

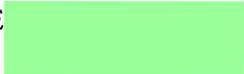
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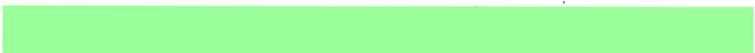
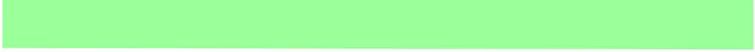
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **OCT 25 2012** OFFICE: TEXAS SERVICE CENTER

FILE 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the 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 in accordance with the instructions on 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,

Kerri Forbes for

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 general contracting business. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 6, 2009 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 Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$600 per week (\$31,200 per year). The Form ETA 750 states that the position requires two years of experience as a painter.

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

On the petition, the petitioner claimed to have been established on June 12, 1998, to have a gross annual income of \$218,369, and to employ one contractor. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary claimed to have worked for the petitioner as a painter since June 1998.

In 2004, 2005, and 2006 the petitioner filed IRS Form 1120, U.S. Corporation Income Tax Return, indicating that the petitioner is structured as a C corporation. These tax returns establish that the petitioner was incorporated on November 2, 1998 with employer identification number (EIN) [REDACTED]. Furthermore, according to the State of New Jersey, Department of Treasury, Division of Revenue & Enterprises Services (contacted telephonically on September 17, 2012), [REDACTED] was incorporated in 1998, and its corporate status was revoked in 2005.

On January 8, 2009 the director issued a request for additional evidence (RFE), requesting that the petitioner submit evidence of its ability to pay the proffered wage from 2001 through 2003. In response to the RFE, counsel submitted partial IRS Forms 1040, U.S. Individual Income Tax Returns filed by the petitioner's shareholder and his wife for 2001 through 2007. Counsel did not explain in the February 9, 2009 letter why the shareholder's individual tax returns were submitted in lieu of the petitioner's Forms 1120. On appeal, counsel only indicates that "... a different tax form was filed..." in 2001, 2002, 2003, and 2007.

Accompanying each Form 1040 is a Schedule C, Profit or Loss from Business. The 2001 Schedule C lists the business as [REDACTED] no EIN is listed where the form requests the EIN "if any." Schedule C for 2002 and 2003 lists [REDACTED] as the business name but does not list an EIN. The petitioner is a corporation, so it is unclear why the petitioner submitted Schedules C for a sole proprietorship. The Schedules C do not relate to the petitioner, [REDACTED] with EIN [REDACTED].

Schedule C for 2007 lists the business name as [REDACTED] but does not list an EIN. The record also contains an August 8, 2007 affidavit from [REDACTED] stating that [REDACTED] is the successor-in-interest to the [REDACTED]. A petitioner may

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).

establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). In this case, the petitioners' affidavit does not indicate when such a transfer of assets from the petitioner to [REDACTED] took place and the record does not contain any documentation of such a transaction. Furthermore, the instant petition was filed on December 17, 2007. If [REDACTED] had already assumed the assets and liabilities of the [REDACTED] as claimed in the August 7, 2007 affidavit, it is not evident why [REDACTED] did not file the petition.

Given the above, the petitioner has not established that the submitted Forms 1040 and accompanying Schedules C pertain to the petitioner. Thus, the record is lacking regulatory-prescribed evidence of the petitioner's ability to pay for 2001, 2002, 2003, and 2007, and the petitioner has not established its ability to pay the wage for those years. However, the submitted documentation will be analyzed as though its relevance had been established.

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 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date, April 24, 2001. The record does not contain any IRS Form W-2, Wage and Tax Statement, or Forms 1099-MISC, Miscellaneous Income, issued to the beneficiary by the petitioner.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v.*

Napolitano, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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. In the case of sole proprietorships, the proprietor's

adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For limited liability companies taxed as sole proprietorships, net income is located on IRS Form 1040, Schedule C, at Line 31.

