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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

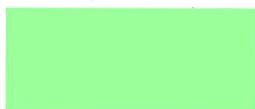


U.S. Citizenship  
and Immigration  
Services



DATE: FEB 05 2013

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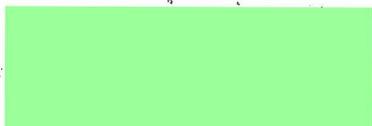


IN RE: Petitioner:  
Beneficiary:



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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Korean Food Specialty Cook. 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 September 9, 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$9.52 per hour (\$19,801.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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.<sup>1</sup>

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 1993 and to have a gross annual income of \$236,638.00. The petition does not state the petitioner's current number of employees or net income. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of 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 onward.

The petitioner did, however, submit W-2 Forms showing it paid the beneficiary wages as follows:

- 2001 - The petitioner did not submit a W-2 Form
- 2002 - The petitioner did not submit a W-2 Form
- 2003 - The petitioner did not submit a W-2 Form

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<sup>1</sup> 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).

- 2004 - The petitioner did not submit a W-2 Form
- 2005 - \$10,080.00
- 2006 - \$12,960.00
- 2007 - \$14,400.00
- 2008 - \$17,280.00
- 2009 - \$17,280.00

Thus, for those years the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those amounts are:

- 2001 - \$19,801.60
- 2002 - \$19,801.60
- 2003 - \$19,801.60
- 2004 - \$19,801.60
- 2005 - \$9,721.60
- 2006 - \$6,841.60
- 2007 - \$5,401.60
- 2008 - \$2,521.60
- 2009 - \$2,521.60

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 (1<sup>st</sup> 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. The record before the director closed on May 27, 2010 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2010 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2009 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 through 2009, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$3,583.00.
- In 2002, the Form 1120 stated net income of \$8,465.00.
- In 2003, the Form 1120 stated net income of \$2,552.00.
- In 2004, the Form 1120 stated net income of \$1,248.00.
- In 2005, the Form 1120 stated net income of \$6,652.00.
- In 2006, the Form 1120 stated net income of \$4,015.00.
- In 2007, the Form 1120 stated net income of \$15,693.00.
- In 2008, the Form 1120 stated net income of \$966.00.
- In 2009, the Form 1120 stated net income of \$12,220.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2008, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages paid to the

beneficiary. The petitioner did have the ability to pay the difference between the proffered wage and the wages paid to the beneficiary for 2007 and 2009.

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.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L of the Form 1120, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18.<sup>3</sup> 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 2001 through 2009, as shown in the table below.

- In 2001, the Form 1120-A stated net current assets of \$4,151.00.
- In 2002, the Form 1120-A was blank with respect to current assets and liabilities.<sup>4</sup>
- In 2003, the Form 1120-A was blank with respect to current assets and liabilities.<sup>5</sup>
- In 2004, the Form 1120-A stated net current assets of \$79,098.00.
- In 2005, the Form 1120-A was blank with respect to current assets and liabilities.<sup>6</sup>
- In 2006, the Form 1120, Schedule L, was blank with respect to current assets and liabilities.<sup>7</sup>
- In 2007, the Form 1120 stated net current assets of \$16,176.00.
- In 2008, the Form 1120 stated net current assets of \$12,959.00.
- In 2009, the Form 1120 stated net current assets of \$12,049.00.

<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>3</sup> On Form 1120-A, the petitioner's year-end current assets are shown on Part III, lines 1-6, and its year-end current liabilities are shown on Part III, lines 13, 14, and 16.

<sup>4</sup> For 2002, 2003, and 2005 corporations with total receipts **and** total assets at the end of the tax year less than \$250,000 are not required to complete the Part III Balance Sheet if the "Yes" box on Part II, question 7, is checked. See [http://www.irs.gov/pub/irs-prior/i1120\\_a--2002.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2002.pdf); [http://www.irs.gov/pub/irs-prior/i1120\\_a--2003.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2003.pdf); and [http://www.irs.gov/pub/irs-prior/i1120\\_a--2005.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2005.pdf) (accessed January 31, 2013). The petitioner had under \$250,000 in total receipts and total assets for these years, as well as in 2006.

<sup>5</sup> *Supra* n.4.

<sup>6</sup> *Supra* n.4.

<sup>7</sup> For 2006, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L if the "Yes" box on Schedule K, question 13, is checked. See [http://www.irs.gov/pub/irs-prior/i1120\\_a--2006.pdf](http://www.irs.gov/pub/irs-prior/i1120_a--2006.pdf) (accessed January 31, 2013).

Therefore, for the years 2001, 2002, 2003, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary. The petitioner did have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary for 2004, 2007, 2008, and 2009.

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 and lines of credit should be used to demonstrate its ability to pay the proffered wage. The AAO has reviewed and considered the petitioner's bank statements; however, counsel's reliance on the balances in the petitioner's bank accounts 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 returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on its tax returns<sup>8</sup> and that was considered above in determining the petitioner's net current assets. While counsel asserts the bank statements show "leftover" funds for certain years, the petitioner provided no evidence to document that these funds were additional to its income or current assets on Schedule L.<sup>9</sup> The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

<sup>8</sup> As stated above, this is listed on Part III of Form 1120-A and on Schedule L of Form 1120.

<sup>9</sup> For years where the petitioner did not complete Schedule L, the AAO cannot determine that the cash was "available," as cash would be balanced against the petitioner's current liabilities. As noted above, the petitioner did not complete Schedule L, which would contain this information, in several years.

Since the line of credit is a “commitment to loan” and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition.<sup>10</sup> As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971). Moreover, the petitioner’s existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position.<sup>11</sup> Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977).

On appeal, counsel cites the court’s decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), in support of the claim that the petitioner’s tax returns may not be the best indicator of its financial situation and that by employing the beneficiary the petitioner will boost its financial ability. The AAO does not find the court’s decision in *Construction and Design* to be particularly supportive or persuasive of the petitioner’s position in this case. The facts of *Construction and Design* are distinguishable from the instant facts in that *Construction and Design* dealt with the conversion of an independent contractor to a permanent employee. *Id.* at 596. Additionally, the court’s holding in that case affirmed the district court’s decision in denying the work visa sought by the petitioner. *Id.* at 598.

On appeal, counsel cites a memorandum dated May 4, 2004, from [REDACTED] Associate Director of Operations, USCIS, regarding the determination of ability to pay [REDACTED] Memorandum). The AAO consistently adjudicates appeals in accordance with the [REDACTED] Memorandum. Accordingly, the AAO has considered the petitioner’s net income, net assets, and the wages paid to the beneficiary, from 2001 through 2009 as set forth above. The petitioner has only established that it could pay the difference between the proffered wage and the wages paid for 2004, 2007, 2008, and 2009.

<sup>10</sup> Additionally, nothing shows that this line of credit was available at the time of the priority date.

<sup>11</sup> Counsel argues that the petitioner’s line of credit indicates that a “business bank evaluated the company’s financial standing . . . and found it favorable.” The petitioner did not submit this evaluation, or any documentation supporting this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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.

In the instant case, the Form I-140 states that the petitioner has been in business since 1993 but does not state its number of employees. The petitioner claimed in the record that it employed four employees, but the petitioner's tax returns do not support this claim due to the amount of wages paid. The record does not contain any evidence of the petitioner's reputation in the industry. The petitioner has not documented its growth since the priority date, and its gross receipts for 2009 are less than those of 2001. As shown above, the petitioner has not established its ability to pay the difference between the proffered wage and the wages paid for 2001, 2002, 2003, 2005, and 2006. 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.