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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: JUN 15 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 $630. 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.[1] 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 an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (USDOL). 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. The director denied the petition accordingly.

As set forth in the director's March 25, 2009 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 ETA Form 9089 was accepted for processing by any office within the employment system of the USDOL. *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 USDOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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[1] The record reflects the ETA Form 9089 and the Form I-140 were filed by [redacted] However, the Form I-290B, Notice of Appeal or Motion, was filed by [redacted] its alleged successor-in-interest. The Form I-290B was signed by counsel and there are G-28s, Notice of Entry of Appearance as Attorney or Representative, in the file signed by both the predecessor and the alleged successor for the same attorney, so the I-290B was properly executed by an authorized representative.

Here, the ETA Form 9089 that was accepted for processing on January 7, 2008, shows the proffered wage as $10.95 per hour ($22,776 per year) and that the position requires 12 months experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The petitioner is structured as an S corporation. On the Form I-140, it claims it was established in 2006 and to employ 3 workers when the petition was filed. On the ETA Form 9089, signed by the beneficiary on July 14, 2008, he claimed he worked for the petitioner from September 15, 2006 to January 3, 2008.

A certified labor certification establishes a priority date for any immigrant petition later based on the ETA Form 9089. Therefore, the petitioner must establish that the job 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. The beneficiary's IRS Forms W-2, Wage and Tax Statement, for 2007 and 2008 show compensation received from the petitioner, as shown in the table below:

2007	2008
$3,000	$6,400

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of January 7, 2008 and onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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, supra*, at 1084, the court held that 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118.

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

In his RFE dated January 29, 2009, the director requested the petitioner submit evidence to establish it had the financial ability to pay the proffered wage as of the priority date of January 7, 2008 and continued to have such ability. No evidence was submitted in response to this request. Although [redacted] claims to have purchased the restaurant on August 11, 2008 and submits evidence of its ability to pay the offered wage after acquisition, other than the

beneficiary's W-2 issued by the petitioner for 2008 listed above, the record is devoid of ability to pay evidence by the petitioning organization, [redacted] from the priority date of January 7, 2008 to the date the new owner allegedly purchased the restaurant.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On appeal, counsel argues that the petitioner has established its ability to pay for 2008 because USCIS should combine the wages paid by the original petitioner, [redacted] with the 2008 net income or net current assets of the alleged successor-in-interest, [redacted] Typically, if the sum of wages paid and the employer's net income or net current assets during the same timeframe equal or exceed the proffered wage, it can be concluded that the petitioner has the ability to pay the proffered wage. Here, it appears that the sum of the wages paid by [redacted] *before it allegedly sold the restaurant on August 11, 2008* and the net income of [redacted] earned *after it allegedly bought the restaurant on August 11, 2008* exceed the proffered wage. However, it is inappropriate to combine wages paid by one entity with the net income or net current assets of another entity in evaluating an ability to pay the proffered wage, even if the purchaser of the restaurant is a bona fide successor-in-interest. In matters where an ongoing business concern is purchased by a successor-in-interest, the petitioning successor must prove the predecessor's ability to pay the proffered wage *as of the priority date and until the date of transfer of ownership to the successor.* In addition, the petitioner must establish the successor's ability to pay the proffered wage *from the date of transfer of ownership forward.* 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1981).

Accordingly, the petitioning successor must establish that it alone had the ability to pay the proffered wage beginning on the date of transfer. As the petitioning successor's net income exceeds the proffered wage for 2008 (as prorated from August 11, 2008), it has established its ability to pay for that time period after the restaurant's acquisition. However, the record is devoid of evidence of the original petitioner's ability to pay the proffered wage from the priority date, i.e. January 7, 2008, to the date of transfer, i.e. August 11, 2008, except for a Form W-2 representing $6,400.00 in wages paid by the original petitioner. The proffered wage is $22,776.00 (or $13,503.80, prorated from January 7, 2008 to August 11, 2008). The petitioner failed to submit the original petitioner's tax return or audited financial statement for 2008. Therefore, it has not been established that the original petitioner had the ability to pay the difference between the prorated proffered wage and the wages actually paid by the original petitioner from the priority date to the date of transfer through net income or net current assets. *See Matter of Dial Auto Repair, Inc.* It has not been established that the job offer was realistic from the priority date in January 2008 to the date the restaurant was allegedly sold in August 2008. *See Matter of Great Wall*, 16 I&N Dec. 142; 8 204.5(g)(2).

Finally, 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.

In the instant case, the record is devoid of evidence of the original petitioner's ability to pay the difference between the prorated proffered wage and the wages actually paid by the original petitioner from the priority date to the date of transfer in 2008 through net income or net current assets. Without the original petitioner's 2008 tax returns or audited financial statements, it would be impossible to conclude that the original petitioner had this ability even considering the evidence in the record in its totality. The original petitioner's gross receipts, officer compensation, or other data cannot be reviewed and considered. Furthermore, the petitioner's 2007 tax return shows nominal net current assets and negative net income for that calendar year. 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.

Therefore, from the date the ETA Form 9089 was accepted for processing by the USDOL, 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.

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.