

(b)(6)

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



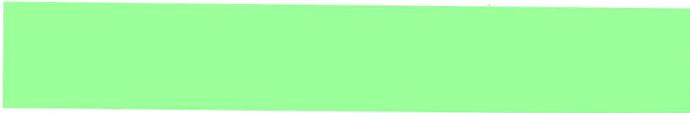
U.S. Citizenship
and Immigration
Services



DATE: **MAR 25 2014** Office: NEBRASKA SERVICE CENTER



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner then filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motions will be granted, and the appeal will be dismissed. The petition remains denied.

The petitioner is an automotive repair service. It seeks to employ the beneficiary permanently in the United States as an autobody repairer. 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.

On motion, and in response to the AAO's Request for Evidence (RFE) dated November 4, 2013, the petitioner submitted copies of bank account statements, tax returns, W-2 forms, selected photographs, and [REDACTED] Corporation. The petitioner also submitted copies of selected articles and pages from books. This constitutes new facts and/or evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motions are granted.

As set forth in the director's decision dated April 6, 2007, and the AAO's decision dated January 22, 2014, the primary issue in this case is whether 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 priority date in this matter is April 25, 2001. Counsel asserts that based upon a totality of the circumstances, the petitioner has established its ability to pay the proffered wage.

Therefore, on motion the primary issue is whether the petitioner has established the continuing ability to pay the proffered wage since April 2001.

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 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$17.43 per hour (\$36,254.40 per year). The Form ETA 750 at part 14 states that the position requires two years of experience in the job offered.

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 [REDACTED] is structured as a C corporation.² The record also shows that [REDACTED] was established in 1994. 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, he does not claim to have been employed by [REDACTED]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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. Comm. 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. Comm. 1967).

In the instant matter, it has been determined that the petitioner, [REDACTED], has established its ability to pay the proffered wage for 2003, 2004, 2005, and 2006. Therefore, the AAO will be examining the petitioner's [REDACTED] ability to pay the proffered wage for 2001 and 2002. Because the successor-in-interest relationship between [REDACTED]

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

² Because the record of proceeding shows that [REDACTED] was the petitioner until 2003, when [REDACTED] took over the business by way of successor-in-interest, the AAO will examine [REDACTED] ability to pay the proffered wage in 2001 and 2002.

did not take place until 2003,
tax returns will be examined for 2001 and 2002.

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. Here, the petitioner has not submitted any evidence to demonstrate that it employed the beneficiary in 2001 and 2002.

If, as in this case, 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.

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).

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. As is indicated on the labor certification, the proffered wage in the instant matter is \$21,000.00 per year. The petitioner’s tax returns demonstrate its net income as shown in the table below:

- In 2000, the Form 1120 stated net income of -\$139,472.00.³
- In 2001, the Form 1120 stated net income of -\$140,194.00.
- In 2002, the Form 1120 stated net income of -\$208,578.00.

Therefore, for the years 2000, 2001, and 2002, the petitioner failed to establish that it had 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.⁴ 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.

USCIS will not consider the petitioner’s total assets in evaluating its ability to pay the proffered wage. These total assets include items such as equipment and real estate which the petitioner

³ Although the priority date in the instant matter is 2001, for purposes of examining the totality of the circumstances, the AAO will consider 2000 tax return.

⁴ 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.

needs to do business. It is unlikely that such assets would be sold in order to pay the beneficiary the proffered wage. Rather, USCIS will review current assets and liabilities in assessing the petitioner's likely capabilities. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below:

- In 2000, the Form 1120 stated net current assets of -\$611,463.00.
- In 2001, the Form 1120 stated net current assets of -\$567,903.00.
- In 2002, the Form 1120 stated net current assets of -\$667,877.00.

The petitioner did not establish that it had sufficient net current assets to pay the proffered wage in 2001 and 2002. 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 through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, counsel asserts that the AAO erred in not properly taking into account the totality of circumstances and assessing all of the evidence which when examined demonstrates the petitioner's ability to pay the proffered wage.

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. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Counsel asserts that the petitioner's average corporate bank account balances should be taken into consideration in determining the petitioner's ability to pay the proffered wage in 2001 and 2002. The petitioner submitted a copy of a summary of its monthly bank balances and cancelled checks for 2001 and 2002. Reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The petitioner also submitted a copy of an accountant letter, written and signed by [REDACTED], CPA, dated March 1, 2013, who stated in part that in 2001, [REDACTED] gross receipts were almost \$3 million, and that as permitted by law, the company's taxable income was reduced by permitted depreciation deductions and other allowable deductions, and that the company's ability to pay the proffered wage is documented on the petitioner's tax return at Schedule L, line 1 that shows cash available in the amount of \$166,000.00. The CPA further stated that in 2002, [REDACTED] reported \$2.9 million in gross receipts, and substantial depreciation for assets and other allowable deductions that reduced its taxable income, and ended the year with a cash flow as indicated on Schedule L, line 1, of approximately \$150,000.00, an amount sufficient to demonstrate the company's ability to pay the proffered wage. Contrary to the statements made, as noted above, both USCIS and the federal courts have concluded that adding back depreciation to net income overstates the petitioner's ability to pay the proffered wage. Depreciation is a real expense. *See, e.g., River Street Donuts, LLC.*

Furthermore, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Therefore, reliance on the petitioner's total assets does not give an accurate picture of the petitioner's ability to pay the proffered wage.

