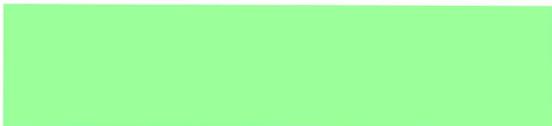


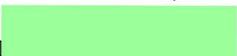
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

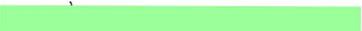


U.S. Citizenship
and Immigration
Services



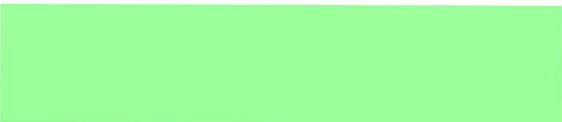
DATE: OFFICE: NEBRASKA SERVICE CENTER FILE: 

MAR 18 2013

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,


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 a microbiology and immunology laboratory testing business. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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 April 14, 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 September 2, 2004. The proffered wage as stated on the Form ETA 750 is \$25.51 per hour (\$53,060.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires a bachelor's degree in fine arts, or two years of experience in the job offered of graphic designer, or two years of experience in the related occupation of graphic artist.

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.¹

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation from 2004 through 2006 and as an S corporation since 2007.² On the petition, the petitioner claimed to have been established in 1985, to have a gross annual income of \$4,312,684.00, and to employ 18 workers currently. According to the tax returns in the record, the petitioner's fiscal year began on July 1st and ended on June 30th for 2004 and 2005, began on July 1st and ended on December 31st for 2006, and was based on a calendar year since 2007. On the Form ETA 750B, signed by the beneficiary on August 16, 2004, 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

¹ 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).

² Although the petitioner's 2007 tax return is the first return filed on Form 1120S since 2004, the petitioner indicated on page 1, part G of its 2007 tax return that it was not the first year that the petitioner was electing to be an S corporation.

that it employed and paid the beneficiary the full proffered wage from the priority date in 2004 or subsequently.

The petitioner submitted the beneficiary's Internal Revenue Service (IRS) Forms W-2 to demonstrate that the petitioner paid the beneficiary in 2006 through 2008 and in 2011. The petitioner additionally submitted pay stubs that it issued to the beneficiary in 2009 for \$1,892.00 and in 2012 for \$45,698.00.

- In 2006, the IRS Form W-2 stated total wages of \$22,480.00.
- In 2007, the IRS Form W-2 stated total wages of \$41,090.00.
- In 2008, the IRS Form W-2 stated total wages of \$46,640.00.
- In 2009, the beneficiary's pay stub stated total wages of \$1,892.00.
- In 2011, the IRS Form W-2 stated total wages of \$53,500.00.
- In 2012, the beneficiary's pay stub stated total wages of \$45,698.00.

In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date. Since the proffered wage is \$53,060.00 per year, the petitioner must establish that it can pay the beneficiary the full proffered wage for 2004, 2005, and 2010, and the difference between the proffered wage and wages already paid to the beneficiary in 2006 through 2009 and in 2012.

Year	Wages Paid	Remaining Difference
2004	\$0.00	\$53,060.00
2005	\$0.00	\$53,060.00
2006	\$22,480.00	\$30,580.00
2007	\$41,090.00	\$11,970.00
2008	\$46,640.00	\$6,420.00
2009	\$1,892.00	\$51,168.00
2010	\$0.00	\$53,060.00
2011	\$53,500.00	None
2012	\$45,698.00	\$7,362.00

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); *Uheda 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).

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. The record before the director closed on March 24, 2009 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was the most recent return available. In response to the Notice of Intent to Deny (NOID) issued by the AAO on September 14, 2012, the petitioner submitted its 2011 tax return. The AAO need not consider this tax return as evidence of the petitioner's ability to pay in 2011, as the petitioner demonstrated that it paid the beneficiary the proffered wage that year. The petitioner's tax returns demonstrate its net income for 2004 through 2010, as shown in the below table.

- In 2004, the Form 1120 stated net income of \$106,188.00.
- In 2005, the Form 1120 stated net income of \$5,059.00.
- In 2006, the Form 1120 stated net income of -\$43,965.00.
- In 2007, the Form 1120S stated net income³ of -\$44,402.00.
- In 2008, the Form 1120S stated net income of \$30,030.00.
- For 2009, the petitioner did not submit a tax return.
- For 2010, the petitioner did not submit a tax return.

