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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

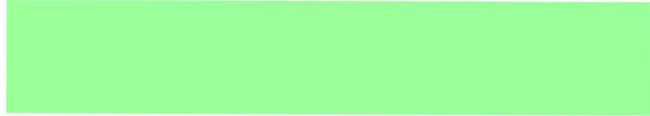


DATE: **MAY 28 2013**

OFFICE: TEXAS SERVICE CENTER

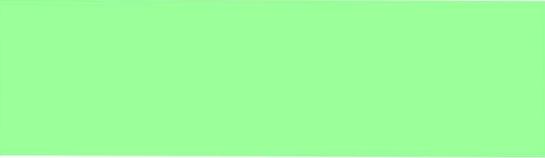
FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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,

*Rachel Ni Torino*  
for

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen and a motion to reconsider.<sup>1</sup> The motion to reopen will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The director determined that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage and denied the Form I-140, Immigrant Petition for Alien Worker, accordingly. On appeal, the AAO also found that the record did not establish the petitioner's ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2) and further concluded that the petitioner had not established that the beneficiary was qualified for the offered position. The AAO additionally indicated that the ETA Form 9089, Application for Permanent Employment Certification, in the record was not signed by the petitioner, beneficiary or counsel and, therefore, that the Form I-140 could not be approved on this basis as well. 20 C.F.R. § 656.17(a)(1).

On motion, counsel for the petitioner submits a brief and additional evidence in the form of the first pages of its federal tax returns for 2009 through 2011; the 2009 business license for [REDACTED] issued by the City of [REDACTED] New Jersey; a 2008 Sanitary Inspection Report for [REDACTED] in [REDACTED] New Jersey; a 2010 newspaper advertisement for [REDACTED] a January 19, 1995 article and advertisement from the [REDACTED] reporting [REDACTED] celebration of its tenth year in business; [REDACTED] payroll for the period May through October 2012; an online advertisement for [REDACTED] that reflects three business locations; the petitioner's bank statements from April 1 through September 30, 2012; 2012 telephone billing statements for the petitioner; 2011 and 2012 utility bills for [REDACTED] 2012 supply invoices for [REDACTED] statements relating to the beneficiary's employment experience; a copy of the ETA Form 9089 bearing the signatures of the petitioner, beneficiary and counsel; and takeout menus and promotional materials for [REDACTED]

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

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<sup>1</sup> On the Form I-290B submitted on October 26, 2012, counsel for the petitioner checked Box A, which states "I am filing an appeal." However, the accompanying brief stated "motion to reopen/reconsider." It is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1 (effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. However, because counsel for the petitioner characterized the petitioner's filing as a motion to reopen and a motion to reconsider on the brief, it will be accepted as such despite the incorrect box being checked on the form.

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence . . . .

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reopen and the motion to reconsider are properly filed and timely. Although the petitioner has not met the requirements for a motion to reconsider, it has satisfied those for a motion to reopen, submitting new facts with supporting documentation not previously provided. Therefore, the motion is granted and the AAO will reopen the matter.

As a threshold matter, the AAO finds that the petitioner, on motion, has satisfied the regulation at 20 C.F.R. § 656.17(a)(1) as it has now provided a copy of the ETA Form 9089 that reflects the signatures of its owner, the beneficiary and counsel. The petitioner's submission of a signed copy of the ETA Form 9089, in conjunction with the original ETA Form 9089 in the record, is found to substantively meet the requirements of 20 C.F.R. § 656.17(a)(1).

The AAO now turns to the issue of whether the petitioner has established a continuing ability to pay the offered wage.

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 . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

As fully discussed on appeal, United States Citizenship and Immigration Services (USCIS) in determining a petitioner's ability to pay first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by the Department of Labor (DOL) and whether it continues to do so. In such cases, if the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during this period, that evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not demonstrate that it employed

and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS examines the net income figure reflected on the petitioner's federal income tax returns, 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 (6<sup>th</sup> Cir. Filed Nov. 10, 2011).<sup>2</sup> If the petitioner's net income during the period time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where an employer's net income or net current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

On appeal, the AAO determined that the record did not establish the petitioner's continuing ability to pay the proffered wage of \$14.65 per hour or \$30,472.00 per year (based on a 40 hour week) as of November 29, 2006, the date on which the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by the Department of Labor (DOL). The petitioner was found to have submitted no evidence that it had employed the beneficiary at a wage equal to or in excess of the proffered wage of \$30,472.00 per year and its federal tax returns for 2006 and 2007 did not establish that its net income or net current assets had exceeded the proffered wage for the required period. The AAO also concluded, pursuant to *Sonogawa*, that the petitioner had failed to submit sufficient evidence to establish that the totality of its circumstances demonstrated its ability to pay the proffered wage, noting that the tax returns in the record reflected low gross revenues, officer compensation and wages paid and, further, that the record lacked evidence of the petitioner's historical growth or any other persuasive evidence of its financial situation.

On motion, counsel for the petitioner contends that the petitioner's overall financial circumstances establish its ability to pay the proffered wage, despite the low net income and negative net current assets reported on its 2006 and 2007 tax returns. He states that the petitioner opened its restaurant business in 1985, currently employs 15 individuals, and is strategically located in a busy business district of [REDACTED] New Jersey. Counsel further asserts that the petitioner's expectation of continued business growth and increasing profits from its [REDACTED] restaurant "and its other

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<sup>2</sup> 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983).

stores,” reasonably establish its ability to pay the proffered wage, noting that the petitioner contends that it has “many other chain location stores in New Jersey,” which demonstrates its ability to pay.

