

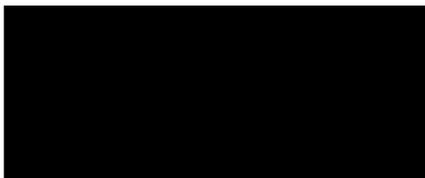
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

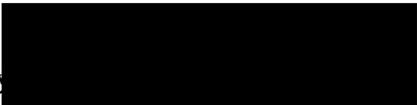
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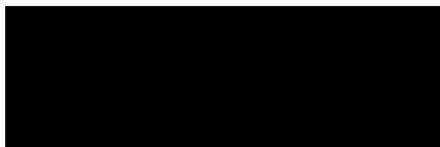
DATE: **MAY 22 2012** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant petition for Alien Worker as any Other, Unskilled Worker 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 AAO inappropriately applied the law in reaching its 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 any motion to 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. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen or reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a trucking company. It seeks to employ the beneficiary permanently in the United States as a tractor-trailer truck driver. 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, and the AAO dismissed the appeal.

As set forth in the director's August 12, 2008 denial, and the AAO's July 1, 2011 decision, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. It is noted that the AAO determined that the petitioner had demonstrated its ability to pay the proffered wage for 2006 and 2007, but had failed to show its ability to pay the proffered wage for 2001, 2002, 2003, 2004, and 2005.

The AAO further determined that what appeared to be receipts for payments to "Esper Motta or Maria Motta" for multiple dates in 2000, 2001, and 2002, did not contain enough information on them to conclude that they reflect wages paid to the beneficiary. The AAO further determined that the Form 1099-MISC for 2002 contained a social security number for the beneficiary that was not listed on the Form I-140; and therefore, was not persuasive evidence of wages paid to the beneficiary.¹ A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issues. Therefore, on motion the issue is whether or not the petitioner has established its ability to pay the proffered wage for 2001, 2002, 2003, 2004, and 2005.

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

The regulation 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

¹ It appears from the record that the beneficiary may have been compensated as a business entity rather than as an employee; and therefore the listed amount should not be considered as wages, but rather as business income.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$10.53 per hour (\$21,902.40 per year). The Form ETA 750 states that the position requires six months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner was structured as a C Corporation with a fiscal year based on a calendar year. The petitioner's owner indicates in the affidavit dated September 10, 2008 that it was established on December 28, 1994 and that it currently employs approximately 42 workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to have worked for the petitioner since August 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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 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).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

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. As noted above, the receipts for payments to [REDACTED] for multiple dates in 2000, 2001, and 2002, and the Form 1099-MISC for 2002 are not persuasive evidence of wages paid to the beneficiary. This issue has not been resolved on motion.

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 that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010)), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent

amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The proffered wage is \$21,902.40 per year. The petitioner’s tax returns demonstrate its net income as shown in the table below:³

- In 2001, the Form 1120 stated net income of \$0.00.
- In 2002, the Form 1120-A stated net income of \$0.00.
- In 2003, the Form 1120-A stated net income of \$0.00.
- In 2004, the Form 1120-A stated net income of \$0.00.
- In 2005, the Form 1120-A stated net income of \$0.00.

Therefore, for the years 2001, 2002, 2003, 2004, and 2005, the petitioner did not have sufficient net income to pay the difference between the wages paid and the proffered wage.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS will 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 on the Form 1120, and on Page 2 Part III, lines 1 through 6 on the Form 1120-A. Its year-end current liabilities are shown on lines 16 through 18 on Form 1120 and lines 13 through 14 on Form 1120-A. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner’s tax returns demonstrate its end-of-year net current assets as shown in the table below:

- In 2001, the Form 1120 did not contain a Schedule L.
- In 2002, the Form 1120-A did not contain a Schedule L.
- In 2003, the Form 1120-A did not contain a Schedule L.

³ Taxable income before net operating loss deduction and special deductions are reported on Line 24 of Form 1120-A and Line 28 of Form 1120.

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.

- In 2004, the Form 1120-A did not contain a Schedule L.
- In 2005, the Form 1120-A did not contain a Schedule L.