The petitioner did not demonstrate sufficient net income to pay the proffered wage in 2005 or 2010, or the difference between the proffered wage and wages already paid in 2006, 2007, and 2009.

Although the petitioner's net income in 2004 was greater than the proffered wage and the petitioner's net income in 2008 was greater than the difference between the proffered wage and wages actually paid, USCIS records indicate that the petitioner filed another Form I-140 petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries that have been pending simultaneously, 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. Comm. 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 Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no specific, corroborated information

³ 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 18 of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 5, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The AAO notes that the petitioner failed to provide Schedule K information for its 2007 through 2008 Forms 1120S. Accordingly, the petitioner did not demonstrate that it had additional income, credits, deductions, or other adjustments shown on its Schedule K for those years. The AAO will therefore consider the petitioner's net income listed on Schedule K of its tax returns.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

about the proffered wages for the beneficiary of that other petition, about the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. Furthermore, no information is provided about the current employment status of the beneficiary, the date of any hiring, and any current wage of the beneficiary.

Because the petitioner failed to provide any evidence regarding the proffered wage and/or wage actually paid to the beneficiary of the other Form I-140 petition, the AAO finds that the petitioner has failed to establish that its net income was sufficient to pay the proffered wage in 2004 or that its net income was sufficient to pay the difference between the proffered wage and wages actually paid in 2008. The petitioner did not demonstrate that it had enough net income to pay all proffered wages for 2004, 2005, and 2010, or the difference between the proffered wage and wages actually paid for 2006 through 2008.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2004 through 2010, as shown in the below table.

- In 2004, the Form 1120 stated net current assets of -\$112,300.00.
- In 2005, the Form 1120 stated net current assets of -\$100,678.00.
- In 2006, the Form 1120 stated net current assets of -\$129,370.00.
- In 2007, the Form 1120S stated net current assets of \$25,510.00.
- In 2008, the Form 1120S stated net current assets of -\$16,959.00.
- For 2009, the petitioner did not submit a tax return.
- For 2010, the petitioner did not submit a tax return.

The petitioner did not demonstrate that it had enough net current assets to pay the proffered wage for 2004, 2005, and 2010, or the difference between the proffered wage and wages actually paid for 2006, 2008, and 2009. Although the petitioner's net current assets in 2007 were greater than the difference

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

between the proffered wage and wages actually paid, the petitioner failed to demonstrate that it had sufficient net current assets to pay the proffered wage of all beneficiaries in 2007.

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, its net income, or its net current assets.

On appeal, counsel asserts that the compensation the petitioner paid its officers in 2004 through 2005 could have instead been used to pay the proffered wage. The sole shareholder of a corporation has 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 Forms 1120 and 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.

The petitioner provided no specific information corroborating this claim made by counsel on appeal, including Forms W-2 issued by the petitioner to any of its officers or statements from any of the petitioner's officers verifying that they would be willing and able to forego such compensation. Further, the petitioner's 2006, 2007, and 2008 tax returns do not reflect any amount of officer's compensation paid in those years (page 1, Line 12). Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

On appeal, counsel claims that the petitioner lost money starting in 2006 due to the trend of outsourcing and that the petitioner experienced uncharacteristically low income in 2006 and 2007 due to legal problems with its patent. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

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 *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.

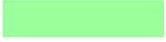
In the instant case, the petitioner did not demonstrate its continuing ability to pay based on wages paid, its net income, or its net current assets. Between 2004 and 2011, the petitioner's gross sales dropped by approximately 66 percent, the petitioner's officer compensation payments dropped by approximately 59 percent, and the petitioner's payroll costs dropped by approximately 48 percent. The petitioner submitted information regarding the reputation of Dr. [REDACTED] in the medical community, including a printout from the petitioner's website. However, the petitioner failed to explain how Dr. [REDACTED] reputation actualized the petitioner's ability to pay from the priority date and subsequently. Further, the printout states that the petitioner's business was founded by Dr. [REDACTED] in 1988. This cannot be reconciled with the date (1985) listed by the petitioner on Form I-140 and on its tax returns. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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.



(b)(6)

Page 10

ORDER: The appeal is dismissed.