

(b)(6)

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

[Redacted]

DATE: **APR 05 2013** OFFICE: NEBRASKA 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 PETITIONER:
[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 McConmade

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a statistician. 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 January 12, 2010 denial, the 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 October 15, 2001. The proffered wage as stated on the Form ETA 750 is \$32.95 per hour (\$68,536.00 per year). The Form ETA 750 states that the position requires a Bachelor's degree in Math or two (2) years of experience in the proffered position.

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 appeal, counsel submits a brief; documentation in regard to one other immigrant visa petition filed by the petitioner; bank account statements for the petitioner in 2001; and copies of documentation already in the record.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation until 2004 and as an S corporation since 2004. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$31,518,307, and to currently employ 11 workers. On the Form ETA 750B, signed by the beneficiary on August 7, 2001, the beneficiary claimed to have worked for the petitioner since April 2001.

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 beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, and IRS Form 1099-Misc, Miscellaneous Income, stated compensation of \$12,000.00 in 2001; \$11,486.36 in 2002; \$20,625.00 in 2003; \$22,600.00 in 2004; \$24,200.00 in 2005; and \$37,300.00 in 2007. Therefore, for the years 2001 through 2008, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2001 through 2005 and in 2007. Since the proffered wage is \$68,536.00 per year, the petitioner must establish that it can pay the

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).

difference between the wages actually paid to the beneficiary and the proffered wage in 2001 through 2005 and in 2007, which is \$56,536.00 in 2001; \$57,049.64 in 2002; \$47,911.00 in 2003; \$45,936.00 in 2004; \$44,336.00 in 2005; and \$31,236.00 in 2007. The petitioner must establish that it also has the ability to pay the full proffered wage to the beneficiary in 2006.

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 2004, the petitioner opted to become an S Corporation. The record before the director closed on November 18, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The most recent tax return submitted to the director was 2006. The petitioner’s tax returns demonstrate its net income as:

- In 2001, the Form 1120 stated net income of \$114,635.00.
- In 2002, the Form 1120 stated net income of \$65,295.00.
- In 2003, the Form 1120 stated net income of \$68,293.00.
- In 2004, the Form 1120S stated net income² of \$91,901.00.
- In 2005, the Form 1120S stated net income of \$142,519.00.
- In 2006, the Form 1120S stated net income of \$145,721.00.
- In 2007, the petitioner failed to submit a tax return.

Therefore, for the years 2001 through 2005, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage and in 2006 to pay the full proffered wage; however, USCIS records indicate that, outside of the petitions filed on behalf of the beneficiary, the petitioner has filed 63 petitions since the petitioner’s establishment in 1995, including 43 I-129 petitions, and 20 I-140 petitions. Under the circumstances, the petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence.³ See 8 C.F.R. § 204.5(g)(2). Further, the

² Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 12, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2004 through 2006, the petitioner’s net income is found on Schedule K of its tax returns.

³ While counsel submits evidence that the petitioner has withdrawn one of the I-140 petitions filed on behalf of one of the other beneficiaries, the petitioner must still establish its ability to pay the

petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. Additionally, the record does not include a copy of the petitioner's 2007 IRS Form 1120S and the AAO cannot make a determination as to whether it had the ability to pay the proffered wage or the difference between the wage actually paid to the beneficiary and the proffered wage in 2007. Therefore, the petitioner has failed to establish its ability to pay the proffered wage or difference between the wages paid and the proffered wage to the instant beneficiary and the beneficiaries of the other Form I-140 petitions in 2001 through 2007 out of its net income.

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.⁴ 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. The petitioner's tax returns demonstrate its end-of-year net current assets as:

- In 2001, the Form 1120 stated net current assets of \$28,109.00.
- In 2002, the Form 1120 stated net current assets of \$102,952.00.
- In 2003, the Form 1120 stated net current assets of \$427,110.00.
- In 2004, the Form 1120S stated net current assets of \$543,571.00.

proffered wage of this beneficiary until the immigrant visa petition was withdrawn in 2010. Additionally, the petitioner fails to provide the required information in regard to the other individuals on whose behalf the petitioner has filed I-140 and I-129 petitions. Counsel asserts that the proffered wages of all the other beneficiaries were computed to be \$346,465.00; these amounts are greater than the petitioner's net income and net current assets in 2001 and 2002. Further, the director's decision notes that there were other petitions for which she was unable to obtain the necessary information in order to determine the totality of the proffered wages the petitioner must establish it has the ability to pay. 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). 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 has the burden of proving eligibility for the benefit sought.

⁴According 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 2005, the Form 1120S stated net current assets of \$498,999.00.
- In 2006, the Form 1120S stated net current assets of \$528,769.00.

Therefore, for the year 2001, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. Additionally, the record does not include a copy of the petitioner's 2007 IRS Form 1120S Schedule L, and the AAO cannot make a determination as to whether it had the ability to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage in 2007. Moreover, as discussed above, the petitioner has filed 63 petitions since the petitioner's establishment in 1995, including 43 Form I-129 petitions, and 20 Form I-140 petitions, about which the petitioner has failed to provide required information. Therefore, the petitioner has failed to establish its ability to pay the proffered wage or difference between the wages paid and the proffered wage in 2001 through 2005 out of its net current assets and the full proffered wage in 2006.

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 petitioner's bank account statements for 2001 and 2002 show it had the financial ability to meet the proffered wages of the beneficiary and other beneficiaries on whose behalf it has filed petitions. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered above in determining the petitioner's net current assets.

The petitioner submits a letter from [REDACTED] CPA, dated November 17, 2009, recommending the use of retained earnings to pay the proffered wage. Retained earnings are a company's accumulated earnings since its inception less dividends. Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings. Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall

under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

Counsel contends that the business was established in 1995 and suffered an industry related loss in response to the September 11, 2001 attacks. Counsel states that despite these setbacks, the company has continuously grown since 2001 and that it has received airline-company awards which reflect its reputation in the travel industry.⁵ The gross sales amounts reflected on the petitioner's tax records do not reflect a steady increase over the years and, as discussed above, the petitioner has failed to establish that it would be able to pay the proffered wage and prevailing to beneficiaries on whose behalf it filed petitions from 2001 through 2007.

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.

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 *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.

⁵ The awards issued to the petitioner by airlines do not reflect a continuing high reputation within the industry. The awards are distributed to travel agencies that patron the particular airline and do not reflect the petitioner's reputation with its customers and with other travel agencies.

In the instant case, the petitioner failed to submit necessary information regarding other Form I-140 and Form I-129 petitions filed on its behalf, precluding the AAO from making a determination as to whether it has the ability to pay the proffered wage for any relevant year. In addition, there is insufficient evidence in the record of the historical growth of the proprietor's business, or of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered. Further, the petitioner failed to submit its 2007 tax return, precluding the AAO from making a determination as to whether it had the ability to pay the proffered wage for that year. 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.

The evidence submitted does not establish that the petitioner 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.