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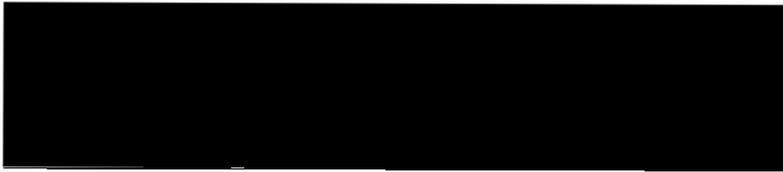
Date:

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:

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition and a subsequent motion to reopen were denied by the Director, Nebraska Service Center. The visa petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a hotel. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 19, 2006 denial, the single 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.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 15, 2001. The proffered wage as stated on the Form ETA 750 is \$60,860.80 per year. The Form ETA 750 states that the position requires a Bachelor's degree in Business Administration or Accounting and two years of experience in the job offered of accountant.

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.¹

On appeal, counsel submits a copy of the petitioner's 1998 through 2000 Forms 1120S, U.S. Income Tax Return for an S Corporation; a copy of Julie Hatch Maxfield, *Jobs in 2005: How do they compare with their March 2001 counterparts?*, 129 Monthly Labor Review 1, 1-2 (July 1, 2006); a copy of Terry Pristin, *Square Feet; Fewer Rooms at the Inn*, Section C, the New York Times (October 19, 2005); a copy of Robert P. Farmer, *Accommodating All Angles*, 26 The Meeting Professional, (March 2006); a copy of Michael Stoler, *Hospitality's Outlook Couldn't Be Rosier*, The New York Sun (August 31, 2006); and a copy of a U.S. Citizenship and Immigration Services (USCIS) interoffice memorandum, dated May 4, 2004, from William R. Yates, Associate Director for Operations, entitled *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)*. Other relevant evidence in the record includes copies of the petitioner's 2001 through 2005 Forms 1120S and copies of the petitioner's 2001 through May 31, 2006 bank statements. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in 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 August 19, 1978 and to currently employ 40 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year January 1 through December 31. On the Form ETA 750B, signed by the beneficiary on September 24, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of \$60,860.80 based on its tax returns, bank statements, and *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also references the interoffice memorandum issued by William R. Yates, Associate Director for Operations, dated May 4, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later

¹ The submission of additional evidence on 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).

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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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). 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.

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 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on June 23, 2006 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2006 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 1998 through 2005, as shown in the table below.

- In 1998, the Form 1120S stated net income² of \$71,847 (line 21 of page one of the petitioner’s IRS Form 1120S).
- In 1999, the Form 1120S stated net income of \$597,530 (line 23 of Schedule K).
- In 2000, the Form 1120S stated net income of \$902,673 (line 23 of Schedule K).
- In 2001, the Form 1120S stated net income of -\$528,380 (line 23 of Schedule K).
- In 2002, the Form 1120S stated net income of -\$548,154 (line 23 of Schedule K).
- In 2003, the Form 1120S stated net income of -\$1,026,747 (line 23 of Schedule K).

² 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) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 1999 through 2005, the petitioner’s net income is found on Schedule K of its 1999 through 2005 tax returns.

- In 2004, the Form 1120S stated net income of \$31,808 (line 17e of Schedule K).
- In 2005, the Form 1120S stated net income of \$1,679,349 (line 17e of Schedule K).

Therefore, for the years 2001 through 2004, the petitioner did not have sufficient net income to pay the proffered wage.³ The petitioner's 2005 net income would demonstrate its ability to pay the proffered wage in that year.

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. The petitioner's tax returns demonstrate its end-of-year net current assets for 1998 through 2005, as shown in the table below.

- In 1998, the Form 1120S stated net current assets of -\$45,639.
- In 1999, the Form 1120S stated net current assets of \$267,195.
- In 2000, the Form 1120S stated net current assets of \$588,581.
- In 2001, the Form 1120S stated net current assets of -\$1,410,001.
- In 2002, the Form 1120S stated net current assets of -\$1,688,795.
- In 2003, the Form 1120S stated net current assets of -\$2,461,168.
- In 2004, the Form 1120S stated net current assets of -\$2,234,468.
- In 2005, the Form 1120S stated net current assets of -\$407,418.

