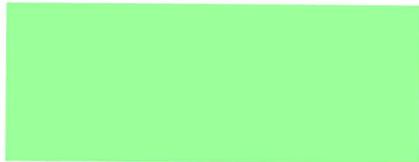


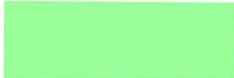


U.S. Citizenship
and Immigration
Services

(b)(6)



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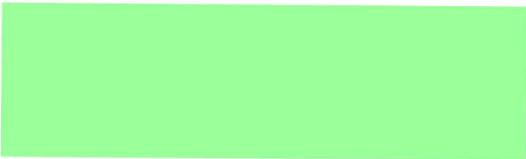
IN RE:

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 (AAO) in your case.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this decision to the Administrative Appeals Office (AAO), and, on November 21, 2011, the AAO dismissed the appeal. The AAO additionally dismissed the petitioner's motion for reconsideration on March 25, 2013. The matter is now before the AAO on a motion to reopen. The motion will be dismissed, and the AAO's decisions of November 21, 2011 and March 25, 2013 affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently¹ in the United States first as a cook. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The Form I-140, Immigrant Petition for Alien Worker, was filed on July 31, 2007. The Form ETA 750 established an April 30, 2001, priority date. The position of cook as stated on the Form ETA 750 requires a minimum of two years of training or experience in the job offered.² The director denied the petition, determining that the petitioner had failed to establish that the beneficiary's employment

¹Section 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(l)(3) also provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

² On Item 14, "Related Occupation," it states "[A]ny restaurant environment." The number of years in this related occupation has been omitted. In Item 15, an additional notation states "Applicant will train and pass the California food handler certification."

experience satisfied the terms of Item 14 of the Form ETA 750 and that the petitioner failed to establish the petitioner's continuing ability to pay the proffered wage.³

The AAO dismissed the appeal on November 21, 2011. The AAO noted that the beneficiary had signed the Form ETA 750B under penalty of perjury on April 28, 2001 and had listed three jobs held. From January 1987 to January 1988, he states that he worked full-time as a cook for [REDACTED]. No address is listed for this employer. From June 1989 to July 1999, the beneficiary states that he worked 15 hours per week as a presser for [REDACTED] in Laguna Niguel, California. From July 1, 1999 to the present (date of signing), the beneficiary states that he has worked as a cook for the petitioner. The petitioner's letter submitted to the record gives the commencement date of this employment as June 1999. An employment verification letter, not on a business letterhead, signed by [REDACTED] was submitted on appeal. It states that he supervised the beneficiary at a [REDACTED] in Tustin, California and that the beneficiary worked there as a cook during the years of 1986 and 1987. As pointed out in the AAO's decision, this letter did not verify specific dates of employment. Further, the dates of the beneficiary's employment at [REDACTED] were stated by the beneficiary on the Form ETA 750B as running from 1987 to 1988, which are not consistent with [REDACTED] letter. The AAO concurred with the director's conclusion that the petitioner had not established that the beneficiary possessed two full years of employment experience as a cook as required by the terms of the labor certification.

Relevant to the petitioner's ability to pay the proffered wage of \$18,512,⁴ the AAO determined that through payment of wages directly to the beneficiary in 2006, 2007 and 2008, the petitioner established

³ 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.

⁴In 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.

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.

its ability to pay the proffered wage in these years. However, in the years of 2001, 2002, 2003, 2004, and 2005, the petitioner's ability to pay had not been established because USCIS electronic records showed that the petitioner had filed one other Form I-140 petition and that the AAO was unable calculate the petitioner's ability to pay the instant petition when information was lacking as to the other

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).

petition.⁵ Where a petitioner files multiple petitions, it is obligated to establish the ability to pay each proffered wage for each beneficiary from his/her respective priority date until lawful permanent residence has been obtained. The AAO found that without the pertinent information on the other beneficiary such as proffered wage, dates of employment and record of wages paid, it was unable to determine the petitioner's ability to pay the proffered wage for the instant beneficiary. It directed the petitioner to address this issue in any further filings.

The petitioner, through counsel, filed a motion to reconsider the AAO's decision of November 21, 2011. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. Based on the deficiencies of that motion, the AAO dismissed it on March 25, 2013.

Counsel has filed another motion styled as a motion to reopen. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel's motion does not submit any affidavits or other documentary evidence. Rather, counsel asserts that the petitioner has paid the proffered wage to the beneficiary in 2006 through 2008 and that in earlier years, the petitioner still continuously operated in good economic times and bad economic circumstances. Pertinent to the beneficiary's experience, counsel asserts that the beneficiary has been working with the petitioner through all the years that the instant petition has been pending and that the previous documentation supports the experience required. As stated above, new facts have not been submitted and no affidavits or other documentation accompanies this motion. As none of the counsel's arguments form the regulatory basis of a motion to reopen, the motion must be dismissed.

Even if accepted as a motion to reconsider, as noted in the AAO's prior decision, with regard to the principles set forth in *Matter of Sonogawa*, the evidence submitted does not reflect a similar fact pattern or merit approval under those principles. Although payment of gross wages reached \$54,414 in 2003, over 20% of this sum was paid to the beneficiary. Further, the petitioner has provided no specific documentation related to the other beneficiary for whom it has petitioned. As stated in the AAO's prior decision, a calculation of the petitioner's ability to pay must include consideration of the proffered wage

⁵ The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application for each beneficiary establishes a priority date for any immigrant petition later based on that labor certification, the petitioner must establish that the job offer was realistic as of the priority date of each petition and that the offer remained realistic for each year thereafter, until each 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. Comm. 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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

and any proof of wages paid to the other beneficiary. Further, a review of the petitioner's gross sales or receipts from 2001 to 2005 reflects a decrease of \$44,000. The AAO does not find that such analogous, unique circumstances such as was present in *Sonegawa* is presented in the instant proceeding.

Relevant to the beneficiary's claimed two years of employment experience, counsel did not specifically address the deficiencies noted in the director's and the AAO's prior decisions. Counsel asserts that the beneficiary has worked with the petitioner during the years that the petition has been pending, but the priority date determines the date by which the beneficiary must have acquired the required work experience as a cook. In this case, the priority date of the instant petition is April 30, 2001, which is the date the DOL first accepted the application for the labor certification. The priority date is the date by which the beneficiary must have obtained the educational, training and work experience requirements set forth on the labor certification. In this case, the petitioner has not demonstrated that the beneficiary obtained the full two years of required experience by the priority date.

Beyond the decision of the director, the AAO notes that the beneficiary and the partner(s) share the same surname. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). The petitioner should address this issue in any further proceedings involving this beneficiary.

The petitioner has not established that it has had the continuing ability to pay the proffered wage to the beneficiary from the priority date onward and has not established that the beneficiary acquired two years of full-time experience as a cook as of 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 motion to reopen is dismissed and the AAO's decisions of November 21, 2011 and March 25, 2013 are affirmed.