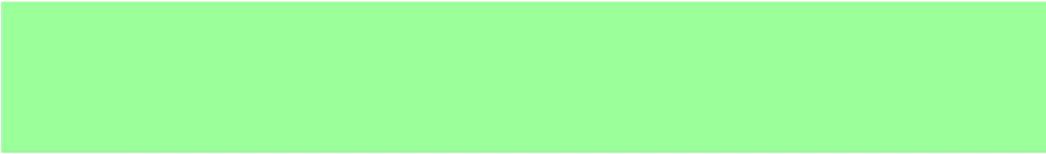




U.S. Citizenship
and Immigration
Services

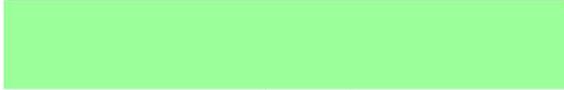
(b)(6)



DATE: **OCT 19 2012** OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner describes itself as a florist. It seeks to employ the beneficiary permanently in the United States as a floral designer. The petitioner requests classification of the beneficiary as an other worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded 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 record shows that the appeal is properly filed 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.

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.¹

As set forth in the director's September 11, 2008 denial, at 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.

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.

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 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 28, 2005. The proffered wage as stated on the Form ETA 750 is \$20,000.00 per year. The Form ETA 750 states that the position requires one year of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1972, to have a gross annual income of \$240,000, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year begins on October 1 and ends on September 30. On the Form ETA 750B, signed by the beneficiary on March 24, 2005, the beneficiary did not claim to have worked for the petitioner.

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'l 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 Sonegawa*, 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 has not established that it has employed the beneficiary from the priority date.

If, as in this case, the petitioner does not establish that it has employed the beneficiary, 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. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, a 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 28, 2008 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny. As of that date, the petitioner's fiscal year 2007 federal income tax return

was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for fiscal years 2004, 2005 and 2006, as shown in the table below:

- For fiscal year 2004, the Form 1120 stated net income of \$26,905.00.
- For fiscal year 2005, the Form 1120 stated net income of \$1,411.00.
- For fiscal year 2006, the Form 1120 stated net income of \$394.00

Therefore, for fiscal years 2005 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

On July 29, 2008 the director issued a notice of intent to deny (NOID) in which the petitioner was informed that the evidence submitted was not sufficient to establish its ability to pay the proffered wage. The director informed the petitioner that its 2005 federal tax return was insufficient to establish its ability to pay the proffered wage. The director also instructed the petitioner to provide evidence of its ability to pay for 2005, 2006 and 2007 including any Forms W-2 issued to the beneficiary.

In response to the NOID, the petitioner submitted amended federal income tax returns (Form 1120X) for fiscal years 2004, 2005 and 2006. Each of these amended federal income tax returns bears the date August 20, 2008. The amended tax returns show an adjusted net income as shown in the table below.

- For fiscal year 2004, the Form 1120X stated net income of \$20,681.00.
- For fiscal year 2005, the Form 1120X stated net income of \$27,652.00.
- For fiscal year 2006, the Form 1120X stated net income of \$22,802.00.

Therefore, the net income stated on the amended federal income tax returns exceeded the proffered wage.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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

²According 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.

wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's original tax returns demonstrate its end-of-year net current assets for 2004, 2005 and 2006, as shown in the table below.

- For fiscal year 2004, the Form 1120 stated net current assets of \$5,916.00.
- For fiscal year 2005, the Form 1120 stated net current assets of (\$3,630.00).
- For fiscal year 2006, the Form 1120 stated net current assets of (\$3,971.00).

The amended returns did not contain changes to the Schedules L. Therefore, for the years 2004, 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

The director refused to accept the petitioner's amended tax returns as evidence of its ability to pay the proffered wage, citing *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In *Katigbak*, the Board held that a beneficiary must meet the requirements of the requested classification by the priority date of the petition. Therefore, based on the initial tax returns, the director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage as of the priority date.

On appeal, counsel asserts that the petitioner had established its ability to pay from its 2004 federal income tax return and the 2005 personal federal income tax return of its owner. Counsel also contends that the director erred in citing *Matter of Katigbak*, as this case related to alien qualification at the time the labor certification was filed, therefore it refers only to education and experience obtained subsequent to the filing date of the visa petition. Counsel argues that the petitioner has the right to correct its federal income tax returns at any time it is necessary and that the Internal Revenue Service has not contested the amended federal income tax returns to this point, therefore USCIS should accept them as evidence of the petitioner's ability to pay.

The AAO rejects counsel's claim that the personal income tax return of the petitioner's owner can be used to establish its ability to pay the proffered wage. According to its tax returns, the petitioner is a C corporation. A corporation is a separate and distinct entity from that of its owners or shareholders. Therefore, the assets of its owner cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

However, the AAO agrees with counsel's assertion that *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) does not apply to the facts of the instant case. The petitioner must establish its ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner's amended federal income tax returns were filed in an attempt to establish that it was able to pay the proffered wage during the relevant years as required by regulation.

However, the AAO cannot approve the petition because the record fails to establish that the submitted amended federal income tax returns represent the petitioner's net income for that period. The initial tax returns and the amended tax returns are inconsistent with each other. It is incumbent upon the

petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (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. *Id.* at 591. The fact that the amended tax returns were filed following the issuance of the director's NOID raises additional questions regarding their validity.

In the instant case, the petitioner did not establish that the amended returns were filed with the Internal Revenue Service. There are no IRS-issued certified copies or transcripts of the amended tax returns. The petitioner did not establish that the petitioner paid the additional income tax resulting from the claimed increase in its net income. The petitioner did not provide a detailed financial explanation with documentary support explaining how, upon further review, it had just enough additional net income each year to pay the proffered wage.

Such evidence could resolve the inconsistency in the record between the tax returns and to establish that the amended returns were validly prepared and filed with the IRS at the time claimed by the petitioner. Alternatively, such evidence could lead to the conclusion that the amended tax returns misrepresent the petitioner's net income for those years. *See* section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C).

In view of the foregoing, the previous decision of the director is withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.