Therefore, for the years 2001 through 2004, the petitioner did not have sufficient net current assets to pay the proffered wage. (The petitioner has already established its ability to pay the proffered wage of \$60,860.80 in 2005 from its net income.)

The petitioner's tax returns demonstrate its gross receipts and salaries paid for 1998 through 2005, as shown in the table below.

³ It is noted that the petitioner has also submitted its 1998 through 2000 Forms 1120S. These tax returns are for the three years preceding the priority date of October 15, 2001, and have limited probative value when determining the petitioner's ability to pay the proffered wage of \$60,860.80 from the priority date and continuing until the beneficiary obtains lawful permanent residence. Therefore, the AAO will not consider the petitioner's 1998 through 2000 Forms 1120S when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

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.

- In 1998, the Form 1120S stated gross receipts of \$9,083,528 and salaries paid of \$1,944,410.
- In 1999, the Form 1120S stated gross receipts of \$9,766,921 and salaries paid of \$1,561,363.
- In 2000, the Form 1120S stated gross receipts of \$10,255,424 and salaries paid of \$1,807,103.
- In 2001, the Form 1120S stated gross receipts of \$8,073,311 and salaries paid of \$2,100,298.
- In 2002, the Form 1120S stated gross receipts of \$7,358,102 and salaries paid of \$2,246,728.
- In 2003, the Form 1120S stated gross receipts of \$7,123,929 and salaries paid of \$2,384,221.
- In 2004, the Form 1120S stated gross receipts of \$9,238,391 and salaries paid of \$2,539,592.
- In 2005, the Form 1120S stated gross receipts of \$11,479,338 and salaries paid of \$2,622,555.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that the petitioner has established its ability to pay the proffered wage based on its income tax returns, its bank statements, and *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner has submitted its bank statements for 2001 through May 31, 2006. These bank statements reflect balances ranging from a low of \$108,494.81 in 2001 to a high of \$1,695,931.20 in 2005.

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), 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, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is considered when determining the petitioner's net current assets.

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. Comm. 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's tax returns indicate it was incorporated on August 1, 1979 and has been in business for approximately 31 years. The petitioner has provided its tax returns for 1998 through 2005, with the 1998 through 2000 and 2005 tax returns establishing the petitioner's ability to pay the proffered wage of \$60,860.80. The petitioner's tax returns from the time of the priority date until 2005 all reflect wages paid of over \$2 million. In addition, the petitioner has shown that the hospitality industry in New York City suffered enormous setbacks due to the September 11, 2001 terrorist attacks.⁵ Further, the petitioner has shown that it was a successful business in the years preceding the priority date and September 11, 2001 terrorist attacks through its 1998 through 2000 tax returns. Therefore, in light of the petitioner's long and continuing business presence (approximately 31 years), its rebound in 2004 and increasing gross receipts in 2004 and 2005, and its increase in wages (greater than \$2 million), the AAO finds that the petitioner could pay the proffered wage from the priority date and continuing to the present.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's tax returns and other evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

⁵ See Julie Hatch Maxfield, *Jobs in 2005: How do they compare with their March 2001 counterparts?*, 129 Monthly Labor Review 1, 1-2 (July 1, 2006); a copy of Terry Pristin, *Square Feet; Fewer Rooms at the Inn*, Section C, the New York Times (October 19, 2005); a copy of Robert P. Farmer, *Accommodating All Angles*, 26 The Meeting Professional, (March 2006); a copy of Michael Stoler, *Hospitality's Outlook Couldn't Be Rosier*, The New York Sun (August 31, 2006). The articles discuss the impact and later subsequent recovery of the hospitality and other industries following the events of September 11, 2001.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The director's decisions of July 19, 2006 and September 12, 2006 are withdrawn. The petition is approved.