided copies of various contracts showing that the petitioner contracted with [REDACTED] in providing services to third-party clients. The petitioner also submitted a copy of a letter, dated December 10, 2008, signed by [REDACTED] [REDACTED] suggests but does not clearly state that the beneficiary was intended as a replacement for [REDACTED]. He states that [REDACTED] services as a network analyst were engaged through a consulting agreement with [REDACTED] from March 2003 to December 2004. The petitioner subsequently hired [REDACTED] directly as an employee from January 2004 to January 2007. Then the petitioner hired the beneficiary in January 2008.

The petitioner also submitted copies of invoices showing [REDACTED] services billed to the petitioner, an itemization of those invoices for 2003 and 2004, and a summary of paychecks and amounts paid to [REDACTED] as an employee for 2005, 2006, and 2007.

It is noted that in general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. There must be evidence that the position involves the same duties as those set forth in the Form ETA 750 and that the beneficiary was intended as a replacement. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.<sup>9</sup> In this case, it is also noted that while the petitioner provided copies of most of the invoices for [REDACTED] work in 2003 that corresponded with the summary of the amounts paid, almost none of the invoice copies for 2004 were provided that would have corroborated the summary of amounts submitted for that year. Further, although the summary of paychecks issued by the petitioner to [REDACTED] were submitted, no supporting documentation such as Wage and Tax Statements (W-2) were provided. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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<sup>8</sup>The petitioner did not submit this on appeal, despite the noted deficiency.

<sup>9</sup>The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

Nevertheless, even in view of the amounts claimed by the petitioner to have paid for [REDACTED] services in 2003 and 2004 and to have been paid to him directly as an employee in 2005, 2006, and in 2007, it does not establish the petitioner's continuing financial ability to pay the proffered wage of \$80,000. It is noted that the petitioner claims to have paid \$34,264 for [REDACTED] services in 2003, which is \$45,736 less than the proffered wage. In 2004, the petitioner claims to have paid \$72,125 for [REDACTED] services, which is \$7,875 less than the proffered wage. As a direct employee, the petitioner paid [REDACTED] \$46,016 in 2005, \$69,597 in 2006 and \$10,560 in 2007. For those years, this was \$33,984 less than the proffered wage in 2005, \$10,403 less than the proffered wage in 2006 and \$69,440 less than the proffered wage in 2007. This disparity in pay from the proffered wage, as well as the lapse in time from the departure of [REDACTED] to the hiring of the beneficiary, raises a question as to whether the position performed by [REDACTED] was the same as the proffered job. Additionally, none of the differences in amounts actually paid for [REDACTED] services as a contractor or as a direct employee and the proffered wage of \$80,000 could have been covered by either the petitioner's net income or net current assets in any of the relevant years. Further, as noted above, the petitioner must establish that it can pay all of its sponsored workers.

In determining a petitioner's ability to pay a proffered salary, USCIS considers whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage. If established, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during a given period. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted above, the record indicates that the petitioner hired the beneficiary sometime in 2008. As of the last year-to-date payroll record the wages paid to the beneficiary were \$21,945.60 less than the proffered wage. As the petitioner did not provide any audited financial statement for 2008, which could have indicated net income or net current assets, the petitioner has not demonstrated its ability to pay the proffered wage based on compensation paid to the beneficiary in 2008.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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).

As herein indicated, the petitioner's reported net income of zero in 2003, 2004, 2005, 2006, and 2007 was insufficient to cover the proffered wage of \$80,000 per year or any deficiency arising from payment of compensation to or for [REDACTED] services.

Further, in 2003, 2004, 2005, and 2006, the petitioner declared -\$10,025 in net current assets. In 2007, it submitted only page one of its 2007 tax return. As no Schedule L was submitted that would have shown net current assets, the petitioner failed to establish that in any of the pertinent years, its net current assets could cover the proffered wage or payment of any shortfall arising out of the difference in compensation paid to or for [REDACTED] services and the proffered wage.

*Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, no detail or documentation has been provided that would clearly establish that such analogous circumstances to *Sonogawa* are present in this case that would support the approval of this petition in view of the multiple petitions that the petitioner has filed. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, from the corporate tax returns submitted to the record, it is noted that from 2003 to 2007, the petitioner's declared net income has been zero and its net current assets have been negative. Unlike the *Sonogawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonogawa* that are persuasive in this matter. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

Additionally, in the context of this petition and the other pending petitions for multiple beneficiaries, the petitioner has not established that it has had the *continuing* financial ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

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.