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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: **AUG 10 2009**

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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a donut shop. It seeks to employ the beneficiary permanently in the United States as a baker. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL).

As set forth in the director's April 21, 2008 denial, the primary 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.

On appeal, counsel asserts that the director should have added the petitioner's depreciation deduction to its net income when determining its ability to pay the proffered wage. Counsel also asserts that the director failed to consider that the petitioner has paid the beneficiary the proffered wage since 2007. Counsel also claims that the petitioner owns its business premises, and that the value of the premises should be included in the determination of the petitioner's ability to pay the proffered wage. Finally, since the labor certification was filed on May 9, 2006, counsel claims that the director failed to prorate the proffered wage for that year.

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.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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

The evidence in the record of proceeding includes the following:

- 2006 Form 1120S, U.S. Income Tax Return for an S Corporation.
- Forms W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary for 2006 and 2008.
- Copies of selected pay stubs for the beneficiary from 2007, 2008 and 2009.

¹The 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).

- Experience letter stating that the beneficiary was employed as a baker.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

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.

Therefore, 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 the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also establish that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The priority date of instant petition is May 9, 2006, the date the labor certification was filed with the DOL. The proffered wage stated on the labor certification is \$600.00 per week (\$31,200.00 per year). The labor certification states that the position requires two years of experience in the job offered. On the labor certification, signed by the beneficiary on June 28, 2006, the beneficiary claimed to have worked for the petitioner since November 1, 2005.

On the petition, the petitioner claimed to have been established in 2004, and to employ seven workers. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

The record contains the beneficiary's Form W-2 for 2006. This document states the wage paid to the beneficiary by the petitioner, as shown in the table below:

<u>Year</u>	<u>Wages Paid (\$)</u>	<u>Remaining Amount (\$)</u>
2006	15,976.00	15,224.00

For 2006, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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. 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 wage expense is misplaced. Showing that the petitioner's gross sales 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*, 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.

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). Accordingly, counsel's claim that the director should have added back depreciation to net income when determining the petitioner's ability to pay the proffered wage is rejected.

The record before the director closed on February 4, 2008, with the receipt of the petitioner's submissions in response to the director's Request for Evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax return demonstrates its net income for 2006, as shown in the table below.²

<u>Year</u>	<u>Net Income (\$)</u>
2006	-31,832.00

For 2006, the petitioner did not have sufficient net income to pay the difference between the wage paid, if any, and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, 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 review the petitioner's assets.

The petitioner’s total assets include depreciable assets that the petitioner uses in its business, including real property that counsel claims should be considered. 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. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Therefore, counsel’s claim that the petitioner’s total assets should have been considered in the determination of its ability to pay the proffered wage is rejected.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ If

²For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18 (2006 to present). When the two numbers differ, the number reported on Schedule K is used for net income. It is noted that the director incorrectly used the number from Line 21 for net income.

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 net current assets for 2006, as shown in the table below.⁴

<u>Year</u>	<u>Net Current Assets (\$)</u>
2006	-75,839.00

For 2006, the petitioner did not have sufficient net current assets to pay the difference between the wage paid, if any, and the proffered wage.

Therefore, the petitioner has 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 director failed account for the fact that the priority date was part of the way through 2006. Counsel states that the director should have prorated the proffered wage for the portion of the year that occurred after the priority date. USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs. However, the petitioner has not submitted such evidence for 2006. Additionally, USCIS will not consider 12 months of income towards an ability to pay a prorated proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage.⁵

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. 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

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.

⁴On Form 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

⁵The petitioner had negative net income and net current assets for 2006. Therefore, even if the petitioner could apply 12 months of net income or net current assets towards a prorated proffered wage in 2006, the petitioner would still not be able to establish its ability to pay the proffered wage based on its tax returns.

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 claims to have been in business since 2004 and to employ seven workers. The petitioner's 2006 tax return shows gross income of \$761,382.00. In addition, although the petitioner was not able to establish its ability to pay the proffered wage in 2006, the petitioner has submitted evidence to establish that it paid the beneficiary at or near the proffered wage from 2007 to the present. For 2007, the record contains the beneficiary's pay stubs from October 8, 2007 through December 30, 2007, indicating that the beneficiary received a salary of \$31,000 in 2007, \$200 less than the proffered wage.⁶ The record contains the beneficiary's 2008 Form W-2, indicating that the petitioner paid the beneficiary a salary of \$35,000.00. This exceeds the proffered wage by \$3,800. The record also contains the beneficiary's pay stubs from January 1, 2009 through March 25, 2009, indicating that the beneficiary received \$1,200.00 per pay period (80 hours worked per pay period at \$15.00 per hour). These pay stubs indicate that the beneficiary has been receiving a wage at or near the proffered wage for 2009.

In this case, it is noted that the petitioner has paid the beneficiary at or near the proffered wage since 2007. However, other than its gross income, the petitioner has not submitted sufficient evidence to establish that the overall magnitude of the its business demonstrates its ability to pay the proffered wage from the priority date. The petitioner has a small number of employees and has not been in business for a substantial period of time. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation. The beneficiary will not be replacing a former

⁶The petitioner did not submit a 2007 Form W-2 for the beneficiary. The beneficiary's pay stub for the period of December 3, 2007 to December 16, 2007 indicates earnings of \$1,200.00 for the pay period with a year to date salary of \$31,000.00. The beneficiary's pay stub for the period of December 17, 2007 to December 30, 2007 indicates earnings of \$1,200.00 for the pay period with a year to date salary of \$1,200. In the absence of the beneficiary's 2007 Form W-2, it is concluded that the petitioner paid the beneficiary a salary of \$31,000.00 for 2007.

employee or an outsourced service. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*.

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 beginning on the priority date.

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.