

(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:

JAN 24 2013

OFFICE: NEBRASKA 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 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,

*Rachel Mitro*  
for

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a business which engages in the restoration and refinishing of antiques. It seeks to employ the beneficiary permanently in the United States as an antique furniture restorer. 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 June 10, 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 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 April 17, 2002. The proffered wage as stated on the Form ETA 750 is \$22.00 per hour (\$45,760.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered of antique furniture restorer.

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>

On appeal, counsel submits a brief; bank statements from 2001, 2002, 2003, 2004, 2005, and 2009; copies of the petitioner's U.S. Corporation Short-Form Income Tax Return (Form 1120-A) for 2002 and 2003; copies of the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for 2004, 2005, 2006, and 2008; and a copy of a letter dated April 20, 2009 from [REDACTED]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation.<sup>2</sup> The petitioner claimed to have been established in 1999<sup>3</sup> and currently to employ four 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 March 13, 2001, the beneficiary did not claim to have worked for the petitioner.<sup>4</sup>

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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).

<sup>2</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under New York law, is considered to be an S corporation for federal tax purposes.

<sup>3</sup> Through 2003, the petitioner was structured as a C Corporation, having filed its federal tax returns on Form 1120-A. In 2004, the petitioner elected to restructure as an S Corporation.

<sup>4</sup> According to the certified Form ETA 750 submitted with the instant petition, the beneficiary did not claim to have worked for the petitioner. On Form G-325A, submitted by the beneficiary with his Application to Register Permanent Residence or Adjust Status (Form I-485), the beneficiary did not claim to have worked for the petitioner. However, with the beneficiary's I-485 Application, the record contains an uncertified Form ETA 750, Parts A and B. In Part B, the beneficiary claimed to have worked for the petitioner, [REDACTED] since September 1998. The record of proceeding also contains a prior Form I-485 filed by the beneficiary and a prior Form I-140 ([REDACTED])

On appeal, counsel asserts that the director did not properly consider the documentation submitted as evidence. On appeal, counsel asserts that the petitioner had additional income, which the director did not consider, and that this income is reflected in the petitioner's bank statements, which were submitted on appeal. On appeal, counsel asserts that the director misrepresented the petitioner's net current assets, the correct figures for which counsel supplies on appeal. Counsel asserts that, in his denial, the director misstated the petitioner's net income for 2005. On appeal, counsel asserts that the petitioner did not supply Schedule L for the years 2002 through 2005 because he was not required to file Schedule L. On appeal, counsel also asserts that, if the petitioner's net income is combined with its net current assets, its ability to pay is established.

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 2002 or subsequently.

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,

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[REDACTED], which was filed for the beneficiary by petitioner of the instant I-140 petition. With the prior I-485 Application, the beneficiary submitted Form G-325A in which he claimed to have worked for [REDACTED] since March 1993. Some of these inconsistencies were addressed by the director in his request for evidence (RFE). However, the petitioner did not provide independent, objective evidence which clarified which claims were true. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 May 7, 2009 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2009 federal income tax return was not yet due. The petitioner submitted its 2008 federal income tax

return on appeal. The petitioner's tax returns demonstrate its net income for each year from 2002 through 2008, as shown in the table below.

- In 2002, the Form 1120-A stated net income of \$12,451.00.
- In 2003, the Form 1120-A stated net income of \$10,150.00.
- In 2004, the Form 1120S stated net income<sup>5</sup> of \$10,907.00.
- In 2005, the Form 1120S stated net income of \$9,107.00.
- In 2006, the Form 1120S stated net income of \$11,578.00.
- In 2007, the Form 1120S stated net income of \$17,098.00.
- In 2008, the Form 1120S stated net income of \$11,160.00.

Therefore, for the years 2002 through 2008, the petitioner did not have 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.<sup>6</sup> 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 2002 through 2008, as shown in the table below.

- In 2002, the Form 1120-A, stated net current assets of \$0.00.
- In 2003, the Form 1120-A, stated net current assets of \$0.00.
- In 2004, the Form 1120S, Schedule L stated net current assets of \$0.00.

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<sup>5</sup> 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 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 October 9, 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 and other adjustments shown on its Schedule K for 2006, 2007, and 2008, the petitioner's net income is found on Schedule K of its tax returns for these years.

<sup>6</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.

- In 2005, the Form 1120S, Schedule L stated net current assets of \$0.00.
- In 2006, the Form 1120S, Schedule L stated net current assets of \$44,288.00.
- In 2007, the Form 1120S, Schedule L stated net current assets of \$54,789.00.
- In 2008, the Form 1120S, Schedule L stated net current assets of \$45,719.00.

Therefore, for the years 2002, 2003, 2004, 2005, 2006, and 2008 the petitioner did not demonstrate 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, with the exception of 2007.

On appeal, counsel asserts that the director failed to consider the documentary evidence submitted properly. Counsel asserts that that the petitioner had additional assets, which the director did not consider, as evidenced by the sums represented on the petitioner's bank statements submitted on appeal.

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

On appeal, counsel asserts that, whereas the director found that the petitioner had \$0.00 in net current assets for 2002, 2003, 2004, and 2005, the petitioner actually had \$36,506.00 in 2002, \$41,726.00 in 2003, \$42,640.00 in 2004, and \$38,684.00 in 2005. However, counsel provided neither a rationale for arriving at these figures nor evidence to substantiate this claim.

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)).

Further, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

The director based his assessment of the petitioner's net current assets upon an analysis of the petitioner's Schedule L, Balance Sheet, which forms a part of the petitioner's federal income tax return for each year. For each of the years from 2002 through 2005, the petitioner reported neither assets nor liabilities on Schedule L.

On appeal, counsel asserts that the petitioner was not required to complete a Schedule L for 2002, 2003, 2004, or 2005 because the petitioner's total receipts for the tax years and total assets at the end of the tax years were less than \$250,000.00.

The AAO concurs with counsel's assertions. According to the directions for Form 1120S,<sup>7</sup> "Schedule L is not required to be completed if the corporation answered 'Yes' to question 8 on Schedule B." Question 8 asks, "are the corporation's total receipts...for the tax year and its total assets at the end of the tax year less than \$250,000? If 'Yes,' the corporation is not required to complete Schedules L and M-1." In this case, the petitioner answered "Yes" to question 8, indicating that its total receipts and end-of-year total assets were less than \$250,000.00. Therefore, the petitioner was not required to complete Schedule L for 2002, 2003, 2004, or 2005. However, the fact that the petitioner was not required to complete Schedule L for the years in question does not excuse its having to provide one of the forms of regulatory prescribed evidence demonstrating its net current assets for those years. The petitioner bears the burden of demonstrating eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

On appeal, counsel asserts that the director misstated the petitioner's net income for 2005, stating that it was \$1,230.00 when, in fact, it was \$9,107.00. Again, the AAO concurs with counsel's assertion and has reflected the accurate figure in its analysis above. However, the accurate figure for the petitioner's net income is still not sufficient to pay the proffered wage for 2005.

On appeal, counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

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<sup>7</sup> <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 9, 2012)

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 \$100,000.00. 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 *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 gross sales have fluctuated over the course of the period for which tax documentation has been provided. During that time, the petitioner's net income has been marginal; officer compensation has been modest; and payroll has been minimal to non-existent. The petitioner has not established the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within the industry, or whether the beneficiary is replacing a former employee or an outsourced service. 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.