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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
and Immigration
Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 20 2010

IN RE: Petitioner:
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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 specialty cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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 from the priority date onwards as well as pay the proffered wages to the sponsored beneficiaries of three other simultaneously pending Form I-140 petitions. Therefore, the director denied the petition.

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 May 28, 2009 notice of decision, at issue in this case is whether the petitioner has established that it has the ability to pay the proffered wage of the beneficiary, and the proffered wages of three other sponsored beneficiaries of simultaneously pending petitions, 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). This office considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

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.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 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 ETA Form 9089 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on December 12, 2006.[2] The proffered wage as stated on the ETA Form 9089 is $23,504.00 per year.

The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on August 16, 2007, the beneficiary claimed to have worked for the petitioner since January 15, 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 Sonegawa*, 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. Here, the record does not contain any evidence that the petitioner paid the beneficiary any wages after the priority date. Although the petitioner submitted Forms W-2, Wage and Tax Statement, from 2007 and 2008, these forms represent wages paid to the

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[2] U.S. Citizenship and Immigration Services (USCIS) records indicate that the petitioner has petitioned for an additional three beneficiaries (not considering withdrawn or abandoned petitions). Two of these petitions [redacted] and [redacted]) have 2004 priority dates but were denied in 2009. [redacted] was appealed to the AAO. The third petition [redacted] has a 2006 priority date and was denied, and also appealed, in 2009. Thus, from 2006 through 2009, the petitioner had three additional petitions pending. The petitioner must demonstrate an ability to pay the wages of its additional sponsored workers as well as the wage of the instant beneficiary.

beneficiary by a different corporation, Ranchero, Inc. Accordingly, these Forms W-2 are not relevant to evaluating the petitioner's ability to pay the proffered wage.

Accordingly, the record does not establish that the petitioner had the ability to pay the proffered wage through an examination of wages paid to the beneficiary in 2006, 2007, and 2008.

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 not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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 April 17, 2009 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 2008 federal income tax return was not yet due. However, as the petitioner submitted a copy of its 2008 tax return on appeal, it will be considered by the AAO.[3]

The petitioner's tax returns demonstrate its net income for 2006 through 2008, as shown in the table below.

- The 2006 Form 1120S states net income[4] of $47,798.
- The 2007 Form 1120S states net income of $59,337.
- The 2008 Form 1120S states net income of $143,962.

In 2006, the petitioner had sufficient net income to pay the proffered wage of $23,504. However, only $24,294 in net income remains to cover the added expense of the three other sponsored workers' wages whose petitions were pending in that year. The first of these workers had a proffered wage of $23,504 and was paid $16,107 by the petitioner in 2006, leaving a difference of $7,397. Thus, $16,897 in net income remains after paying the added expense of this salary. The proffered wage of the second and third sponsored workers was $22,131 and $23,504, respectively. As the proffered wages of the second and third sponsored workers each exceeds the remaining net income, the petitioner has not established that it had the ability to pay the proffered wage and all its sponsored workers' wages/balance of those wages through its net income in 2006.

In 2007, the petitioner had sufficient net income to pay the proffered wage of $23,504. However, only $35,833 in net income remains to cover the added expense of the three other sponsored workers' wages whose petitions were pending in that year. The first of these workers had a proffered wage of $23,504 and was paid $18,435 by the petitioner in 2007, leaving a difference of $5,069. Thus, $30,764 in net income remains after paying the added expense of this salary. The

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[3] It is noted that the petitioner submitted its 2001, 2002, 2003, 2004, and 2005 tax returns on appeal in an attempt to establish that it has the ability to pay the proffered wage considering the totality of the circumstance. These tax returns will be considered in that context.

[4] 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 18 of Schedule K. *See* Instructions for Form 1120S, 2009, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed June 22, 2010) (which indicate that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

proffered wage of the second sponsored worker was $22,131. As no wages were paid to that worker in 2007, only $8,633 in net income remains after paying the added expense of paying this salary. The proffered wage of the third sponsored worker was $23,504, who was paid $6,743 by the petitioner in 2007, leaving a difference of $16,761. As the difference between the proffered wage of the third sponsored worker and wages actually paid exceeds the remaining net income, the petitioner has not established that it had the ability to pay the proffered wage and all its sponsored workers' wages/balance of those wages through its net income in 2007.

In 2008, the petitioner had sufficient net income to pay the difference between the proffered wage and the amount of wages actually paid to the beneficiary. As the net income exceeded the sum of the proffered wages of all four sponsored beneficiaries, the petitioner has shown that it had the ability to pay the proffered wage through its net income in 2008.

In sum, the petitioner has not established that it had the ability to pay the proffered wage and all its sponsored workers' wages out of its net income in 2006 and 2007.

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.[5] 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 2006 and 2007, as shown in the table below.

- The 2006 Form 1120S reflects net current assets (liabilities) of -$30,995.
- The 2007 Form 1120S reflects net current assets (liabilities) of -$78,737.

In 2006 and 2007, the petitioner had negative net current assets. Thus, it has not shown an ability to pay, in those years, the proffered wage using its net current assets. It also has not shown the ability to pay, out of its net current assets, the added expense of the balance of the instant wage and the balance of the wages of its three additional sponsored workers. Therefore, the petitioner has not shown the ability to pay the instant wage and all its sponsored workers' wages using its net current assets during 2006 and 2007.

Thus, the petitioner has not established that it had the continuing ability to pay the instant wage and all its sponsored workers' wages from the priority date onwards through an examination of: wages paid to the beneficiary and to its other sponsored workers; its net income; or its net current assets.

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[5]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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel argues that the director erred in considering the proffered wages of three other sponsored beneficiaries of simultaneously pending petitions in concluding that the petitioner failed to establish that it had the ability to pay the proffered wage. Counsel claims that this "all or nothing formula" is flawed because the record establishes that the petitioner could have paid "one or more of the beneficiaries the proffered wage." However, counsel's argument is not persuasive. As noted above, 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. If a petitioner sponsors more beneficiaries for permanent residence than it can afford to pay, then it has not established that any of the job offers is realistic. 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.

Counsel also claims that USCIS should take into consideration the totality of the circumstances in evaluating the petitioner's evidence of its ability to pay the proffered wage. Specifically, counsel argues that USCIS should consider the petitioner's longevity, its yearly gross income since 2001, its number of employees, and its wage payment history.

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 Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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.

Here, the immigrant petition indicates that the petitioner was incorporated in 1997 and has 25 employees. As noted by counsel on appeal, the petitioner's gross receipts have been substantial over the years, ranging from $1,621,127.00 in 2008 to $1,865,755.00 in 2001. However, as revealed through these figures, the petitioner's income has been fluctuating, with the most recent tax year being the lowest figure for gross receipts since 2001. Likewise, the petitioner's payroll has shrunk to

its second lowest level since 2001. The petitioner also has not shown that the beneficiary would be replacing a former employee or an outsourced service; and it has not shown the occurrence of any uncharacteristic business expenditures or losses in 2006 and 2007. Simply put, the record is devoid of evidence establishing that the petitioner had the ability to pay the proffered wage in 2006 and 2007, and that its job offer was realistic, given its modest net income, negative net current assets, and three additional sponsored beneficiaries. 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 or all its sponsored workers' wages.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

**ORDER**: The appeal is dismissed.