The petitioner's tax returns demonstrate its net income for 2004, 2005, and 2006 as reflected in the following table. [REDACTED] adjusted gross income for 2001, 2002, 2003, and the net income of [REDACTED] for 2007, is also reflected below.

Tax Year	Evidence Submitted	Net Income (Form 1120 for corporation/Form 1040 Schedule C for LLC) or AGI (Form 1040 for sole proprietorship)
2001	Form 1040, & Schedule C for [REDACTED]	\$22,229 ²
2002	Form 1040, & Schedule C for [REDACTED]	\$23,875
2003	Form 1040, & Schedule C for [REDACTED]	\$23,336
2004	Petitioner's Form 1120	\$80
2005	Petitioner's Form 1120	\$435
2006	Petitioner's Form 1120	\$1,397
2007	Form 1040, & Schedule C for [REDACTED]	\$26,480

Therefore, for the years 2004 through 2006 the petitioner did not have sufficient net income to pay the proffered wage.

[REDACTED] tax returns indicate that there were six members in his household in 2001, 2002 and 2003. In 2001, 2002 and 2003, [REDACTED] adjusted gross income fails to cover the proffered wage of \$31,200. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to

² Page one of IRS Form 1040 was not submitted. However, the AGI was taken from line 34 on page two.

pay the proffered wage. In 2007, [REDACTED] did not have sufficient net income to pay 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.³ 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 wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In 2004, 2005, 2006, Schedule L of the petitioner's Form 1120 contains no information. Form 1040, Schedule C does not contain information regarding net current assets for a sole proprietorship or limited liability company. Therefore, for the years 2001 through 2007 the record does not contain evidence to establish that 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 requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than the AAO would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Also on appeal,⁴ counsel states that the petitioner paid the beneficiary \$9,005 in 2002; \$40,158, in 2003; \$35,220 in 2004; \$36,677 in 2005; \$37,228 in 2006; and \$17,602 in 2007. Counsel states that the petitioner did not issue IRS Forms W-2 to the beneficiary, but that the payments are reflected in the petitioner's tax returns. The record contains a January 20, 2009 affidavit from [REDACTED] stating from 2001 through 2006, the beneficiary was the only employee of the [REDACTED] and that his compensation has been no less than \$31,000 per year. This statement contradicts

³According 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.

⁴ This argument was also made in response to the January 8, 2008 RFE; however, it was not discussed in the director's May 6, 2009 decision.

counsel's assertion that the petitioner paid the beneficiary \$9,005 in 2002 and \$17,602 in 2007. 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).

The petitioner's affidavit stating that the petitioner paid the beneficiary is not supported by any objective documentary evidence of wages paid to the beneficiary, such as payroll documents, IRS Forms W-2 or 1099, or paychecks issued to the beneficiary by the petitioner. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner's tax returns report on line 13 of Form 1120 that the following amounts were paid in salaries and wages in 2004, 2005 and 2006: \$35,220; \$36,677; and \$37,228, respectively. The submitted Schedules C reflect compensation paid to subcontractors as follows: \$9,005 in 2002, \$40,148 in 2003 and \$17,602 in 2007. Again, the record does not establish that the beneficiary was the recipient of any or all of the compensation reflected above. Even assuming the record contained such evidence, the proprietor's adjusted gross income is not sufficient to pay the full proffered wage of \$31,200 in 2001, or the difference of \$22,195 in 2002, as well as support a family of six, with the remainder.

Finally on appeal, counsel notes that the petitioner paid officer compensation of \$28,200 in 2004, \$29,500 in 2005 and \$29,500 in 2006. Counsel asserts that this officer compensation is discretionary and could have been used to pay the proffered wage. These amounts are below the proffered wage of \$31,200. Furthermore, the record does not contain evidence to establish that the petitioner's shareholder was both willing and financially able to forego compensation received. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Given all of the above, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner 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.

Counsel is correct in that 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. The petitioner submitted only three years of its tax returns, its corporate status was revoked in 2005, and it did not establish that [REDACTED] was its successor-in-interest. 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.

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 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.