

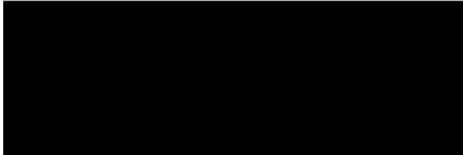
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
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U.S. Citizenship
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Services



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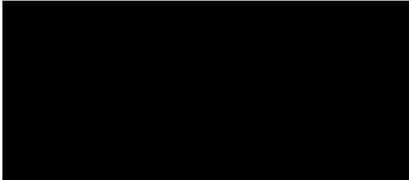
Petitioner:

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:

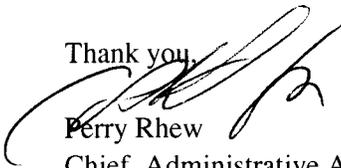


INSTRUCTIONS:

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 with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires 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 Director, Texas Service Center (director), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an elderly home. It seeks to employ the beneficiary permanently in the United States as an institutional 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 the beneficiary possessed the employment experience required and that it had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the beneficiary has the requisite experience as set forth in the Form ETA 750.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(ii) *Other documentation—*

(A). *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled Workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 4, 2002, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20 per year).¹ The Form ETA 750 states that the position requires two years of experience in the job offered of institutional cook.

The evidence in the record of proceeding shows that the petitioner is a tax exempt corporation. The petitioner indicated on Form I-140, Immigrant Petition for Alien Worker, filed on January 11, 2008, at part 5, section 2 that the organization was established in July 1962 and employs 24 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, that was signed by the beneficiary under penalty of perjury on June 20, 2002, the beneficiary indicated that she was employed by the petitioner as an institutional cook from August 2, 2001 to the present (date of signing).

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,

¹ The Form ETA 750 listed an overtime rate of \$28.33, but did not list that any specific hours were required.

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).

Beneficiary's Experience

It is noted that counsel asserts on appeal that since DOL approved the labor certification submitted by the petitioner on behalf of the beneficiary, then USCIS is somehow obliged to accept the employment verification letter submitted on her behalf as evidence of her eligibility for the visa classification sought even though that employment was not listed on the Form ETA 750.

The AAO does not concur. As noted above, the Form ETA 750 in this matter is certified by DOL. USCIS, however, determines if the alien is eligible for the visa classification sought. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).² *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

² Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

It is noted that Item 15 of Part B of the Form ETA 750 contains the following instructions relevant to the qualifications of the alien:

List all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9.

As mentioned above, the beneficiary signed the Form ETA 750, under penalty of perjury, on June 20, 2002. Only one job is listed. As stated above, she claims to have been employed by the petitioner as an institutional cook from August 2, 2001 to the present (date of signing). No other employment is listed.

In response to the director's request for evidence issued on October 1, 2008, however, the petitioner submitted a letter, dated June 10, 2003, from [REDACTED] of St. Catherine (Jamaica). It is signed by [REDACTED]. She states that the beneficiary worked for that employer from "1997 to 2000" as a "level 4 cook." [REDACTED] also describes the beneficiary's duties.

As noted by the director, this employment was not listed on the Form ETA 750.³ Moreover, it is noted that a previous Form I-140 petition was filed on behalf of the beneficiary in 2001 by another employer seeking to employ the beneficiary as a home care provider. It was accompanied by an uncertified Form ETA 750 labor application. However, it also contained the beneficiary's signature, dated April 15, 2001, attesting to her employment as a domestic home care provider for [REDACTED] from December 1996 to January 2000. The beneficiary claims to have worked 60 hours per week in this position. It is noted that [REDACTED] resided in Georgetown, Grand Cayman, which is approximately 200 miles from Jamaica where it is claimed in the instant proceeding that the beneficiary worked for the [REDACTED].

