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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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**MAY 06 2009**

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:  
LIN 06 267 51761

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

[REDACTED]

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by ETA Form 750, Application for Alien Employment Certification (labor certification), approved by the U.S. 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 labor certification. The director denied the petition accordingly.

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 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 labor certification was accepted for processing by 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 the labor certification submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the labor certification was accepted on April 11, 2001. The proffered wage stated on the labor certification is \$17.36 per hour (\$36,108.80 per year). The labor certification states that the position requires two years of experience in the job offered and the ability to prepare special orders for the petitioner's catering service.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp.*, *NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir.

1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record shows that the petitioner was incorporated in 1968 and is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year lasts from December 1 to November 30.

On appeal, counsel submits bank statements for the period of December 1, 2004 to December 31, 2004, and for November 14, 2001, November 14, 2002, November 14, 2003, November 14, 2004 and November 14, 2005. Counsel asserts on Form I-290B that the provided evidence "shows that there is money in our accounts." Counsel did not submit a brief with the appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the labor certification, 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, U.S. 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 petitioner will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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. The record contains the beneficiary's Forms W-2 for 2001, 2002, 2004, 2005 and 2006.<sup>2</sup> These documents indicate compensation paid by the petitioner, as shown in the table below.

- The 2001 Form W-2 stated compensation of \$20,800.00.
- The 2002 Form W-2 stated compensation of \$20,800.00.
- The 2004 Form W-2 stated compensation of \$22,150.00.
- The 2005 Form W-2 stated compensation of \$24,000.00.
- The 2006 Form W-2 stated compensation of \$26,000.00.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

<sup>2</sup> The petitioner did not submit a 2003 Form W-2 for the beneficiary.

The petitioner also provided a copy of the first page of the beneficiary's 2003 Form 1040, U.S. Individual Income Tax Return, which stated wages of \$21,200.00.<sup>3</sup> The first page of Form 1040 does not name the employer(s) that paid the wages. Therefore, the beneficiary's Form 1040 does not demonstrate that the petitioner employed the beneficiary in 2003. The petitioner also did not provide any evidence that it employed the beneficiary in 2007.

Accordingly, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$36,108.80 per year during the period from the priority date through 2007. Instead, the petitioner paid partial wages for 2001, 2002, 2004, 2005 and 2006. The petitioner has not demonstrated that it paid the beneficiary any wages in 2003 and 2007. The petitioner is therefore obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage. This difference is shown in the table below.

- In 2001, the difference between the wage paid and proffered wage was \$15,308.80.
- In 2002, the difference between the wage paid and proffered wage was \$15,308.80.
- In 2003, the petitioner did not demonstrate that it paid the beneficiary any wages.
- In 2004, the difference between the wage paid and proffered wage was \$13,958.80.
- In 2005, the difference between the wage paid and proffered wage was \$12,108.80.
- In 2006, the difference between the wage paid and proffered wage was \$10,108.80.
- In 2007, the petitioner did not demonstrate that it paid the beneficiary any wages.

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. 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).

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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected.

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<sup>3</sup> Wages are reported on Line 7 of Form 1040.

*See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record before the director closed on July 9, 2007, upon receipt of the petitioner's response to the director's request for evidence. As of that date, the petitioner's federal income tax return for the December 1, 2006 to November 30, 2007 fiscal year, which would have been reported on the petitioner's 2006 tax return, was not yet due. However, it must be noted that the petitioner did not submit a tax return for the December 1, 2000 to November 30, 2001 fiscal year, which would have been reported on the petitioner's 2000 tax return. Therefore, the petitioner did not provide a tax return for the fiscal year that encompassed the April 11, 2001 priority date. The petitioner's failure to provide this evidence required by 8 C.F.R. § 204.5(g)(2) is, by itself, sufficient cause to dismiss this appeal. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner's Forms 1120 for 2001, 2002, 2003, 2004 and 2005 demonstrate its net income, as shown in the table below.<sup>4</sup>

- From December 1, 2001 to November 30, 2002 (as reported on the petitioner's 2001 tax return), the petitioner's net income was \$116.00.
- From December 1, 2002 to November 30, 2003 (as reported on the petitioner's 2002 tax return), the petitioner's net income was \$2,157.00.
- From December 1, 2003 to November 30, 2004 (as reported on the petitioner's 2003 tax return), the petitioner's net income was -\$5,924.00.
- From December 1, 2004 to November 30, 2005 (as reported on the petitioner's 2004 tax return), the petitioner's net income was \$26,813.00.
- From December 1, 2005 to November 30, 2006 (as reported on the petitioner's 2005 tax return), the petitioner's net income was \$32,258.00.

