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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**

[REDACTED]

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Date: **MAY 09 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,

*Elizabeth McCormack*

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, Form ETA 750, Application for Permanent Alien Certification, approved by the United States 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 beginning on the priority date of the visa petition and 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 November 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 Permanent Alien 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 3, 2001. The proffered wage as stated on the Form ETA 750 is \$17.61 per hour (\$36,628 per year). The Form ETA 750 states that the position requires two years of experience as a cook.

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.<sup>1</sup>

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.<sup>2</sup> On the petition, the petitioner claimed to have been established in 1997 and to currently employ 85 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750, signed by the beneficiary on March 20, 2001, the beneficiary claimed to have begun working for [REDACTED] in December 1998.<sup>4</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an 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'l

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<sup>1</sup> 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).

<sup>2</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

<sup>3</sup> [REDACTED] is listed on submitted evidence as an establishment connected with the petitioner at the same address as the one listed on the Form ETA 750.

<sup>4</sup> The beneficiary submitted a second copy of Form ETA 750B with the beneficiary's signature dated December 26, 2007. The information contained on the later signed copy is the same except for the date that the beneficiary began his employment with the petitioner (this copy indicates that the beneficiary began his employment with the petitioner in March 2000. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner should submit evidence to resolve this discrepancy in any further filings.

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 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 submitted the following Forms W-2:

- The 2001 Form W-2 states that the petitioner paid the beneficiary \$14,300.
- The 2002 Form W-2 states that the petitioner paid the beneficiary \$16,248.
- The 2003 Form W-2 states that the petitioner paid the beneficiary \$16,640.
- The 2004 Form W-2 states that the petitioner paid the beneficiary \$17,980.
- The 2005 Form W-2 states that the petitioner paid the beneficiary \$20,680.
- No 2006 Form W-2 was submitted.
- The 2007 Form W-2 states that the petitioner paid the beneficiary \$29,360.

None of these amounts is equal to or exceeds the proffered wage. As a result, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2001 was \$22,328; in 2002, was \$20,380; in 2003, was \$19,988; in 2004, was \$18,648; in 2005, was \$15,948; and in 2007, was \$7,268. The petitioner must demonstrate its ability to pay the full proffered wage in 2006.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 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*, 719 F.Supp. at 537 (emphasis added).

In *K.C.P. Food*, 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).

The record before the director closed on January 8, 2008 with the receipt by the director of the petitioner’s original submissions. As of that date, the petitioner’s 2006 federal income tax return would be the most recent return available. The petitioner did not submit any evidence of its ability to pay before the director. On appeal, the petitioner asserts that it failed to submit evidence of its ability to pay the proffered wage because its accountant was not available, but that it “always met its tax obligations . . . employed and paid [the] beneficiary during [the] given period . . . [and] the wages paid to [the] beneficiary was almost equal to this stipulated in labor certification.” The petitioner submitted its 2001 through 2007 returns with its appeal. The petitioner’s tax returns stated its net income as detailed in the table below:

- In 2001, the petitioner’s Form 1065 stated net income of -\$19,833.<sup>5</sup>

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<sup>5</sup> For an LLC taxed as a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner’s Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has

- In 2002, the petitioner's Form 1065 stated net income of -\$1,670.
- In 2003, the petitioner's Form 1065 stated net income of \$4,677.
- In 2004, the petitioner's Form 1065 stated net income of \$55,992.
- In 2005, the petitioner's Form 1065 stated net income of \$33,354.
- In 2006, the petitioner's Form 1065 stated net income of \$14,93x.<sup>6</sup>
- In 2007, the petitioner's Form 1065 stated net income of \$65,592.

Therefore, for the years 2001, 2002, and 2003, the petitioner did not establish that it had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage nor did it establish its ability to pay the full proffered wage in 2006.

In addition, USCIS records indicate that the petitioner has filed an Immigrant Petition for Alien Worker (Form I-140) for one more worker with a January 14, 1998 priority date. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until each beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). As a result, we are unable to determine whether the petitioner's net income in 2004, 2005, and 2007 would be sufficient to meet its wage obligations.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered

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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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed February 29, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, all of the petitioner's Schedule Ks have relevant entries for additional adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax return for every year.

<sup>6</sup> The copy of the 2006 Form 1065 does not show the last digit of the amount found on Line 1 of the Analysis of Net Income (Loss) of Schedule K.

<sup>7</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net current assets of -\$77,132.
- In 2002, the petitioner's Form 1065 stated net current assets of -\$56,957.
- In 2003, the petitioner's Form 1065 stated net current assets of -\$70,033.
- In 2004, the petitioner's Form 1065 stated net current assets of -\$84,328.
- In 2005, the petitioner's Form 1065 stated net current assets of -\$65,945.
- In 2006, the petitioner's Form 1065 stated net current assets of -\$57,710.
- In 2007, the petitioner's Form 1065 stated net current assets of -\$39,220.

Therefore, for none of the years did the petitioner establish that it had sufficient net current assets to pay the difference between the actual wage paid and the proffered wage or the full proffered wage in 2006.

Thus, 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.

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, the petitioner did not submit any evidence concerning the other sponsored worker, had negative net current assets in every year, and had insufficient net income to pay the difference between the actual wage paid and the proffered wage to the instant beneficiary in 2001, 2002, 2003, and 2006. The petitioner did not submit any evidence to demonstrate that it had an off year or unusual circumstances nor did the petitioner submit evidence demonstrating its reputation in the community to liken its situation to the one presented in *Sonegawa*. 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.

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.