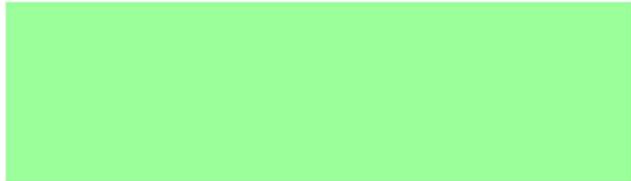


(b)(6)

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

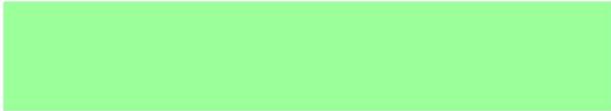


DATE: JUN 04 2013 OFFICE: TEXAS SERVICE CENTER

FILE:

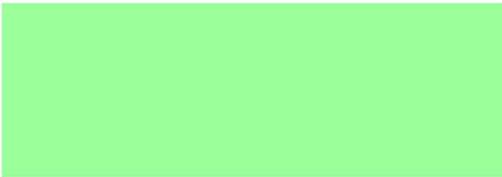


IN RE: Petitioner:
Beneficiary:



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.

Thank you,

A handwritten signature in cursive script that reads "Elizabeth McCormack".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on July 31, 2012 the AAO rejected the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. The AAO rejected a subsequent appeal because it was filed by the beneficiary, who is not a proper party to the proceeding. 8 C.F.R. § 103.2(a)(3) and 8 C.F.R. § 103.3(a)(1)(iii)(B), and because the petitioner had not signed the petition as required by 8 C.F.R. § 204.5(c) and 8 C.F.R. § 103.2(a)(2). The AAO further found that the petitioner and its successor did not have the ability to pay the proffered wage from the priority date, specifically for 2004, and that the petitioner had sponsored multiple beneficiaries, and did not establish its ability to pay all of the sponsored workers.

On motion, the petitioner asserts: that the AAO misapplied the current law as depreciation and amortization expenses must be added back to the petitioner's net income because such expenses are not real expenses; the AAO misapplied the holding in *Matter of Sonogawa* because given the totality of the circumstances, considering uncharacteristic legal fees, the shareholders' willingness to contribute officer compensation, and the reputation of the petitioner, the petitioner has established the ability to pay; and that the USCIS promulgation of the regulations under 8 C.F.R. § 204.5(g)(3) do not pass constitutional muster and cannot be accorded Chevron deference.

On appeal, the AAO notified the petitioner in a Notice of Intent to Dismiss (NOID), on August 2, 2011, that the petition was improperly filed and provided the petitioner with instructions on how to correct the deficiency. However, the petitioner did not respond to the AAO's NOID. On July 31, 2012, the AAO rejected the petitioner's appeal because no evidence was submitted correcting the deficiency in the petition.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

On July 31, 2012, the AAO found that the I-140 was not properly signed by the petitioner; the petitioner has overcome this issue on motion with the filing of a revised and properly signed I-140 submitted as evidence with the motion.

¹The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

On motion, the petitioner asserts that it established the ability to pay. The petitioner argues that depreciation and amortization should be included in the calculation of the petitioner's net income. However, as we noted in our previous decision dated July 31, 2012, with respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), stated:

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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

The petitioner also, in support of its argument that depreciation should be added back to net income, relies on a decision by the seventh circuit court of appeals in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The court noted that USCIS “looks at a firm’s income tax returns and balance sheets first,” and then went on to state that if the petitioner’s tax returns do not establish its ability to pay the proffered wage, the petitioner “has to prove by other evidence its ability to pay the alien’s salary.” *Id.* at 563. In this case the petitioner has not shown sufficient resources to pay the proffered wage.

The court in *Construction and Design Co.* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612.

Further, the court in *Construction and Design Co.* noted that the "proffered wage" could understate the cost to the employer in hiring an employee, as opposed to an independent contractor, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." *See id.* at 596. The court stated that if an employer has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure. *Id.* at 595. The previous AAO decision differs from the findings *Construction & Design* in that the petitioner has not established through any documentary evidence sufficient cash flow, either existing or anticipated, to establish its ability to pay the proffered wage in 2004.

The director found in its decision dated, July 19, 2008 that the petitioner failed to establish its ability to pay the current beneficiary in 2004. On motion, the petitioner asserts that in 2004 the company experienced an uncharacteristic business loss in 2004 for the payment of legal fees in connection with a trademark lawsuit to defend its name, the [REDACTED] Counsel states, that the AAO should have considered this loss in its review of the totality of the company's circumstances pursuant to *Matter of Sonogawa*, 12 I&N Dec. Counsel submitted a letter from the law firm of [REDACTED] stating that it received \$16,000 in 8 separate \$2,000 cash transactions from the petitioner. Copies of the checks written to the attorney were also submitted. In reviewing the record at hand to include evidence submitted on motion, we find it more likely than not that the petitioner encountered an uncharacteristic business loss in 2004 because of a lawsuit filed against the petitioner in 2003.

Nevertheless, the petitioner has not established that under the totality of circumstances, that it has the ability to pay the proffered wage in 2004. As noted in the AAO decision dated July 31, 2012, the evidence submitted is not sufficient to establish that either [REDACTED] or [REDACTED] had adequate funds to pay the proffered wage of the instant beneficiary and the additional sponsored beneficiaries. As discussed previously, the evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the beneficiaries have obtained lawful permanent residence. Additionally, the AAO notes that even were the AAO to add back into the petitioner's net income (\$11,000) for 2004, the amounts paid to its attorneys (\$16,000) the petitioner would still not have sufficient funds in 2004 to pay the proffered wage of \$36,000. There is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth.

Finally, the petitioner argues that USCIS cannot ask for evidence of other beneficiaries sponsored by the petitioner and that the AAO misinterpreted 8 C.F.R. § 204.5(g)(3). However, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore 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 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). Moreover,

counsel for the petitioner argues that certain provisions of the immigration laws, including the regulations governing the requested immigration benefit, are unconstitutional. The AAO observes that, like the Board of Immigration Appeals, this office cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

On motion, the petitioner asserts that the proffered wage may be paid out of its shareholders' compensation. We note that the shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. However, officer compensation will not be considered in this instance because the record contains no evidence of the petitioner's multiple shareholders' intention to reduce their salaries in order to pay the beneficiary the full proffered wage as well as any other beneficiaries sponsored by the petitioner.²

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 sustained that burden.

ORDER: The motion to reopen is granted and the decision of the AAO dated July 31, 2012 is affirmed. The petition is denied.

² The current beneficiary, and not the shareholders, has borne the cost of the motion at hand, as evidenced by a copy of a personal check written by the beneficiary to USCIS for the filing fee.