In addition, counsel states that the petitioner has been in business since 1994 that its income has steadily increased and that its gross receipts exceeded \$1 million per year. Reliance on the petitioner's gross receipts and wages paid to other workers is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner showing that it paid wages in excess of the proffered wage is insufficient. Furthermore, the petitioner has not shown through audited financial documents that the increase in income has been significant enough to allow it to pay the beneficiary's wage. *See Sonegawa, supra.* 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 asserts that the petitioner's business was affected by the events of September 11, 2001 in New York. To support this assertion, counsel states that the petitioner was in litigation and was carrying a large sales tax liability; over \$699,937.00 in 2000, \$773,175.00 in 2001, and \$852,105.00 in 2002, and that it paid a reduced amount in 2004 in settlement of this liability. Counsel states that the petitioner's bank statements reflect additional available funds that were not reflected on its 2001 and 2002 tax returns because of the liability arising from the temporary tax dispute which was ongoing at that time. As noted above, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The petitioner submitted a copy of the decision in *In the Matter of George Statharos*, as Officer of [REDACTED], decided on June 12, 2003, with a dismissal of the petition. The petitioner also submitted a copy of a Satisfaction of Judgment for [REDACTED] Corporation which indicates that the warrant by the New York State Department of Taxation and Finance was issued to [REDACTED] on April 20, 2004, and that the judgment is recorded as having been satisfied in the sum of \$144,476.00 on July 8, 2008. Here, the documents do not show that [REDACTED] was indebted to the New York State Department of Taxation and Finance in 2001 or 2002, even though [REDACTED], is said to have represented [REDACTED] as one of its officers. There is no evidence in the record to demonstrate a successor-in-interest relationship between [REDACTED] and [REDACTED].

The petitioner also submitted a copy of an article published by [REDACTED] (January 2014 issue) stating that in 2001, the New York City medallion market prices increased almost by five-fold from 2001 to 2010. The petitioner submitted a copy of an article published by [REDACTED] Magazine (January 2014 issue) listing New York City Taxi Medallion Prices, December 2013 for an individual medallion and for a mini corporation (2 medallions); the latter being priced over two times that of the former. The petitioner submitted a copy of chapter 1 from a book entitled [REDACTED]. The author discusses the difficulties facing the taxi drivers in New York City after September 11; stating that the taxi operation in New York City suffered extreme hardship as a consequence of the 9/11 attack. Although the Wounded City report indicates that the September 11 event resulted in a business and economic loss to the New York City taxis, there is no evidence in the record to demonstrate any specific loss to the petitioner.

The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001. The general report and the broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot without more specific information

demonstrate why the petitioner does not have the continuing ability to pay the proffered wage beginning on the priority date. Neither the increase in medallion prices nor the Wounded City report establishes that the petitioner's financial status would have been stronger had it not been for the events of September 11.

The AAO notes that the petitioner's tax returns do not show a substantial decrease in net income or net current assets from 2000 to 2001 to 2002. The petitioner's income was -\$139,472.00 in 2000; -\$140,194.00 in 2001; and -\$208,578.00 in 2002. The petitioner's net current assets were -\$611,463.00 in 2000; -\$567,903.00 in 2001; and -\$208,578.00 in 2002. The petitioner has not shown a significant variation in its income or net current assets for any of these three years, nor any specific negative impact resulting from the events of September 11 sufficient to substantiate its claimed uncharacteristic business loss.

The evidence presented on motion and in response to the AAO's RFE cannot be concluded to outweigh the evidence of record that, considering the totality of circumstance, the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

In weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Although alleged by counsel on motion, there are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Although the petitioner, [REDACTED] income tax returns demonstrate an increase in gross receipts to and including 2009, and a modest salary growth over the years, this progress is insufficient to ignore the deficiencies in [REDACTED]; 2000, 2001 and 2002 net income and net current asset amounts. Furthermore, the petitioner has not submitted sufficient evidence to demonstrate its reputation within the industry or that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The AAO's prior decision, dated January 22, 2014, is affirmed. The petition remains denied.