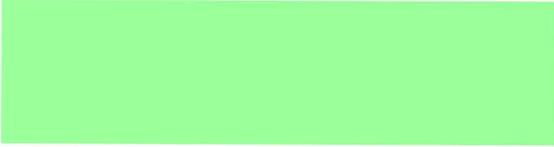


(b)(6)

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

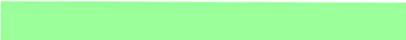


U.S. Citizenship
and Immigration
Services



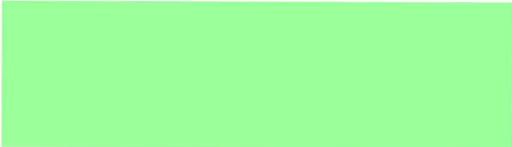
DATE: **AUG 29 2013** OFFICE: TEXAS SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Ni Joxio
RNR

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The approval of the preference visa petition was revoked by the Director, Texas Service Center (director). On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for further consideration. The petitioner has filed a motion to reopen and a motion to reconsider. The motion to reopen will be granted. The previous decision of the AAO as it relates to the petitioner's ability to pay will be affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty cook pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). 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 revoked the approval of the Form I-140, Petition for Immigrant Worker, based on his determination that the petitioner had failed to follow DOL recruitment requirements and, further, that the petitioner had engaged in fraud or willful misrepresentation in the labor certification process. On appeal, the AAO withdrew the director's decision and remanded the matter for further consideration, finding that the Notice of Intent to Revoke (NOIR) had not adequately advised the petitioner of the derogatory information on which the revocation would be based and that the record did not establish that the petitioner had failed to follow DOL recruitment procedures or that it had engaged in fraud or misrepresentation in the labor certification process. However, based on its *de novo* review of the record, the AAO also determined that the visa petition in this matter was not approvable as the petitioner had not established its ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2).¹

On motion, counsel for the petitioner contends that the petitioner does have the ability to pay the proffered wage to the beneficiary and submits additional financial documentation in support of this assertion, including the petitioner's tax returns for the years 2001 through 2011,² copies of Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (Forms W-2) issued to the beneficiary for the years 2003-2006 and 2008-2011, the petitioner's Forms 941, Employer's Quarterly Tax Returns from the years 2002-2004 and 2007-2011; the beneficiary's earnings statements or pay stubs from 2003-2005, 2008-2010, and 2012; and copies of AAO nonprecedent decisions discussing ability to pay.

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² The petitioner's 2002 tax return has not been submitted.

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reopen and the motion to reconsider are properly filed and timely. Although the petitioner has not met the requirements for a motion to reconsider, it has satisfied those for a motion to reopen, submitting new facts with supporting documentation not previously provided. Therefore, the motion is granted and the AAO will reopen the matter. Consideration of the record will be limited to the issues raised by the petitioner on motion.

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.

A petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). A petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification approved by DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750, Application for Alien Employment Certification, was accepted by DOL on April 30, 2001. The proffered wage stated on the Form ETA 750 is \$12.57 per hour or \$22,877.40 per year (based on 35 hours per week).

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claims to have been established in 1988. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year.

Demonstrating Ability to Pay

A petitioner must establish that its job offer to a beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition subsequently based on it, a petitioner must demonstrate that a job offer is realistic as of the priority date and that it remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A 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 a 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 a petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether it has employed and paid the beneficiary during that period. If a petitioner establishes by documentary evidence that it has 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.

If a petitioner does not establish that it employed and paid a beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on a 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 a petitioner's gross receipts and wage expense is misplaced. Showing that a petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that a 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 U.S. 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).

In cases where an employer’s net income or net current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of that organization’s business activities. *See Matter of Sonogawa* at 612. In assessing the totality of a petitioner’s circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Ability to Pay Based on Wages Paid the Beneficiary

The AAO’s December 3, 2012 decision found that the petitioner had not established a continuing ability to pay the proffered wage based on the beneficiary’s earnings, as the record reflected that only in 2004, 2005 and 2009 had the beneficiary’s income exceeded the \$22,877.40 proffered wage. On motion, the petitioner submits additional IRS Forms W-2 and Forms 1099 for the beneficiary, which reflect his earnings, beginning in 2003,³ as follows:

- 2003: \$5,720.00
- 2004: \$23,320.00
- 2005: \$22,880.00
- 2006: \$7,040.00
- 2008: \$5,905.00
- 2009: \$25,960.00

³ Although in an affidavit submitted on motion, the petitioner’s owner states that the beneficiary’s 2002 IRS Form W-2 has been provided, the AAO does not find this document to be included in the record. The record also does not contain the beneficiary’s IRS Form W-2 for 2007 as health problems, documented in the record, prevented him from working for the petitioner that year.

