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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



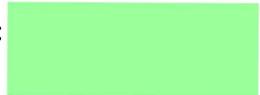
U.S. Citizenship  
and Immigration  
Services



DATE: JUN 24 2013

OFFICE: NEBRASKA SERVICE CENTER

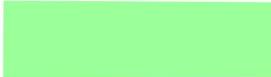
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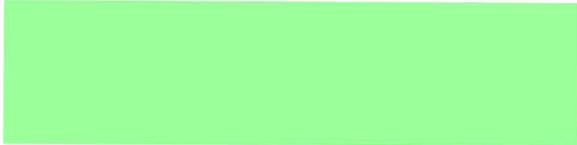
Petitioner:

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:

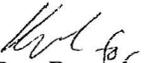


INSTRUCTIONS:

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,

  
Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

The petitioner is an Indian restaurant. It seeks to employ the beneficiary permanently in the United States as an Indian specialty 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 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 May 7, 2010 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.

The AAO issued a notice of derogatory information and request for evidence (RFE) on May 8, 2013. The AAO determined that the director incorrectly stated in her decision that the petitioner's Forms 1120S reflect net income greater than the proffered wage for all years other than 2005 and 2006. In the RFE, the AAO also requested information regarding the other beneficiaries for whom the petitioner has petitioned, and additional evidence regarding the petitioner's ability to pay the proffered wage.

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 November 14, 2002. The proffered wage as stated on the Form ETA 750 is \$24,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position as an Indian specialty cook.

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>

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 1991 and to currently employ 20 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 November 11, 2002, the beneficiary 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 2002 or subsequently.

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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).

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, 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 February 1, 2010 with the receipt by the director of the petitioner’s submissions in response to the director’s notice of intent to deny. As of that date, the petitioner’s 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2002, 2003, 2004, 2005, 2006, 2007, and 2008, as shown in the table below.

- In 2002, the Form 1120S stated net income<sup>2</sup> of \$12,209.
- In 2003, the Form 1120S stated net income (loss) of \$(7,200).
- In 2004, the Form 1120S stated net income of \$54,705.
- In 2005, the Form 1120S stated net income of \$15,523.
- In 2006, the Form 1120S stated net income of \$11,413.
- In 2007, the Form 1120S stated net income of \$5,257.
- In 2008, the Form 1120S stated net income of \$10,588.

Therefore, for the years 2002, 2003, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner has established that its net income was greater than the proffered wage in 2004. The AAO notes that the director failed to consider the petitioner’s additional deductions and adjustments shown on Schedule K when calculating the petitioner’s net income. The AAO withdraws the director’s statements regarding the petitioner’s net income in 2002, 2003, 2004, 2007, and 2008.

In the RFE, the AAO requested the petitioner’s federal tax returns for 2009, 2010, and 2011. The AAO notes that the petitioner submitted the first page of its 2009, 2010, and 2011 Forms 1120S. The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

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<sup>2</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 23 (1997-2003), 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 April 2, 2013) (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 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner’s net income is found on Schedule K of its tax returns.

USCIS records indicate that the petitioner has filed three other I-140 petitions since the petitioner's establishment in 1987. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In its response to the AAO's RFE, the petitioner did not address the AAO's concerns regarding multiple beneficiaries and it did not submit any of the evidence requested. Therefore, the petitioner has failed to demonstrate that it had sufficient net income to pay the beneficiary the proffered wage in any of the relevant years from the priority date in 2002 or subsequently.

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. 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, 2003, 2005, 2006, 2007, and 2008, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$(63,284).
- In 2003, the Form 1120S stated net current assets of \$(76,709).
- In 2005, the Form 1120S stated net current assets of \$(33,718).
- In 2006, the Form 1120S stated net current assets of \$(35,809).
- In 2007, the Form 1120S stated net current assets of \$(37,370).
- In 2008, the Form 1120S stated net current assets of \$(23,232).

Therefore, for the years 2002, 2003, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net current assets to pay the proffered wage of the instant beneficiary, or any of the other beneficiaries for which it has petitioned.

As noted above, the petitioner failed to submit complete copies of its tax returns for 2009 through 2011, as requested in the AAO's RFE. Therefore, the petitioner has failed to demonstrate that it had sufficient net current assets to pay the beneficiary the proffered wage in any of the relevant years from the priority date in 2002 or subsequently.

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

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<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.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

In the RFE, the AAO stated

In response to the director's notice of intent to deny, your attorney of record, among other things, asserts that the director has failed to consider the officers' compensation as evidence of the petitioner's ability to pay the proffered wage to the beneficiary from the priority date. The AAO accepts counsel's assertion on this issue; however, it is imperative for the AAO to determine that all of your supporting documents are consistent with the claims made on the present petition.

The AAO requested "a sworn statement or affidavit from the sole shareholder of your organization, [REDACTED] stating he is willing and able to pay the difference between the beneficiary's salary and the proffered wage from the priority date until the beneficiary obtains lawful permanent residence" and photocopies of [REDACTED] Forms W-2 for 2002 through 2012. [REDACTED] submitted a notarized letter on the petitioner's letterhead dated June 7, 2013 stating that he and the petitioner "have the financial where with all to pay the beneficiary salary and proffered wage from the priority date until the beneficiary obtains lawful permanent residence." [REDACTED] sworn statement does not comply with the AAO's RFE in that it does not state that he is willing and able to pay the difference between the beneficiary's salary and the proffered wage. In addition, in response to the RFE, the petitioner submitted [REDACTED] Forms W-2 for 2003, 2004, 2007, 2008, 2009, 2010, 2011, and 2012. The record does not contain a 2002 or 2005 Form W-2 for [REDACTED]

The record includes a letter on [REDACTED] letterhead dated January 27, 2010 signed by [REDACTED], CPA. In his letter, [REDACTED] states that in 2005, the petitioner spent \$8,200 on new furniture and recognized \$1,179 in depreciation. In 2006, the petitioner spent \$6,700 on silverware and a dinner set and recognized \$1,995 in depreciation. [REDACTED] states that these "unusual expenses" do not happen every year and could have been deferred and that depreciation does not deplete the petitioner's cash flow. [REDACTED] states that the amount spent on "usual expenses" could have been used to pay the proffered wage.

The AAO is not persuaded by this argument. The petitioner's expenses for furniture and dinnerware are the actual cost of doing business. Further, even adding these amounts back to the petitioner net income or net current assets does not establish the petitioner's ability to pay the proffered wage to the instant beneficiary in 2005 or 2006 and does not overcome the petitioner's shortfall in 2002, 2003, 2007, or 2008. Nor does it demonstrate the petitioner's ability to pay the proffered wages of all other beneficiaries for which it has petitioned.

The petitioner's tax returns were prepared pursuant to the accrual method of accounting, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. See <http://www.irs.gov/publications/p538/ar02.html#d0e1351> (accessed June 21, 2013). This office would, in the alternative, have accepted tax returns prepared pursuant to cash method of accounting,

if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.<sup>4</sup> The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not pursuant to the accountant's adjustments.

In his brief on appeal, counsel stated that the beneficiary would help the petitioner increase its "potential and annual sales." Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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

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<sup>4</sup> Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. See <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed June 21, 2013).

California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 has not established its historical growth since 1987, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. On appeal, counsel asserts that the director failed to consider the longevity of the petitioner's business and submits customer reviews from [REDACTED]. The AAO notes that the [REDACTED] reviews begin in 2006 and the [REDACTED] reviews begin in 2009. These reviews do not establish the petitioner's reputation since 1987 and the record contains no other evidence of the petitioner's historical growth or any uncharacteristic expenditures or losses. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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.