³ See *Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

during the same time period. As noted by the Board in *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988):

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

It is incumbent upon 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. *See Id.* The discrepant evidence of the beneficiary's employment has not been explained or resolved. Taken together with the omission of the beneficiary's purported employment by the [REDACTED] from Part B of the Form ETA 750 in this proceeding, this evidence cannot be found to be credible. The petitioner has not established that the beneficiary possessed the requisite two years of employment experience in the job offered as of the priority date.

Ability to Pay the Proffered Wage

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.

Although the director's request for evidence (RFE) permitted the petitioner to submit evidence of the beneficiary's employment and compensation paid, the petitioner provided no evidence of the beneficiary's wages, either in response to the RFE, or on appeal.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 sales and profits and wage expense is misplaced. 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 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).

The petitioner's tax returns, Form 990, line 18, demonstrate its excess (or deficit) for 2002, 2003, 2004, 2005, 2006 and 2007 as shown in the table below.

- In 2002, the Form 990 stated net revenue of - \$12,649.
- In 2003, the Form 990 stated net revenue of \$164,667.
- In 2004, the Form 990 stated net revenue of - \$210,804.
- In 2005, the Form 990 stated net revenue of - \$231,424.
- In 2006, the Form 990 stated net revenue of -\$121,059.
- In 2007, the Form 990 stated net revenue of -\$39,729.

Therefore, for the years 2002, 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net revenue to pay the proffered wage of \$39,291.20 per year.

As an alternative 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. It is noted that the Form 990 does not permit a filer to identify its net current assets. In order to establish its net current assets in this case, the petitioner would have needed to have submitted *audited* balance sheets. However, the record is devoid of such evidence. 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)). Accordingly, for the years 2002, 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.⁴

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 any wages paid to the beneficiary, or its net income or net current assets.⁵

⁴ We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its operation. Those depreciable assets will not be converted to cash during the ordinary course of operation and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. It is noted that the petitioner's Forms 990 include entries for end-of-year "cash-non-interest bearing (item 45) and "savings and temporary cash investments (item 46) in Part IV, Page 3. These amounts are: \$2,229 (item 45) (2002); \$350,646 (item 46) (2003); \$423,150 (item 46) (2004); \$159,970 (item 46) (2005); \$100,485 (item 46) (2006); and \$88,729 (item 46) (2007). Although these cash figures represent current assets, they have not yet been reduced by current liabilities which may apply.

Furthermore, any suggestion that the petitioner's end-of-year cash figures should be added to its excess revenue in calculating the funds available to the petitioner to pay the proffered wage is not persuasive. That calculation would be inappropriate because some of its excess revenue, after paying expenses, will be retained as cash. Adding the petitioner's end-of-year cash to its excess revenue would likely be duplicative, at least in part.

Accordingly, without *audited* balance sheets, the petitioner's net current assets have not been established, and it has not been established that the remaining net current assets (after considering liabilities) were available to pay the proffered wage at any time beginning on the priority date.

⁵ The director rejected the copies of the petitioner's tax returns submitted in response to the request for evidence because (except for 2006), they indicated that they were prepared after the issuance of the request for evidence. On appeal, counsel submitted evidence that the returns were filed with the Internal Revenue Service (IRS). The AAO accepts this evidence and

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. 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, or the occurrence of any uncharacteristic business expenditures or losses.

As noted above, although the petitioner appears to have been established for a number of years, the record contains only the tax returns for the years 2002 through 2007. All but one fails to demonstrate its ability to pay the proffered wage of \$39,291.20. It cannot be concluded that the petitioner has established a framework of profitable years. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In this matter, the overall circumstances do not establish that the petitioner had the ability to pay the proffered wage. The Forms 990 show negative net revenue in all but one year. The record does not establish that the petitioner had the ability to pay the proffered wage in 2002, 2004, 2005, 2006, or 2007 and no facts paralleling those in *Sonogawa* are present to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Accordingly, the petitioner has not established that its overall circumstances demonstrate that it could pay the proffered wage beginning on the priority date.

ORDER: The appeal is dismissed.

withdraws the director's determination in this regard, but for the reasons stated herein, does not find that the petitioner established its continuing ability to pay the proffered wage from the priority date onward.