- 2010: \$15,035.00
- 2011: \$4,260.00

As none of the additional IRS Forms W-2 submitted by the petitioner on motion report income equal to or in excess of the proffered wage, the AAO continues to find that the wages paid to the beneficiary by the petitioner establish its ability to pay the proffered only in the years 2004, 2005 and 2009.

Even if the submitted IRS Forms W-2 did report that the petitioner had paid the beneficiary a salary in excess of the proffered wage for all of the above years, this evidence would still not satisfy the regulation at 8 C.F.R. § 204.5(g)(2), which requires a petitioner to establish its ability to pay the proffered wage from the priority date onward. Here, the petitioner has provided no documentation of the beneficiary's earnings in 2001 and 2002, although the record contains a March 12, 2009 affidavit sworn by the petitioner's owner, which indicates that the beneficiary began working for the petitioner in January 2001. The record also establishes that the beneficiary was not employed by the petitioner in 2007. Therefore, the petitioner cannot demonstrate its continued ability to pay the proffered wage during the required period based on the wages it paid to the beneficiary.

As the petitioner has not established its ability to pay based on the wages it paid to the beneficiary, the AAO will consider whether its net income and/or net current assets demonstrate its ability to pay the proffered wage during those years in which the beneficiary did not earn income in excess of the proffered wage.

Ability to Pay Based on Net Income

The current record before the director closed on March 19, 2009 with the receipt of the petitioner's response to the director's NOIR. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 was the most recent return available. Accordingly, the AAO will review the petitioner's tax returns submitted for 2001, 2003 and 2006 through 2008, years in which the beneficiary's wages do not establish the petitioner's ability to pay.

The tax returns submitted for the record demonstrate the petitioner's net income⁴ for these years as follows:

- 2001: \$20,415.00

⁴ 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) or line 18 (2006-2011) of Schedule K.

- 2002: The petitioner did not submit a tax return for this year.
- 2003: \$10,087.00
- 2006: \$5,270.00
- 2007: \$5,286.00
- 2008: \$33,210.00

Therefore, for the years 2003 and 2006, the petitioner did not demonstrate its ability to pay the difference between wages paid and the proffered wage based on its net income. For the years 2001, 2002, and 2007, the petitioner did not establish its ability to pay the proffered wage based on its net income.

Ability to Pay Based on Net Current Assets

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.⁵ 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 end-of-year net current assets for the years 2001, 2003, 2006, and 2007, as follows:

- 2001: \$7,672.00
- 2002: The petitioner did not submit a tax return for this year.
- 2003: \$34,544.00
- 2006: \$6,105.00
- 2007: \$4,534.00

Therefore, for the year 2006, the petitioner did not demonstrate its ability to pay the difference between wages paid and the proffered wage based on its net current assets. For the years 2001, 2002, and 2007, the petitioner did not establish its ability to pay the proffered wage based on its net current assets.

The petitioner has not established that it had the ability to pay the beneficiary the proffered wage as of the April 30, 2001 priority date onward.

⁵According 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.

On motion,⁶ counsel asserts that the beneficiary has been paid the “prevailing wage” during his years of employment with the petitioner. She also contends that the only periods in which the beneficiary was paid less than the proffered wage were those in which he experienced health problems, 2006 through 2008, and during which the petitioner renovated its restaurant, September 2011 to February 2012. She also contends that the submitted Forms 941, which reflect the petitioner’s substantial payment of wages from 2001 through 2011, establish its ability to pay the beneficiary. Counsel states that, except for the period in which the petitioner was engaged in the renovation of its restaurant, it paid quarterly wages of between \$15,000.00 and \$72,000.00 to its employees, whose numbers ranged from 5 to 14. She also asserts that the quarterly wage offered to the beneficiary can be calculated at \$5,720.00, which exceeds the proffered wage for the same period.

Although the AAO notes counsel’s assertions regarding the wages paid the beneficiary, the AAO finds that they do not outweigh the evidence presented in the tax returns submitted by the petitioner. Further, as previously indicated, counsel’s reliance on the petitioner’s wage expenses is misplaced. Proof that a petitioner has met and continues to meet substantial wage obligations does not establish its ability to pay the proffered wage.

