

(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: **MAY 21 2015**



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:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Nebraska Service Center, (director). We dismissed the petitioner's appeal, affirmed our decision on motion to reconsider, and denied a subsequent motion. The case is now before us on a third motion to reopen and motion to reconsider. The motions will be denied, our decision to dismiss the appeal will be affirmed.

The petitioner describes itself as a deli/catering business. It seeks to employ the beneficiary permanently in the United States as a garde manger. 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 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. Specifically, the petitioner provided additional documentation regarding its sole-shareholder's income.

At 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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). Here, the Form ETA 750 was accepted on December 16, 2004.

The proffered wage as stated on the Form ETA 750 is \$500 per week (\$26,000 per year, based on 52 weeks of work). The Form ETA 750 states that the position requires two years of experience in the offered job as a garde manger. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, 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).

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on February 8, 2000, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

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. As stated in our previous decision, the petitioner employed the beneficiary, but did not pay the beneficiary the full proffered wage in all years from the priority date of December 16, 2004. Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, provided by the petitioner reflect the beneficiary was paid as follows:

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Year	Wages Paid to Beneficiary
2004	No evidence submitted
2005	No evidence submitted
2006	No evidence submitted
2007	\$4,200 <sup>2</sup>
2008	\$18,000
2009	\$26,000
2010	\$18,000
2011	\$16,000
2012	\$20,000
2013	\$19,000
2014	\$24,000

The petitioner has established that it employed and paid the beneficiary the full proffered wage in 2009. The petitioner established that it paid partial wages in 2007, 2008, 2010, 2011, 2012, 2013, and 2014. Therefore, the petitioner must establish that it could pay the full proffered wage in 2004, 2005, and 2006 and the difference between the proffered wage and the wages actually paid to the beneficiary in 2007, 2008, 2010, 2011, 2012, 2013, and 2014, that is:

Year	Difference Between Proffered Wage and Wages Paid to Beneficiary
2004	\$26,000
2005	\$26,000
2006	\$26,000
2007	\$21,800
2008	\$8,000
2010	\$8,000
2011	\$10,000
2012	\$6,000
2013	\$7,000
2014	\$2,000

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*

<sup>2</sup> The record reveals that the beneficiary was hired in 2008 to replace another worker, [REDACTED] who had worked for the petitioner in 2007 and who was paid the indicated wages.

*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 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).

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. A corporation's year-end current assets are

shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns reflect the following net income<sup>3</sup> and end-of-year net current assets<sup>4</sup>:

<b>Year</b>	<b>Net Income</b>	<b>Net Current Assets</b>
2004	\$-7,762	\$-35,859
2005	\$-11,060	\$-43,819
2006	\$-12,016	\$-52,415
2007	\$-8,927	\$-17,430
2008	\$-7,896	\$-16,065
2010	\$-526	\$-17,951
2011	\$13,485	n/a
2012	\$-2,678	\$-13,322
2013	\$-2,292	\$-138,336

Therefore, the petitioner had sufficient net income to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2011, but did not have sufficient net income or net current assets to establish the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2004, 2005, 2006, 2007, 2008, 2010, 2012, or 2013.

The petitioner asserts on motion that USCIS should have considered funds paid as compensation to the sole shareholder when it calculated the ability 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 Form 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

<sup>3</sup> Forms 1120S, U.S. Income Tax Return for an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (since 2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 29, 2015) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The petitioner claimed no additional income, credits, deductions, or other adjustments on Schedule K of its tax returns.

<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

figures for ordinary income. The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock.

In our Request for Evidence (RFE) dated January 30, 2015, we requested evidence of wages paid to the beneficiary in 2013 and 2014 and a copy of the petitioner's 2013 federal income tax return, annual report, or audited financial statement. We also requested evidence that the company's sole shareholder was able to forego her annual compensation in order to pay the difference between the proffered wage and the wages actually paid to the beneficiary. Specifically, we requested that the petitioner provide copies of the company owner's personal income tax returns from 2008, 2009, 2010, 2012, and 2013, as well as evidence of the company owner's personal annual household expenses for each year since 2004.

The petitioner responded to this request by submitting additional evidence regarding the sole-shareholder's ability to forego all or part of the compensation she received from the petitioning company in order to allow the company to establish the ability to pay the proffered wage. As the petitioner has paid the beneficiary the full proffered wage in 2009 and had sufficient net income to pay the proffered wage in 2011, the petitioner's response to the RFE reflects the following:

Year	Sole-Shareholder's Annual Officer Compensation	Sole-Shareholder's annual household expenses
2004	\$26,200	\$32,200
2005	\$26,000	\$29,700
2006	\$26,000	\$25,900
2007	\$23,000	\$32,200
2008	\$23,000	\$20,876
2010	\$18,000	\$18,900
2012	\$16,000	\$21,470
2013	\$15,000	\$20,850

The petitioner's sole shareholder stated that she received child support payments in each year since 2005; however, child support payments to the petitioner's owner cannot be considered in determining the petitioner's ability to pay the proffered wage to the beneficiary. The company owner also stated that she received income from the rental of her home in 2005 and 2006 and income from an inheritance in 2007; however, this income is not reflected on her federal income tax returns.<sup>5</sup> Therefore, the claimed income cannot be considered.

<sup>5</sup> With the current motion to reopen the petitioner submits evidence relating to the 2007 disbursement of funds from the sale of the company owner's mother's home. However, as noted above, this income was not claimed on the company owner's federal income tax return. 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).

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."

The company owner's claimed annual household expenses exceeded her officer compensation in 2004, 2005, 2007, 2010, 2012, and 2013 and her federal income tax returns do not reveal any other sources of income in 2006, 2007, 2010, 2012, or 2013. The owner's household expenses were less than her officer's compensation in 2006 and 2008. After paying her claimed household expenses, the remaining balance of her compensation available to apply toward the proffered wage in those years would be \$100 and \$2,105, respectively. Thus, while the company owner states that she would have been willing to forego her officer compensation in order to pay the proffered wage to the beneficiary, the submitted evidence does not establish that she would have been able to do so in any of the relevant years. 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)).

The company owner states in response to the RFE that she could also have opened an equity line of credit on her property. In this case, the petitioner's owner submitted no evidence that she could have obtained such a line of credit or that the line of credit would have augmented her financial position. In addition, a home equity line of credit would increase the petitioner's owner's debt and add to her monthly expenses. Finally, as noted above, a corporation is a separate and distinct legal entity from its owners and shareholders. Therefore, a line of credit secured by the company's owner's personal property cannot establish the petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

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 has not established the historical growth of its business; in fact, as previously noted, the petitioner's tax records reveal an overall decline in gross receipts from 2004 to 2013 and negative net income and net current assets in all relevant years. Nor has the petitioner established its reputation within its industry, nor claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. The petitioner's gross receipts have generally declined since 2005, from \$262,829 to \$156,080 in 2013. Further, the petitioner claims three employees, but reports an average of about \$40,000 in salaries and wages on its tax returns. The record does not demonstrate that the petitioner would be able to increase its total salaries and wages paid by more than 50% for one additional worker. The petitioner did not demonstrate its ability to pay the proffered wages to the beneficiary by means of its net income or net current assets in all relevant years except 2011. 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 from the priority date onwards.

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). The petitioner has not met that burden.

**ORDER:** The motion to reopen and motion to reconsider are denied and our decision dated June 3, 2014, is affirmed. The petition remains denied.