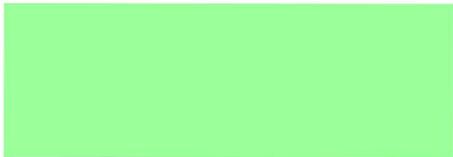




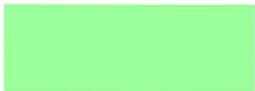
U.S. Citizenship
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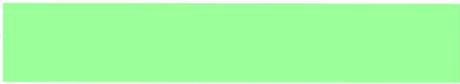
DATE: FEB 19 2013

OFFICE: TEXAS SERVICE CENTER

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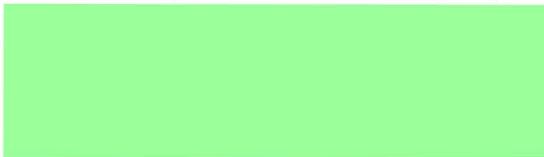
IN RE:

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 Director, Texas Service Center, denied the preference visa petition and initially rejected the petitioner's appeal as untimely. Upon receipt of the petitioner's motion to reconsider, the Acting Director, Texas Service Center, withdrew the rejection of the petitioner's appeal and forwarded the appeal to the Administrative Appeals Office (AAO).¹ The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a hand stonecutter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor 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 December 7, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the

¹ The petitioner's Form I-290B, Notice of Appeal or Motion, indicated that the petitioner would file a brief and/or additional evidence within 30 days of its notice. To date, however, the AAO has not received a brief and/or evidence in this matter.

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 June 28, 2002. The proffered wage, as stated on the Form ETA 750, is \$15.76 an hour for a 35-hour work week² (or \$28,683.20 a year). The Form ETA 750 states that the position requires two years of full-time employment experience in the offered 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.³

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in October 1989 and to employ 15 to 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 31, 2002, 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. USCIS may also consider the totality of the circumstances affecting the petitioning business. *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

² The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes 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).

³ 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).

petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not submitted any evidence that it employed and paid the beneficiary since filing the labor certification in 2002.

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 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 July 13, 2009, upon receipt of the petition. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns state its annual net income amounts on Forms 1120S,⁴ as follows: (8,990)⁵ for 2002; (12,973) for 2003; \$14,643 for 2004; \$23,129 for 2005; \$40,706 in 2006; \$62,201 for 2007; and \$56,031 for 2008. Because the petitioner’s annual net income amounts for 2002, 2003, 2004, and 2005 did not equal or exceed the annual offered wage of \$28,683.20, the petitioner has not established that it had sufficient net income to pay the proffered wage in those years.

Because the petitioner’s annual net income amounts for 2006, 2007 and 2008 exceeded the annual offered wage of \$28,683.20, the petitioner appears to have established that it had sufficient net income to pay the beneficiary’s proffered wage in those years. USCIS records, however, show that the petitioner filed immigrant visa petitions for at least five other workers from 2005 through 2009. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until each petition is denied or the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has not established that its annual net income amounts for 2006, 2007 and 2008 are sufficient to pay not only the beneficiary’s offered wage for those years, but also the offered wages of its other sponsored workers for those years. The AAO therefore finds that the petitioner has not established sufficient net income to pay the beneficiary’s offered wage in any year since the 2002 priority date. In any further filings, the petitioner must document its ability to pay all of the beneficiaries’ proffered wages during the relevant time period.

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) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 2, 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 deductions and other adjustments shown on its Schedules K for 2003, 2006, 2007 and 2008, the petitioner’s annual net income amounts for those years are found on Schedules K of its 2003, 2006, 2007 and 2008 tax returns.

⁵ Amounts in parentheses indicate negative figures.

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.⁶ 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 annual net current asset amounts as follows: (\$7,454) for 2002; (\$16,419) for 2003; (\$1,993) for 2004; \$7,031 for 2005; \$256 for 2006; (\$98) for 2007; and \$28,123 for 2008. Because none of these amounts equal or exceed the annual offered wage of \$28,683.20, the petitioner has not established that it had sufficient net current assets to pay the beneficiary's offered wage since the 2002 priority date. Nor has the petitioner shown that it had sufficient net current assets to pay the offered wages of the other workers it has sponsored for immigrant visas.

Therefore, based on an examination of wages it paid to the beneficiary, here, none, its annual net income amounts, and its annual net current asset amounts, the petitioner has not established that it had the continuing ability to pay the proffered wage of the beneficiary.

On appeal, counsel asserts that the director abused his discretion in denying the petition based on the insufficient annual net income amounts in the petitioner's tax returns. Counsel argues that a May 4, 2004 memorandum by former USCIS Associate Director of Operations William R. Yates stated that, to demonstrate its ability to pay the offered wage, a petitioner may submit financial records other than its tax returns – such as profit/loss statements, bank account records and personnel records. *See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, Determination of Ability to Pay under 8 CFR 204.5(g)(2), at 2, (May 4, 2004).* In the instant case, the petitioner submitted copies of monthly bank account statements from January 2002 to December 2008, which the petitioner claims the director did not consider in his decision.

The memorandum upon which counsel relies provides guidance to adjudicators in determining a petitioner's ability to pay the offered wage. The AAO consistently adjudicates appeals in accordance with the memo. The memo first states that a petitioner must submit the required initial evidence specified in 8 C.F.R. § 204.5(g)(2), including copies of annual reports, federal tax returns, or audited financial statements. *Interoffice Memo., p. 2.* Adjudicators should examine a petitioner's initial evidence, referencing a petitioner's net income, net current assets, and employment of the

⁶ 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.

