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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: **MAY 20 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on motion. The motion will be granted, the previous decision by the AAO dated April 20, 2012, will be affirmed, and the petition will remain denied.

The petitioner is a restaurant establishment. It seeks to employ the beneficiary permanently in the United States as a 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 failed to submit the initial required evidence to establish: (1) that the petitioner had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; and, (2) that the beneficiary had the required experience for the position offered. The petitioner submitted additional documents on appeal and the AAO determined that the petitioner had failed to establish its ability to pay the proffered wage in 2001, and had failed to establish that the beneficiary possessed the experience required on the labor certification as of the priority date. The AAO dismissed the appeal.

The record shows that the motion is properly filed and timely. 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.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The petitioner asserts that the beneficiary does in fact have the requisite two years of employment experience as described in the job requirements for labor certification, but placed an inaccurate date of employment on the Form ETA 750.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. Counsel indicates that USCIS failed to consider discretionary evidence, and the totality of the circumstances in concluding that the petitioner did not have the ability to pay the proffered wages from the priority date in 2001.

As set forth in the AAO appeal dismissal dated April 20, 2012, one of the issues 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. Beyond the decision of the director, the AAO also determined the petitioner did not demonstrate that the beneficiary obtained the requisite two years of employment experience prior to the priority date of the labor certification.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$607.20 per week which amounts to \$ 31,574.40 per year. The Form ETA 750 states that the position requires two years of experience.

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 motion.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner failed to state when the petitioner was established, its current number of employees, gross or net annual incomes, or the petitioner's IRS tax identification number as required by the Form I-140, Immigrant Petition for Alien Worker. The petitioner claimed to have been established in 1997. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year basis. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have worked for the petitioner at the time of filing, however other documents in the record state that he began employment with the petitioner in September 2006.²

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

¹ The submission of additional evidence on motion 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 motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The petitioner did not submit any evidence of wages paid to the beneficiary.

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 April 26, 2001. Although the petitioner indicates in his affidavit dated May 18, 2012 that he hired the beneficiary during the vacation period of his regular cook, no demonstrated proof of wages paid was submitted for review such as W-2s, cashed payroll checks, etc. for the specific year in question, or for anytime thereafter. Without documentary evidence to support this claim, the assertions of counsel or petitioner, will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 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 to demonstrate its ability to pay the proffered wage to the beneficiary.

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 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 December 31, 2007 with the receipt by the director of the Form I-140. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. As the AAO found that the petitioner could pay the proffered wage in 2002 to 2006, only 2001 will be considered here. The petitioner's tax returns for the year in question, demonstrate its net income for 2001, as shown to be \$20,767.

Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage.

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.³ A corporation's year-end current assets are shown

³According 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

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. As the petitioner can establish its ability to pay the proffered wage from 2002 to 2006, only 2001 will now be considered. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 to be \$20,129.00.

Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the proffered wage.

In addition, counsel offers evidence into the record indicating that the petitioner's total assets of \$34,840 for 2001 are the same as its net current assets, and should have been used as a basis for calculating the ability to pay. Counsel's submission that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is without merit. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner also submits a letter from [REDACTED] dated May 10, 2012. [REDACTED] indicates that USCIS erred in concluding the petitioner did not have the ability to pay the proffered wage during the 2001 year based on reliance on the ordinary income of \$20,767.00. [REDACTED] submits that according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, [REDACTED] interpretation of the language in that memorandum is overly broad and does not

comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 26, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in years 2002 through 2006, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001.

The petitioner indicates that USCIS should have instead pro-rated the proffered wages to encompass only the period from the priority date of April 26, 2001 through the end of the calendar year, a period of approximately 8 months. However, the ability to pay wages cannot be demonstrated only from the specific priority day onwards. The ability to pay must be established for the full calendar year. If the proffered wage period were pro-rated utilizing such an ability to pay analysis, it would also be necessary to pro-rate the net income of the petitioner for the year of 2001. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage.

While 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 petitioner has not submitted such evidence.

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

Counsel's assertions on motion 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 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 submitted insufficient information into the record in order to determine that based on a totality of the circumstance analysis the business had the ability to pay the proffered wage in 2001. The petitioner has not demonstrated that he paid the wage in 2001 or any other year, to the beneficiary. The petitioner failed to state any of the required information on Form I-140 to include date of establishment, number of employees, taxpayer identification number, or gross and annual income. The tax returns reflect low officer compensation paid, no wages paid in any year (although tax returns reflect some cost of labor paid). In addition, although it is noted that the business has been operating since 1997, no independent information was provided regarding its reputation, or any issues of business replacement. As indicated in the AAO's previous decision upon appeal, the petitioner has not established any unusual circumstances to parallel those in *Sonegawa*. 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 ability to pay the proffered wage beginning on the priority date.

The AAO also found in a beyond the decision of the director during appeal, that the employment experience letter submitted for the beneficiary from [REDACTED] dated October 23, 2006, described the beneficiary's experience to be that of an international chef operating in a manager role at the restaurant, and not of an Italian food cook as indicated by the beneficiary on the labor certification. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

The AAO also determined that the employment period with [REDACTED] as stated by the beneficiary on the Form ETA 750, differed from the previously mentioned October 23, 2006 employment experience letter. The AAO therefore in viewing the all of the evidence presented as a whole, determined that the beneficiary did not have the requisite two years of experience in the position offered as a cook, Italian specialty as stated by the petitioner in the labor certification application.

The petitioner also submits upon motion an aforementioned affidavit from its sole shareholder, [REDACTED] dated May 18, 2012 which states that he reviewed the letter from the beneficiary's prior employer at [REDACTED] and believes that USCIS read more into the description than was stated. [REDACTED] also indicates that it is necessary for a cook to have the experiences indicated on the letter from [REDACTED] in order to properly estimate food consumption as also indicated in the advertising he placed during the certification process. The petitioner's sole shareholder also indicated that the beneficiary mistakenly put the incorrect employment date on the Form ETA 750 regarding the end date of his previous employment with [REDACTED]. The AAO does not find these statements to be sufficient in resolving the inconsistencies found upon motion. 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). Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In the instant motion the petitioner offered no independently objective, corroborating documentation of the beneficiary's employment experience in order to demonstrate that the beneficiary has the requisite experience as of the priority date in light of the inconsistencies determined by the AAO in its decision dated April 20, 2012. As the letter references that the beneficiary prepared both "national and international dishes such as, Italian and Portuguese dishes," the letter does not establish that the beneficiary has 2 years of experience in the position offered as a cook, Italian specialty. The labor certification does not state that the individual can qualify based on experience in related occupations, such as a cook, any specialty. Therefore, it has not been demonstrated that the beneficiary obtained the requisite employment experience before the priority date of the petition.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen and reconsider is granted. The prior decision of the AAO, dated April 20, 2012, will not be disturbed, and the petition remains denied.