The evidence fails to demonstrate that for the years 2001, 2002, 2003, 2004, and 2005, the petitioner had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in not properly taking into account the totality of circumstances and assessing the evidence which demonstrated the petitioner's ability to pay the proffered wage. Counsel further asserts that when taken into consideration, other sources of income such as officers' compensation amounts can be funds made available to pay the proffered wage; and that the shareholder's statement confirms this claim. The petitioner submits as evidence copies of the petitioner's owner's Forms 1040 and lists of his household expenses.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120. For this reason, the petitioner's figures for compensation of officers may be considered in certain circumstances as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that in 2001, 2002, 2003, 2004, and 2005, the sole shareholder held 100 percent of the company's stock. According to the petitioner's IRS Forms 1120, at page 1, line 12 (Compensation of Officers), the petitioner elected to pay the sole shareholder compensation in the amount of \$64,500.00 in 2001 and \$65,000.00 in 2002, 2003, 2004, and 2005. As evidence on appeal, the petitioner submitted a statement by the sole shareholder specifically expressing his willingness to forego a portion of his compensation in order to meet the proffered wage which is \$21,902.40. The petitioner submitted a copy of the shareholder's IRS Form 1040 personal income tax return and a list of the shareholder's recurring monthly household expenses in the amount of \$52,224.00 in 2001, \$50,079.00 in 2002, \$52,700.00 in 2003, \$48,474.00 in 2004, and \$50,842.00 in 2005. In order to determine the petitioner's ability to pay the proffered wage, the shareholder's monthly expenses must be considered along with the officer's adjusted gross income to confirm that this claim would have been realistic. Based upon a review of the petitioner's owner's Forms 1040, he claimed 6 dependents and he had an adjusted gross income of \$75,380.00 in 2001, \$72,963.00 in 2002, \$75,080.00 in 2003, \$70,721.00 in 2004, and \$75,020.00 in 2005. Based upon the evidence, it appears unlikely that the officer would, or could, have sacrificed such a large portion of his compensation, to pay the proffered wage since the priority date. Furthermore, given the \$0.00 net income amounts for 2001, 2002, 2003, 2004, and 2005 and the six dependents claimed by the petitioner's owner on his personal tax returns for those years, it is also unlikely that this money,

even if sacrificed by the officer as compensation, could have been made available to compensate the beneficiary.

Furthermore, it appears that the sole shareholder's lists of household expenses were significantly understated. For example, the sole shareholder claims he had "property tax" expenses of \$4,500.00 in each year (2001 to 2005). However, the sole shareholder's Schedules A show real estate and personal property tax deductions ranging from \$14,600.00 to \$29,200.00. 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 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 (BIA 1988).

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. The petitioner submitted an affidavit in which the owner of the petitioner stated that the beneficiary's proposed employment will result in increase to the petitioner's income. Contrary to the petitioner's claim, no financial details or evidentiary documentation has been provided to explain how the beneficiary's employment as a truck driver will significantly increase profits for the petitioner. It is further noted that although the beneficiary claims to have been employed by the petitioner since August 2000, the petitioner's tax returns do not reflect an increase in income as claimed by the petitioner's owner.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. 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 *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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2001, 2002, 2003, 2004, and 2005. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner infers that it has been in business for a number of years, that the petitioner has experienced growth in its income, and that it has always made its payroll. Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Furthermore, the petitioner has not shown through professional prepared financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. Overall, the record is not persuasive in establishing that the job offer was realistic from 2001 through 2005.

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

In addition to the issue considered on motion, the AAO will dismiss the appeal for two additional reasons.

First, the AAO will withdraw its determination in its July 1, 2011 decision that the petitioner has established its ability to pay the proffered wage through its net current assets in 2006 and 2007. To the contrary, the petitioner's 2006 and 2007 tax returns (Schedule L) do not credibly establish that it had net current assets available in those years to pay the proffered wage to the beneficiary. The current assets on which the petitioner relies in 2006 and 2007 are "other current assets" which are listed in statements appended to the Schedules L. The 2006 statement lists 26 items, which appear to consist of 25 vehicles or trailers and "office equipment." The 2007 statement lists the exact same 26 items (plus one additional vehicle). Although these assets are characterized as "current assets" (i.e. assets having a life of one year or less), it appears more likely that these assets were not available to pay the proffered wage to the beneficiary. Not only do these appear to be equipment used in the business, they were in fact not liquidated within one

year given that the petitioner listed the exact same pieces of equipment as “current assets” two years in a row. Accordingly, it has not been established that the petitioner had net current assets available to pay the proffered wage in 2006 and 2007, and the AAO will dismiss the appeal for this additional reason.

Second, the AAO will dismiss the appeal, and deny the petition, because it has not been established that the petitioner more likely than not intends and desires to employ the beneficiary in the certified position. 8 C.F.R. § 204.5(c). Accordingly, the Form I-140 is not accompanied by a labor certification valid for the job opportunity. 20 C.F.R. § 656.30(c)(2). As noted above, the petitioner claims to have paid the beneficiary \$97,948.79 in 2002. The proffered wage is \$21,902.40 per year, or less than 25% of what was actually paid to the beneficiary in 2002. Although it is not clear what professional relationship exists between the petitioner and the beneficiary, it appears unlikely that the petitioner truly intends and desires to employ the beneficiary as an unskilled “tractor-trailer truck driver” for a fraction of what he has been paid previously. It is also unlikely that the beneficiary would accept such employment. Therefore, the petition is denied for this additional reason.

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 AAO’s prior decision, dated July 1, 2011, is affirmed. The petition remains denied.