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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 18 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,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the appeal will be dismissed, and the petition will be denied.

The petitioner describes itself as a Mexican restaurant. It seeks to permanently employ the beneficiary in the United States as a Mexican cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition was filed with a labor certification approved by the U.S. Department of Labor (DOL) on behalf of another beneficiary. The director denied the petition after determining 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 AAO affirmed the director's determination that the petitioner had not established the ability to pay the proffered wage as of the priority date. The AAO also noted that the beneficiary had left employment with the petitioner and had begun employment with a different restaurant; thus, suggesting that a valid job offer may no longer exist.

We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because counsel asserts that the AAO made an erroneous decision through misapplication of law or policy; namely, that the AAO erred in its calculation of the petitioner's ability to pay the proffered wage.

At 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 May 12, 2003. The proffered wage as stated on the Form ETA 750 is \$10 per hour (\$20,800 per year, based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience as a Mexican cook.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on September 15, 1997 and to currently employ eleven workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on July 9, 2007, the beneficiary did not claim to have worked for the petitioner. The beneficiary claimed to have worked as a Mexican cook for [REDACTED] from January 1998 until June 2000. This assertion is corroborated by a July 14, 2000 employment letter signed by [REDACTED] who indicated he was the General Manager at [REDACTED].

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

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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 submitted copies of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, showing that it employed and paid the original beneficiary<sup>1</sup> as follows:

2003	Not submitted
2004	\$6,975
2005	\$20,150
2006	\$20,150

Submitted Forms W-2 show the petitioner employed and paid the current beneficiary \$3,520 in 2007 and \$19,360 in 2008.

Counsel asserts on motion that the petitioner should only be required to establish the ability to pay the proffered wage for the prorated portion of 2003 that occurred after the May 12 priority date. The AAO's previous decision specifically stated that 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 AAO, in its dismissal of the appeal, pointed out that USCIS

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<sup>1</sup> As stated above, the current case involves the substitution of the beneficiary on the labor certification. The original labor certification was filed on behalf of Jose Arellano-Torres and the current beneficiary was substituted on July 9, 2007. In a letter dated July 24, 2012, the petitioner's general manager stated that the current beneficiary was replacing the original beneficiary, who had been working in "the same position set forth in the ETA 750." In an affidavit dated July 24, 2012, the original beneficiary affirmed that he had worked full-time for the petitioner in the offered job in 2004, 2005, and 2006 and that he took a different job in 2007. The evidence in the record names the replaced worker, contains competent evidence of the wages paid and fulltime employment, verifies that his duties are those of the proffered position as set forth on the ETA 750, and contains evidence that the petitioner has replaced him with the beneficiary. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Therefore, this portion of the AAO's previous decision will be withdrawn and the wages paid to the original beneficiary will be considered toward the petitioner's ability to pay the proffered wage.

will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage. The AAO used the analogy that we would not consider 24 months of income towards paying the annual proffered wage. Counsel objects on motion that it has not asked USCIS to consider 24 months income to pay 12 months of proffered wage. However, counsel failed to apply the analogy to the case at hand, where the petitioner and counsel are, in fact, asking USCIS to consider 12 months of income to pay only seven months of proffered wages. The petitioner has submitted no evidence of its prorated income in 2003 to match its demand for a prorated proffered wage.

The petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it did pay a portion of the proffered wage. As the proffered wage is \$20,800 per year, the petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the original beneficiary and the substituted beneficiary, that is:

2003	\$20,800
2004	\$13,825
2005	\$650
2006	\$650
2007	\$17,280
2008	\$1,440

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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 petitioner’s tax returns reflect the following net income<sup>2</sup>:

2003	\$15,370
2004	\$-4,709
2005	\$-17,905
2006	\$31,093
2007	\$94,848

Therefore, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages actually paid to the original beneficiary in the years 2003, 2004, or 2005.

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>3</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.

<sup>2</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

<sup>3</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.

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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 the following end-of-year net current assets:

2003	\$19,027
2004	\$14,545
2005	\$-3,672

On motion, counsel again states that the balances in the petitioner's bank accounts should be considered as evidence of the petitioner's ability to pay the proffered wage and again explained that the bank statements were more accurate than the cash assets specified on Schedule L of its corporate income tax returns. Specifically, counsel stated that the 2005 Schedule L "did not correctly reflect the actual cash shown in the bank statement, probably due to a clerical error/omission by the tax preparer." However, the record contains no evidence of submission to the IRS of amended corporate income tax returns for the years in question. USCIS requires IRS-certified copies of amended returns to establish that amended returns were actually received and processed by the IRS. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Thus, counsel's assertion that the income tax returns were in error is not persuasive and AAO will rely on the net current assets listed on the petitioner's tax return that was initially submitted.

For the years 2003 and 2005 the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages actually paid to the original beneficiary. 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.

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.

Unlike the petitioner in *Sonegawa*, the current petitioner has not established the historical growth of its business or its reputation within its industry. Also unlike the petitioner in *Sonegawa*, the current petitioner has not claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. The petitioner did not demonstrate its ability to pay the difference between the proffered wages and the wages actually paid to the beneficiary and his predecessor by means of its net income or net current assets from the priority date or subsequently. 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 from the priority date onwards.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO's previous decision also noted that the current beneficiary had left employment with the petitioner and had taken employment with a different restaurant. The AAO noted that this raised issues of "portability" under the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), as described in section 204(j) and section 212(a)(5)(A)(iv) of the Act. However, petitioner has maintained that the job offer remains open to the current beneficiary and the beneficiary has maintained his intent to return to employment with the petitioner. Therefore, this portion of the AAO's decision will be withdrawn.

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 reconsider is granted and the appeal is dismissed. The petition remains denied.