



U.S. Citizenship
and Immigration
Services

[REDACTED]

B6

Date: **OCT 10 2012** Office: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF BENEFICIARY:

[REDACTED]

INSTRUCTIONS:

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

If you believe the 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: On May 23, 2012 the director revoked the approval of the petition and certified the decision to the AAO for review pursuant to 8 C.F.R. § 103.4(a). Upon review, the AAO will affirm the director's decision.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750).

In the Notice of Certification dated May 23, 2012 (2012 NOC), the director found that the petitioner failed to establish by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 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 certification.²

As set forth in the director's 2012 NOC, the sole 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.

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).

¹ Section 203(b)(3)(A)(i) of 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.

² The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on certification. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Here, the ETA Form 750 was accepted for processing by the DOL on August 29, 2002. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.65 per hour or \$23,023 per year based on a 35 hour work week.³

To show that the petitioner has the continuing ability to pay \$12.65 per hour or \$23,023 per year from August 29, 2002, the petitioner submitted the following evidence:

- Copies of Forms 1120 U.S. Corporation Income Tax Return for the years 2001 through 2010;
- Copies of the beneficiary's Forms W-2 Wage and Tax Statement for the years 2004 through 2009;
- Copies of the petitioner's payroll history reports for the years 2005 through 2010; and
- Various awards establishing the high reputation of the petitioner and articles about the petitioning business.

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 1985.

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. 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).

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.

³ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL Memo indicates that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

Based on the evidence submitted, the beneficiary received the following wages from the petitioner between 2004 and 2009:

<i>Tax Year</i>	<i>Actual wage (AW) (Box I, W-2)</i>	<i>Yearly Proffered Wage (PW)</i>	<i>AW minus PW</i>
2004	\$6,840	\$23,023	(\$16,183)
2005	\$16,200	\$23,023	(\$6,823)
2006	\$15,120	\$23,023	(\$7,903)
2007	\$13,500	\$23,023	(\$9,523)
2008	\$10,260	\$23,023	(\$12,763)
2009	\$14,040	\$23,023	(\$8,983)

Therefore, the petitioner has not established the ability to pay in any of the years shown above. In order to meet the burden of proving by preponderance of the evidence that the petitioner has the ability to pay the proffered wage from the priority date, the petitioner must demonstrate that it could pay the following amounts (all in \$):

<i>Tax Year</i>	<i>Remainder of the beneficiary's PW</i>
2002	23,023
2003	23,023
2004	16,183
2005	6,823
2006	7,903
2007	9,523
2008	12,763
2009	8,983

However, those amounts shown above are not all that the petitioner has to demonstrate to meet the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage. In adjudicating the petition, we find that the petitioner has previously filed three (3) other immigrant petitions since 2002. The table below shows the details of the other petition that the petitioner filed:

<i>Receipt Number</i>	<i>Beneficiary's Last Name</i>	<i>Priority Date</i>	<i>Decision</i>	<i>Date Adjusted to Lawful Permanent Residence</i>
EAC0321850941	Marette	07/02/02	Approved	11/18/04
EAC0315250686	Almeida	05/31/02	Approved	05/26/05
EAC0501552815	Mezzon	07/23/03	Approved ⁴	N/A

⁴ In a letter received by the AAO on June 22, 2012 the [redacted] of the petitioner, [redacted] requested that the approval of the petition be revoked.

USCIS records reveal that the petitioner offered to pay the following proffered wage to each of the sponsored beneficiaries, and that each of the beneficiaries actually received the following wages from the petitioner from his or her respective priority date to the date he or she was adjusted to lawful permanent residence (LPR):

Receipt Number (Priority date: 07/02/02; Date adjusted to LPR: 11/18/04).

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2002	\$0	\$23,023	(\$23,023)
2003	\$0	\$23,023	(\$23,023)
2004	\$17,144.01	\$23,023	(\$5,878.99)

Receipt Number (Priority date: 05/31/02; Date adjusted to LPR: 05/26/05).

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2002	\$0	\$23,023	(\$23,023)
2003	\$0	\$23,023	(\$23,023)
2004	\$9,865.18	\$23,023	(\$13,157.82)
2005	\$14,780	\$23,023	(\$8,243)

Receipt Number (Priority date: 07/23/03; Date adjusted to LPR: N/A).⁵

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2003	\$0	\$19,383	(\$19,383)
2004	\$0	\$19,383	(\$19,383)
2005	\$0	\$19,383	(\$19,383)

⁵ In a letter received by the AAO on June 22, 2012 the owner of the petitioner, stated that the business no longer wish to employ as she has left the employment with the petitioner since 2005. The AAO notes, however, that the petitioner is required to establish the ability to pay the proffered wages for until she (either one or more of these circumstances apply): receives her LPR; unless and until we revoke the petition, or unless and until the petitioner withdraws the petition. The request to withdraw the approval of the petition is received in 2012; therefore, the petitioner is required to establish the ability to pay \$19,383 from the priority date (which, according to USCIS records, is July 23, 2003) until June 22, 2012 (the date the AAO received the request to revoke the approval of the petition).

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required to establish the ability to pay the proffered wage of the current beneficiary and also of *all* other beneficiaries listed above from the date of filing each respective labor certification application until the date the beneficiary obtains lawful permanent residence, or until the petition is either withdrawn or revoked.