Therefore, for 2001, 2002, 2003, 2004 and 2007, the petitioner failed to demonstrate sufficient net income to pay the difference between the wage paid and the proffered wage.

If the petitioner's net income, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will then review the petitioner's net current assets. We do not consider the petitioner's total assets in the determination of the ability

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<sup>4</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120, U.S. Corporation Income Tax Return.

to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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. USCIS therefore considers net current assets as an alternative method to actual wages paid and net income for demonstrating the petitioner's ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, 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 net current assets during the years in question are shown in the chart below.

- From December 1, 2001 to November 30, 2002 (as reported on the petitioner's 2001 federal income tax return), the petitioner's net current assets was -\$25,931.00.
- From December 1, 2002 to November 30, 2003 (as reported on the petitioner's 2002 federal income tax return), the petitioner's net current assets was -\$34,493.00.
- From December 1, 2003 to November 30, 2004 (as reported on the petitioner's 2003 federal income tax return), the petitioner's net current assets was -\$14,961.00.
- From December 1, 2004 to November 30, 2005 (as reported on the petitioner's 2004 federal income tax return), the petitioner's net current assets was \$7,899.00.
- From December 1, 2005 to November 30, 2006 (as reported on the petitioner's 2005 federal income tax return), the petitioner's net current assets was \$27,633.00.

Therefore, for 2001, 2002, 2003, 2004 and 2007, the petitioner had not established that it had the 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.

Counsel asserts in the appeal that there is another way to determine the petitioner's ability to pay the proffered wage. Counsel submits bank statements for the period of December 1, 2004 to December 31, 2004, and for November 14, 2001, November 14, 2002, November 14, 2003, November 14, 2004 and November 14, 2005 as evidence of the petitioner's ability to pay the proffered wage. Counsel's 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) that are required to establish a petitioner's ability to pay a proffered wage. While the regulation allows additional material "in

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<sup>5</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 do not establish 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, such as the petitioner's taxable income or the cash specified on Schedule L that were considered in determining the petitioner's net current assets. Fourth, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

In summary, counsel's assertions on appeal do not establish that the petitioner could pay the proffered wage from the day the labor certification was accepted for processing by the DOL.<sup>6</sup>

In addition to the preceding analysis, 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 (BIA 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 *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.

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<sup>6</sup> Further, the submitted bank statements contain a different Employer Identification Number (EIN) than is listed on the petitioner's federal income tax returns, the beneficiary's W-2 statements, and the Form I-140, Immigrant Petition for Alien Worker. The EIN listed on the bank statements is [REDACTED], whereas the EIN listed on the other documents is [REDACTED]. Counsel did not submit an explanation for this discrepancy. Accordingly, counsel has not demonstrated that these bank statements relate to the petitioner. 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 proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

In the instant case, the petitioner claims to have been in business since 1968. For the years tax returns were submitted, the petitioner has had gross receipts of over \$1.2 million per year. The petitioner did not submit any evidence about its reputation or its number of employees.<sup>7</sup> The petitioner has not established the occurrence of any uncharacteristic business expenditures or losses. The petitioner's longevity and gross receipts, by themselves, are not sufficient to demonstrate ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. Section 203(b)(3)(A)(i) of the Act 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. While no degree is required for this classification, 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The certified Form ETA 750 labor certification requires two years of experience in the job offered and the ability to prepare special orders for the petitioner's catering service.<sup>8</sup>

The record includes a letter from [REDACTED] in Dobbs Ferry, New York, that was submitted in response to the director's request for evidence. The letter states that the beneficiary worked at the company "in 1996 through 1997" as an "Italian and English cook." The letter does not state whether the beneficiary's employment was full time, nor does it provide the specific dates of employment. The letter does not set forth the specific duties of the position. In

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<sup>7</sup> The field "Current Number of Employees" was left blank on the Form I-140, Immigrant Petition for Alien Worker, as were several other relevant fields.

<sup>8</sup> Item 15 of ETA Form 750A (Other Special Requirements) states "Prepares special orders for our catering service."

addition, there is no evidence in the record that demonstrates the beneficiary's ability to prepare special orders for the petitioner's catering service as required by Item 15 of ETA Form 750A of the labor certification. The submitted experience letter is therefore not sufficient to demonstrate that the beneficiary qualifies for the offered position. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

**ORDER:** The appeal is dismissed.