Ability to Pay Based on the Totality of the Petitioner’s Circumstances

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 Sonegawa* at 612 .

In *Matter of Sonegawa*, the petitioner had been in business for over 11 years and routinely earned a gross annual income of approximately \$100,000.00. 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 its net income and/or net current assets, including 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

⁶ The record contains two briefs from counsel, the first, dated December 26, 2012, was submitted at the time the petitioner filed its motion to reopen on December 27, 2012 and the second, dated February 7, 2013, was received on February 11, 2013. The AAO notes that both briefs address the same issues and are supported by the same evidence.

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.

On motion, counsel for the petitioner states that the tax returns submitted by the petitioner demonstrate that it is a profitable business. She asserts that the restaurant operated by the petitioner closed for renovations from September 5, 2011 to February 24, 2012, which negatively affected its income during these years. Counsel asserts, however, that the recent loss of income should not "negate the petitioner's long history of demonstrated income and ability to [pay] its employees" and points to the decision in *Matter of Sonogawa*. She contends that "evidence of an ability to pay a workforce and to make a profit can be established over a period of time and can be considered as evidence of a petitioner's reasonable expectation of profits." The petitioner, counsel points out, has been operating successfully for nearly 25 years and the recent dip in income should not preclude a finding that it is able to pay the proffered wage.

The AAO notes that the petitioner's gross receipts, as reflected in the tax returns it has submitted for the record, have steadily declined from a high of \$484,084.00 in 2004 to \$272,518.00 in 2010, and to \$159,321.00 in 2011. Therefore, while the petitioner's 2011-2012 renovation may have contributed to the drop in income reflected in the petitioner's 2011 tax return, it does not explain the uninterrupted decline in the petitioner's gross receipts between 2005 and 2010. Further, although counsel points to the affidavit from the petitioner's owner submitted on motion as proof of the renovation of the petitioner's restaurant, the record does not document this event. Neither does it offer evidence of the petitioner's closure for a period of six months in 2011 and 2012. Going on record without supporting documentation is not sufficient to meet the petitioner's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As a result, the record does not demonstrate that the drop in the petitioner's gross income between 2005 and 2011, as reflected in its federal tax returns, can be explained by the renovation of its restaurant. Having assessed the totality of the circumstances in this case, the AAO does not find the petitioner to have established that it had the continuing ability to pay the proffered wage as of the April 30, 2011 priority date.

Moreover, a review of USCIS databases indicates that during the specified period, the petitioner filed petitions for multiple Form I-140 beneficiaries. Where a petitioner has filed multiple petitions for multiple beneficiaries, that petitioner must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. See *Matter of Great Wall* at 144-145; see also 8 C.F.R. § 204.5(g)(2). In the instant case, the petitioner has not addressed its financial obligations with regard to the other individuals for whom it filed the Form I-140 petitions that were pending or approved as of April 30, 2001 and thereafter. For this reason as well, the record does not establish the petitioner's ability to pay the proffered wage.

Upon review, the AAO has also considered whether the petitioner has established the ability to pay the beneficiary when the petition was filed and through the date of initial approval. The petition in this case was approved on May 15, 2003. As of the date of approval of the petition, the petitioner's

tax return for 2003 was not yet due. Thus, in order for the director to have appropriately approved the petition, the record of proceeding must have established the petitioner's ability to pay in 2001 and 2002. The record of proceeding does not contain evidence demonstrating the petitioner's ability to pay the proffered wage in 2001 and 2002. The petition was not approvable when filed. Thus, USCIS would have had good and sufficient cause to revoke the approval of the petition based on the petitioner's failure to establish the ability to pay in 2001 and 2002.

The record on motion does not establish the petitioner's continuing ability to pay the proffered wage as of the priority date. Accordingly, the AAO will affirm that part of its December 3, 2012 decision relating to the petitioner's ability to pay the proffered wage.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden with regard to establishing its ability to pay.

The present proceedings do not affect the AAO's December 3, 2012 remand of the present case to the director. As previously indicated, the AAO has withdrawn the director's June 28, 2010 revocation of the approval of the Form I-140 petition, returning the case for further consideration and the entry of a new decision.

ORDER: The motion to reopen is granted. The prior decision of the AAO, as it relates to the petitioner's ability to pay is affirmed. The AAO's December 3, 2012 remand of the petition to the director for further review remains unchanged.