In support of counsel’s assertions, the record contains the first page of the petitioner’s tax returns for 2009 through 2011, as well as its bank statements from April 1 through September 30, 2012. The petitioner has also provided its 2009 business license issued by the City of [REDACTED] which counsel points to as proof of its existence. The submitted 2008 Sanitary Inspection Report relating to its [REDACTED] restaurant in [REDACTED] and the paid utility bills, counsel asserts, are proof of the petitioner’s satisfactory performance, compliance with state regulations and sense of responsibility. Counsel further states that the petitioner’s submission of a 2010 newspaper advertisement for [REDACTED] in [REDACTED] and a January 19, 1995 article and advertisement from the [REDACTED] reporting [REDACTED] celebration of its tenth year in business, offer evidence of its “excellent track record, historical growth, service to the community and long-standing business.” He also contends that the submission of the petitioner’s payroll records for the week ending May 3, 2012 through October 18, 2012 is proof of its financial strength and ability to pay its other employees.

As proof of the scope of the petitioner’s business operations, counsel points to the online advertisement for [REDACTED] which reflects business locations in [REDACTED] and the takeout menus and promotional materials for these locations that have been submitted for the record. Counsel contends that these promotional materials further demonstrate that the petitioner’s financial resources are such that it can afford to contribute to the community.

The AAO notes the additional evidence submitted by the petitioner in the present case, but does not find it to support counsel’s assertions. The additional tax materials submitted for the record are limited to the first pages of the petitioner’s tax returns for 2009 through 2011, which reflect gross revenues of \$511,716.00 for 2009; \$577,379.00 for 2010; and \$606,206.00 for 2011; net income of \$5,417.00 for 2009; \$8,729.00 for 2010 and \$5,363.00 for 2011; and officer compensation of \$70,200.00 for 2009; \$70,600.00 for 2010; and \$75,400.00 for 2011. This additional information regarding the petitioner’s finances is, however, of little evidentiary value in the absence of the petitioner’s complete tax filings for these years. The 2012 bank statements provided by the petitioner offer evidence only of the amount of money it had in its account during a particular time period rather than its financial health and the submitted payroll records also indicate only that the petitioner paid wages to between 11 and 18 workers from May to October 2012. Moreover, the submitted payroll records indicate that for the entire May to October period, the majority of the petitioner’s employees were employed on a part-time basis, working 20 or fewer hours a week. The AAO also finds the online advertisement, takeout menus and promotional materials provided by the petitioner to offer insufficient proof of its ownership of multiple restaurants. The record contains no settlement agreements, mortgage loans, articles of incorporation, property tax assessments or registrations with the State of New Jersey to demonstrate the petitioner’s ownership or operation of any restaurant other than the [REDACTED] located in [REDACTED]. Therefore, the AAO does not find the record on motion to offer sufficient evidence of the petitioner’s finances or business growth to establish that the totality of its circumstances demonstrate its ability to pay the proffered wage.

Based on the record before us on motion, the petitioner has not established its ability to pay the proffered wage as of the November 29, 2006 priority date of the ETA Form 9089.

The petitioner also submits evidence to overcome the AAO's determination that the petitioner has failed to demonstrate that the beneficiary is qualified for the offered position of cook.

On appeal, the AAO questioned the beneficiary's claim to have worked two full-time jobs for a period of five years, noting that the ETA Form 9089 indicated that the beneficiary had begun his employment with both [REDACTED] on February 4, 1997, and had left his employment with these restaurants on August 11, 2002 and August 11, 2003 respectively. The AAO also found that an April 23, 2007 statement from [REDACTED] which indicated that the beneficiary had left her employment on August 11, 2003, contradicted the date provided by the beneficiary on the ETA Form 9089, noting that, pursuant to *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), it was incumbent on the petitioner to resolve any inconsistency in the record with independent objective evidence. The AAO further found that the statement from [REDACTED] did not meet the requirements of the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) as it failed to state her title, whether the beneficiary had worked full- or part-time, or provide a detailed description of the beneficiary's employment.

On motion, the petitioner submits statements from each of the employers reflected on the ETA Form 9089. The statement from [REDACTED] is dated October 12, 2012 and identifies her as the owner of [REDACTED]. In her statement, [REDACTED] indicates that she employed the beneficiary as a cook from February 4, 1997 to August 11, 2002 and that he worked 40 hours a week, from 6 pm to 1 am, Monday through Saturday. She states that as a cook he was responsible for "the preparation of all foods, the development of each and every one of the dishes, preparation of pastas, salads, main dishes, vegetable cooking and other activities." The October 5, 2012 statement from [REDACTED] reflects that he is the owner of [REDACTED] and that the beneficiary worked at his restaurant from February 4, 1997 until August 11, 2003. He states that the beneficiary worked approximately 40 hours a week, Monday through Saturday, from 10 am until 5 pm, and that he was responsible for prepping, receiving orders and cooking, specifically "sautéing, soups, meats, desserts and finishing dishes."

Although the AAO acknowledges the statements from [REDACTED] we do not find them to resolve the questions raised regarding the beneficiary's employment history. The petitioner has submitted no independent, objective evidence of the beneficiary's prior employment experience as required by *Matter of Ho*, e.g., pay stubs, tax documents, financial statements or other evidence of payments made to the beneficiary by his prior employers during the claimed periods. Accordingly, the record on motion fails to demonstrate that the beneficiary had the two years of experience as a cook as of the priority date as required by the ETA Form 9089 and, therefore, that he is qualified for the offered position.

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. Accordingly, the prior decision of the AAO will be affirmed.

**ORDER:** The motion to reopen is granted and the decision of the AAO dated September 28, 2012 is affirmed. The petition remains denied.