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beneficiary in determining whether it has the ability to pay the offered wage. *Id.* If the required initial evidence does not establish ability to pay, USCIS may deny the petition. *Id.*, at p. 3.

The memo further states that a petitioner may submit additional evidence of its ability to pay, such as profit/loss statements, bank account records, or personnel records “[i]n certain instances.” Interoffice Memo., p. 3. But the memo states that USCIS adjudicators “are not required” to accept or request additional financial evidence:

Acceptance of these documents by [US]CIS is discretionary. Therefore if the required initial evidence is submitted and does not establish the petitioner's ability to pay, [US]CIS adjudicators may deny the petition.

Interoffice Memo., p. 3

If a USCIS adjudicator exercises discretion to accept additional financial evidence, the memo states that the evidence “must clearly establish the petitioner's ability to pay.” Interoffice Memo., p. 3. Otherwise, USCIS may deny the petition based on any doubts, without requesting further clarification. *Id.*

Contrary to counsel’s assertion, the AAO finds that the director did not abuse his discretion in failing to accept the petitioner’s bank account statements as evidence in determining its ability to pay the beneficiary’s offered wage. Under the abuse of discretion standard, an agency’s decision must be reversed if it is “arbitrary, irrational, or contrary to law.” *Sevoian v. Ashcroft*, 290 F.3d 166, 174 (3d Cir.2002). Here, 8 C.F.R. § 204.5(g)(2) allows the director to deny a petition without accepting additional evidence. Moreover, the petitioner has stated no reason why the director, in this instance, should have favorably exercised his discretion to accept the additional financial evidence. The petitioner has not demonstrated, for example, why the initial evidence specified at 8 C.F.R. § 204.5(g)(2) is inapplicable to the petitioner or otherwise paints an inaccurate financial picture of the petitioner. Nor has the petitioner submitted evidence to demonstrate that the funds reported in its bank statements represented additional available funds that its tax returns did not reflect as taxable income or as cash. See *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) (going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings). The director considered the petitioner’s taxable income amounts on its Forms 1120S and its Schedule L cash amounts in his examinations of the petitioner’s net income and net current assets amounts to determine the petitioner’s ability to pay. The AAO therefore finds that the director’s decision was not arbitrary, irrational, or contrary to law and that the petitioner did not demonstrate its ability to pay the offered wage by its bank statements. Without evidence demonstrating that these funds are additional to those already considered, the AAO cannot consider these statements to reflect additional funds available to the petitioner.

Citing a non-precedent AAO decision, counsel also asserts that USCIS erred in failing to consider the normal accounting practices of the petitioner, even though its tax returns do not reflect its ability

to pay the proffered wage. See AAU [REDACTED] 2003 WL 24163367 (INS) (Jan. 17, 2003). In the 2003 case, the AAO held that, despite showing an insufficient net income amount on its tax return, the petitioner established its ability to pay by submitting documentary evidence that sole owners of professional medical services corporations normally minimize their corporations' taxable incomes by withdrawing profits as officer compensation to avoid "double taxation." *Id.*

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Therefore, the AAO need not follow the non-precedent case that counsel cites.

Even if the AAO were to consider the cited case, however, the petitioner does not explain how the 2003 case regarding a professional medical service corporation applies to it, a construction corporation. The Schedules K in the petitioner's 2006, 2007, and 2008 tax returns indicate that the petitioner, like the petitioner in the 2003 case, has a sole shareholder. But, unlike the petitioner in the 2003 case, the petitioner has not submitted any evidence that it and other solely owned construction companies normally minimize their net income amounts by allocating profits elsewhere for tax purposes. Also unlike the petitioner in the 2003 case, the petitioner does not appear to be annually withdrawing profits as officer compensation. Rather, the petitioner's tax returns show that its annual officer compensation amounts from 2002 to 2008 are \$52,000 (except for \$53,000 in 2004), indicating that the petitioner's officer compensation amounts resemble a steady annual salary that is not subject to change based on the petitioner's annual amount of net income. For the foregoing reasons, the AAO finds that the petitioner has not established that the 2003 case applies to demonstrate the petitioner's ability to pay the offered wage.

The AAO cannot conclude that counsel's assertions on appeal outweigh the evidence presented in the tax returns that the petitioner submitted, which demonstrate that the petitioner could not pay the proffered wage from the day the DOL accepted the Form ETA 750 for processing.

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. at 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

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

In the instant case, the petitioner has been doing business for more than 20 years, a favorable factor in determining its ability to pay the offered wage. According to its tax returns, however, both the petitioner's gross revenue and labor cost amounts in 2008 were less than its corresponding figures in 2002. Unlike the petitioner in *Sonegawa*, the petitioner has not provided evidence of an outstanding reputation in its industry, or of the occurrence of an uncharacteristic business expenditure or loss that explains its inability to otherwise demonstrate an ability to pay the offered wage. Also unlike the petitioner in *Sonegawa*, the petitioner has sponsored multiple workers for immigrant visas and has not established that it has had the continuing ability to pay all of its sponsored workers, including the beneficiary, since their priority dates. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not established that it has had the continuing ability to pay the proffered wage since 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.