

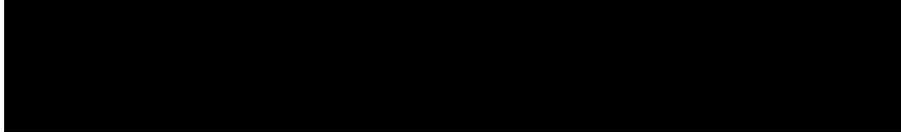
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



PUBLIC COPY

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Date: **MAR 28 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 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a floral arrangement company. It seeks to employ the beneficiary permanently in the United States as a floral designer. 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 June 16, 2008 denial, the 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.63 per hour (\$24,190 per year). The Form ETA 750 states that the position requires two years of experience in the position offered as a floral designer.

The AAO conducts appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner stated that it was established in 1991, but does not indicate the current number of workers as required on Form I-140, Part 5. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 2, 2001, the beneficiary claimed to have begun working for the petitioner in February 1991.

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. 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 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. Comm. 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. The petitioner provided the following evidence of employment:

- The 2002 Form W-2 states that the petitioner paid the beneficiary \$6,580.
- The 2003 Form W-2 states that the petitioner paid the beneficiary \$14,088.
- The 2004 Form W-2 states that the petitioner paid the beneficiary \$19,152.
- The 2005 Form W-2 states that the petitioner paid the beneficiary \$19,152.

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 2006 Form W-2 states that the petitioner paid the beneficiary \$22,060.
- The 2007 Form W-2 states that the petitioner paid the beneficiary \$21,305.

As none of these wages paid to the beneficiary exceed the proffered wage, the petitioner must provide evidence of its ability to pay the difference between the actual wage paid and the proffered wage, which in 2002 was \$17,610; in 2003 was \$10,102; in 2004 was \$5,038; in 2005 was \$5,038; in 2006 was \$2,130; and in 2007 was \$2,885. As no Form W-2 was submitted for 2001, the petitioner must demonstrate its ability to pay the full proffered wage in that year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross 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*, 696 F. Supp. 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, 558 F.3d at 116. “[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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed with the receipt by the director of the petitioner’s initial submissions on October 15, 2007. As of that date, the most current tax return available was the petitioner’s 2006 federal tax return. The petitioner provided its 2007 tax return on appeal. The petitioner submitted the following Forms 1120S:

- In 2001, the Form 1120S stated net income² of -\$87,911.
- In 2002, the Form 1120S stated net income of -\$44,295.
- In 2003, the Form 1120S stated net income of \$13,762.³
- In 2004, the Form 1120S stated net income of \$37,945.
- In 2005, the Form 1120S stated net income of \$21,172.
- In 2006, the Form 1120S stated net income of \$41,814.
- In 2007, the Form 1120S stated net income of \$40,642.

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), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 3, 2009) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K in 2001, 2002, 2004, 2006, and 2007, the petitioner’s net income is found on Schedule K for 2001, 2002, 2004, 2006, and 2007 and on line 21 of its tax returns for 2003 and 2005.

³ On June 27, 2003, a transfer of ownership of the petitioning business occurred. The Agreement for Shares of Stock in the record demonstrate that all of the assets and liabilities of the business remained intact and that the business continued operations under the same name, at the same address, and with the same tax identification number. One of the new owners of the business was the other worker sponsored by the petitioner.

USCIS electronic records show that the petitioner filed one other Form I-140 petition, which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The other petition was submitted by the petitioner in June 1999 and the other worker adjusted to a permanent resident on January 4, 2005. The petitioner established its ability to pay the proffered wage for the instant beneficiary in 2006 and 2007 through its net income. The petitioner's net income in 2003 through 2005 would be sufficient to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage in those years alone; whether the net income would be sufficient to show the petitioner's ability to pay the wages of the second beneficiary until his adjustment in 2005 is unclear. In 2001 and 2002, the petitioner has not established that it can pay either the beneficiary of the instant petition or the other sponsored worker.

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.⁴ 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 Forms 1120S stated the following net current assets:

- The 2001 Form 1120S stated net current assets of -\$15,063.
- The 2002 Form 1120S stated net current assets of -\$58,444.
- The 2003 Form 1120S stated net current assets of -\$44,835.
- The 2004 Form 1120S stated net current assets of -\$6,501.
- The 2005 Form 1120S stated net current assets of \$12,210.
- The 2006 Form 1120S stated net current assets of \$5,419.
- The 2007 Form 1120S stated net current assets of -\$75,849.

⁴ 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.

The negative net current assets in 2001 and 2002 are insufficient to demonstrate the ability to pay the proffered wage in those years to the instant beneficiary or the proffered wage to the other sponsored worker. Further, because no evidence was submitted concerning the other sponsored worker's wages, the petitioner has not established that it can pay both the wage of the instant beneficiary and the other sponsored worker in 2003, 2004, and 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

The petitioner submitted a line of credit account summary from [REDACTED] indicating that it had an available credit limit of \$85,000 as of July 28, 2007.⁵ In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit were available at the time of filing the petition.⁶ As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans are reflected in the balance sheet provided in the tax return or audited financial statement and have been fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and

⁵ The line of credit is in the name of the petitioner's former shareholder.

⁶ Nothing shows that the petitioner held this line of credit in 2001.

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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 tax returns demonstrate minimal or negative net current assets in every year and total salaries paid which are minimal and have been decreasing to an amount in 2007 that is less than the beneficiary's proffered wage.⁷ On appeal, counsel asserts that the petitioner's business was "adversely affected by the attack on the World Trade Center on September 11, 2001."⁸ In support of the assertion, counsel submitted an "Economic Update" from the Partnership for New York City which states that the three years following the September 11 attack caused a "prolonged recession" that has led to a higher than usual unemployment rate and a decrease in growth rate. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, such as a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A broad statement by counsel that its business was impacted adversely by the events of September 11, 2001 cannot, by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such general evidence might suggest, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. However, the petitioner has not submitted specific evidence of the impact of September 11, 2001 on its business operations. The petitioner did not submit for comparison, for example, its tax returns for the years preceding September 11, 2001. The AAO also notes that the petitioner's tax returns indicate that 2003 was the

⁷ The Forms 1120S indicate that the total wages paid in 2001 were \$52,608, in 2002 were \$69,940, in 2003 were \$44,193, in 2004 were \$40,662, in 2005 were \$40,302, in 2006 were \$34,862, and in 2007 were \$22,705. The beneficiary's proffered wage is \$24,190. As noted above, the petitioner failed to state its total number of employees. Therefore, we are unable to determine how many employees are covered by the petitioner's total salaries or the size of the petitioner's operations.

⁸ While the petitioner's business is in Manhattan, the petitioner's business is not in the immediate vicinity of the World Trade Center, but is instead several miles away.

weakest year for the petitioner's gross receipts, not 2001 or 2002. Counsel also states that the petitioner could pay the proffered wage in 2000, but no evidence was submitted to support this statement.⁹ 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). In addition, the petitioner submitted no evidence as to its reputation or any evidence showing that several years were not representative of the petitioner's overall financial picture. The petitioner sponsored a second worker and must establish that it can pay both workers, which it has not done. 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.

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.

⁹ The year 2000 is before the priority date. While the petitioner's tax return would not be required, such evidence may be considered in assessing the totality of the petitioner's circumstances.