Combining the wages of all four beneficiaries the petitioner has to demonstrate the ability to pay the following total wages (all in \$):

	<i>The beneficiary</i>	<i>Marette</i>	<i>Almeida</i>	<i>Mezzon</i>	<i>Total</i>
2002	23,023	23,023	23,023	0	<u>69,069</u>
2003	23,023	23,023	23,023	19,383	<u>88,452</u>
2004	16,183	5,878.99	13,157.83	19,383	<u>54,602.82</u>
2005	6,823	0	8,243	19,383	<u>34,449</u>
2006	7,903	0	0	19,383	<u>27,286</u>
2007	9,523	0	0	19,383	<u>28,906</u>
2008	12,763	0	0	19,383	<u>32,146</u>
2009	8,983	0	0	19,383	<u>28,366</u>
2010	23,023	0	0	19,383	<u>42,406</u>

The petitioner can demonstrate the ability to pay those amounts through either its net income or net current assets. If the petitioner chooses to demonstrate the ability to pay through its net income, USCIS will 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). 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 record before the director closed on February 21, 2012 upon receipt by the director of the petitioner’s submission of additional evidence in response to the director’s Intent to Deny dated January 18, 2012 (2012 NOID). As of that date, the petitioner’s 2011 federal income tax return was not yet available. Therefore, the petitioner’s income tax return for 2010 is the most recent return available. The petitioner’s tax returns demonstrate its net income (loss) for the years 2002 through 2010, as shown below (all in \$):

<i>Tax Year</i>	<i>Net Income (Loss)⁶</i>	<i>Total PW</i>
2002	10,394	69,069
2003	6,142	88,452
2004	5,555	54,602.82
2005	5,808	34,449
2006	18,396	27,286
2007	18,304	28,906
2008	18,079	32,146
2009	5,236	28,366

⁶ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120 (net income before net operating loss).

2010	0	42,046
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Therefore, the petitioner did not have sufficient net income to pay the proffered wages of the beneficiaries.

As an alternate 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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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.

The petitioner's tax returns demonstrate its net current assets (liabilities) for the years 2001 through 2010, as shown in the table below (all in \$):

Tax Year	Net Current Asset	Total PW
2002	35,807	69,069
2003	7,639	88,452
2004	27,274	54,602.82
2005	8,483	34,449
2006	18,829	27,286
2007	14,664	28,906
2008	68,614	32,146
2009	44,864	28,366
2010	23,703	42,046

The petitioner's net current assets in from 2002 to 2010 were all less than the total wages to pay the beneficiaries. Therefore, the AAO agrees with the director that the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing until each beneficiary obtains permanent residence or until the petition is withdrawn.

On certification, counsel states that this case is similar to *In re Matter of X*, [REDACTED] (AAO, Feb. 5, 2009),⁸ where the petitioner was an S corporation, had been in business for 15

⁷ 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.

⁸ This case can be accessed online at the following address: <http://www.uscis.gov/err/B6%20->

years, employed 30 workers, had gross income in excess of \$2 million per year from the priority date, and paid an average of more than \$300,000 in officer compensation and over \$100,000 in workers' salaries and wages from 2001 to 2006. Counsel also states that in the *Matter of X, id.*, the record contained a written statement from the petitioner's president stating, "I would be willing and my intention is to forego a portion of my compensation in order to pay the entire proffered annual wage of \$33,883."

Here, to demonstrate the owners' willingness to forego part of their compensation to pay the wages of the beneficiaries, [redacted] of the petitioner, and [redacted] of the petitioner, submitted statements received by the AAO on June 22, 2012, in which they both state:

I would be willing and my intention is to forego a portion of my compensation in order to pay the entire proffered annual wage of \$23,023 to [redacted] [the beneficiary]. I would also be willing to forego a portion of my annual wage to pay the salary of [redacted] [the other beneficiary].

The petitioner's reliance on the officers' compensation is misplaced. The record contains no evidence showing that the officers are willing to forgo their compensation to pay the proffered wages of all of the sponsored beneficiaries (the letter dated June 22, 2012 from [redacted] and [redacted] stated the willingness to forgo officers' compensation to pay the proffered wages of the beneficiary and [redacted]. Nor does the record include evidence demonstrating that the officers can afford to forgo a large part of their salaries to pay the proffered wages of all of the sponsored beneficiaries. The table below illustrates the officer compensation as compared to the total proffered wages of the beneficiaries (all in \$):

<i>Tax Year</i>	<i>Officer Compensation</i>	<i>Total PW</i>
2002	118,500	69,069
2003	127,167	88,452
2004	148,900	54,602.82
2005	222,400	34,449
2006	168,300	27,286
2007	177,393	28,906
2008	222,993	32,146
2009	211,149	28,366
2010	207,926	42,046

The record does not reflect that [redacted] and [redacted] would forgo most of their combined compensation to pay all of the total proffered wages in 2002, 2003, and 2004. Further, no evidence of record supports the petitioner's contention that [redacted] and [redacted] would be

able to forgo large part of their compensation to pay the total proffered wages in those years. 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)).

Finally, 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, 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.

The AAO acknowledge that the petitioner has been in competitive business since 1985 or for over 26 years. The business, as counsel stated in response to the director's 2012 NOID, has over 40 employees yearly, pays wages averaging in over \$370,000 in wages and salaries per fiscal year, and furthermore, has a gross income of over \$2 million per year. The business, according to counsel, has a stellar reputation within its industry.

In this case, however, the petitioner sponsored multiple beneficiaries, and based on the record, the petitioner has not shown that it has the ability to pay the proffered wages of all of the beneficiaries. The petitioner has not paid equal to or in excess of the sponsored beneficiaries' proffered wages from their respective priority dates, and has not shown that it can cover any difference in the proffered wage and the wages paid.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. The AAO is not

persuaded that the petitioner has that ability. We conclude that the petitioner has not met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date. The revocation of the previously approved petition is affirmed. 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 director's decision to revoke the previously approved petition is affirmed.