

(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: **JAN - 4 2013**

OFFICE: TEXAS SERVICE CENTER

FILE [Redacted]

IN RE: Petitioner:
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,

Kiera Polos for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

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

The petitioner is a franchise restaurant.² It seeks to employ the beneficiary permanently in the United States as an evening manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or 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.

The director's July 23, 2009 denial identified the issue of 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

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).

² The record contains a variation of the petitioner's name, for example both the petition and labor certification were filed under the name of [REDACTED], whereas the petitioner's tax return and the State of Illinois indicate that the petitioner's name is [REDACTED]. See www.ilsos.gov/corporatellc/ (accessed November 30, 2012).

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 August 19, 2003. The proffered wage as stated on the Form ETA 750 is \$39,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position of evening manager or two years of experience in the related occupation of either a shift supervisor or manager. The labor certification also requires a food sanitation certificate.

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 2000 and to currently employ six 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 beneficiary³, she 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 during any relevant timeframe including the period from the priority date in 2003 or subsequently.

³ The beneficiary did not date her signature on the labor certification.

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 consisted of copies of the first two pages of the petitioner’s tax returns for the years 2003, 2004, and 2005, and a copy of its complete 2006 tax return.⁴ As noted in footnote 6 below, when a petitioner is operating as an S corporation, its net income is found either on page 1 or Schedule K (which appears on pages 2 and 3 of the 2003, 2004, and 2005 tax returns). On appeal, the petitioner submitted copies of its complete 2007 and 2008 tax returns. The petitioner’s tax returns demonstrate its net income for the years 2003 through 2008 as shown in the table below.

- In 2003, the petitioner’s net income cannot be determined.⁵
- In 2004, the petitioner’s net income cannot be determined.
- In 2005, the petitioner’s net income cannot be determined.
- In 2006, the Form 1120S stated net income⁶ of \$44,896.⁷

⁴ It is noted the director considered the petitioner’s net income for 2003, 2004, and 2005 as shown on page one of its tax returns, without consideration of any relevant entries for additional income, credits, deductions, or other adjustments that might appear on Schedule K. It is further noted that in 2003, the director prorated the proffered wage based on the priority date and determined that the petitioner did establish that it had met its ability to pay in 2003. USCIS will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than USCIS would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary’s wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. In 2004 and 2005, the director determined that based on the net income as shown on page one of the petitioner’s tax returns, it did not establish that it had sufficient net income to pay the proffered wage. USCIS, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

⁵ It is not possible to determine the petitioner’s net income in the years 2003, 2004, and 2005, as the record does not contain the petitioner’s complete tax return, nor does the record contain the petitioner’s annual reports or audited financial statements for those years.

⁶ 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 (2003), line 17e (2004-2005), and line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 12, 2012) (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 deductions shown on its Schedule K for 2006, the

- In 2007, the Form 1120S stated net income of \$65,943.
- In 2008, the Form 1120S stated net income of \$82,290.

Therefore, for the years 2003, 2004, and 2005, the petitioner did not establish that it had sufficient net income to pay the proffered wage. For the years 2006, 2007, and 2008, the petitioner did establish that it had sufficient net income to pay the proffered wage.

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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6.⁹ 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. As the record only contains the first two pages of the petitioner's tax returns for 2003, 2004, and 2005, and the petitioner did not submit any other regulatory-prescribed evidence of its net current assets, the petitioner's net current assets cannot be determined for those years.

Therefore, for the years 2003, 2004, and 2005, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

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, citing *Construction and Design Co. v. United States*, 563 F.3rd 593 (7th Cir. 2009), asserts that the AAO must consider the petitioner's bank statements and the total financial circumstances of the petitioner. Counsel submits copies of the petitioner's monthly bank statements for 2003, 2004, and 2005.¹⁰

petitioner's net income is found on Schedule K of its tax return for 2006. Because the petitioner had no additional deductions shown on its Schedule K for 2007 and 2008, the petitioner's net income is found on line 21 of page 1 of its tax returns for 2007 and 2008.

⁷ The director incorrectly stated this amount as \$46,631.

⁸ 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.

⁹ Schedule K appears on page 4 of the 2003, 2004, and 2005 tax returns.

¹⁰ For the year 2003, the bank statements were from [REDACTED] for the years 2004 and 2005, the bank statements were from [REDACTED] The 2004 and 2005 statements list a different address for the petitioner.

It is noted that the instant case arose in the seventh circuit and that the AAO is bound by precedent decisions of the seventh circuit court of appeals. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). In *Construction and Design*, the seventh circuit court of appeals analyzed a petitioning employer's continuing ability to pay an alien who was working for the petitioning employer as an independent contractor. In *Construction and Design*, the alien was paid \$23,000 less in salary as an independent contractor than the employer planned to pay him as an employee. The court stated that "it is unclear where the extra money he was going to be paid, plus employment taxes (plus employee benefits, if any), would be coming from." In the instant case, there is no evidence that the beneficiary was working for the petitioner as an independent contractor, so the facts in this case differ from those in *Construction and Design*. Further, the petitioner has not established that it had the ability to pay the proffered wage based on its total financial circumstances.

The director issued a request for evidence on February 28, 2008 specifically requesting evidence of the petitioner's ability to pay the proffered wage. In response, the petitioner submitted only copies of its 2004 and 2005 IRS Forms 941, Employer's Quarterly Federal Tax Return. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the bank statements to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the bank statements submitted on appeal.

Even if the AAO were to consider the petitioner's bank statements, 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, the petitioner's balance in its bank accounts would be reflected on its Schedule L and as such would be considered in the analysis of its net current assets; however, the petitioner did not submit its Schedule L for the years 2003, 2004, and 2005.

Counsel also asserts that the petitioner's 2004 salaries were higher than normal because the petitioner was paying the salaries of the employees of its sister company. As evidence, counsel submits a statement dated August 24, 2009 from the petitioner's president stating that during 2004

he was in the process of opening another company and was paying the salaries of those employees through the petitioner until the other company was incorporated. He estimated the amount of salaries paid to those employees to be between \$25,000 to \$30,000. However, the petitioner did not name the "sister company" or submit any evidence to support these assertions. 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)).

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 petitioner's sales fluctuated from 2003 to 2008, thus it has not established its historical growth. There is no evidence of the petitioner's reputation in its industry, and the petitioner claimed only six employees on the Form I-140 petition. There is no evidence that the beneficiary will be replacing a current employee or an outsourced service. As previously discussed, counsel asserts that the petitioner's 2004 salary expenses were higher than normal, but the record contains no independent objective evidence to support counsel's assertion.¹¹ Thus, assessing the

¹¹ Counsel also references a decision issued by the AAO concerning the totality of circumstances analysis, but does not provide its published citation. 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

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 petitioner has also failed to establish its continuing ability to pay the proffered wage to multiple beneficiaries as of the priority date. *See* 8 C.F.R. § 204.5(g)(2). According to USCIS records, the petitioner filed another I-140 petition on behalf of another beneficiary.¹² Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage paid to the other beneficiary, whether the petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Thus, the petitioner has also failed to establish that it had the continuing ability to pay the proffered wage to the beneficiary and the proffered wage to the beneficiary of its other petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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).

¹² USCIS records indicate the other petition was assigned receipt number LIN04 046 50407.