

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

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**

B6

DATE: OCT 03 2011

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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 \$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,
A handwritten signature in black ink, appearing to read "Perry Rhew".

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. The appeal will be dismissed.

The petitioner is a farm. It seeks to employ the beneficiary permanently in the United States as a first line supervisor-agriculture crop worker. As required by statute, the petition is accompanied by 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 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.

At the outset, it is noted that this petition was not eligible for approval at filing because it was not accompanied by a valid labor certification. The regulation at 20 C.F.R. § 656.17 describing the basic labor certification process provides in pertinent part:

(a) Filing applications.

(1) . . . Applications filed and certified electronically must, upon receipt of the labor certification, be signed immediately by the employer in order to be valid. Applications submitted by mail must contain the original signature of the employer, alien, attorney, and/or agent when they are received by the application processing center. DHS will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent.¹

Although an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition, it was not signed by the employer, alien or the attorney. As such, the preference petition should have been rejected. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Because the director's denial rested on his determination that the petitioner had not established its continuing financial ability to pay the proffered wage, this office will also review the merits of that decision.

¹ Similar instructions are found on page 8 of the ETA Form 9089.

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 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, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on May 23, 2006, which establishes the priority date. The proffered wage as stated on the ETA Form 9089 is \$16.07 per hour, which amounts to \$33,425.60 per year. The ETA Form 9089 states that the position requires 24 months of 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.²

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on May 23, 1968, to have a gross annual income of \$483,923, a net annual income of \$68,719 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year runs from June 1st to May 31st of the following year. On the ETA Form 9089, it is claimed that the beneficiary has worked for the petitioner from June 1, 2000 to May 23, 2006.

² 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In the instant case, the petitioner provided a copy of a Wage and Tax Statement (W-2) for 2007 reflecting that it paid the beneficiary \$28,600 in wages, which represents \$4,825 less than the proffered wage of \$33,425.60 for the calendar year of 2007. The petitioner did not submit any W-2 forms or any other evidence of pay to the beneficiary for any other year despite the claim on the ETA Form 9089 that the beneficiary has been employed with the petitioner since 2000.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner has submitted copies of its 2005, 2006 and 2007 corporate tax returns to the underlying record and on appeal. The period(s) covered by these returns are June 1, 2005 to May 31, 2006 (2005 return), June 1, 2006 to May 31, 2007 (2006 return) and June 1, 2007 to May 31, 2008 (2007 return).

- The Form 1120 stated net income on the 2005 tax return is \$68,719.
- The Form 1120 stated net income on the 2006 tax return is -\$83,342.
- The Form 1120 stated net income on the 2007 tax return is \$33,646.

Therefore, for the 2006 fiscal year the petitioner did not have sufficient net income to pay the proffered wage or to cover any shortfall between actual wages paid and the proffered wage during the period.

Besides net income, USCIS may review a petitioner's net current assets. They are the difference between a petitioner's current assets and current liabilities.³ A corporate petitioner's year-end current assets are shown on Schedule L of its corporate income tax return, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total of a corporation's end-of-year net current assets 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 as shown below:

- For fiscal year 2005, the Form 1120 stated net current assets are -\$201,525.
- For fiscal year 2006, the Form 1120 stated net current assets are -\$305,723.
- For fiscal year 2007, the Form 1120 stated net current assets are -\$415,203.

Therefore, during the period from 2005 to 2008 as covered by the corporate tax returns, the petitioner's net current assets were not sufficient to cover payment of the proffered wage or any shortfall between actual wages paid and the proffered wage.

We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets, which would include farm equipment as asserted on appeal, are 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. Rather, as noted above, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Additionally, on appeal it has been suggested that wages paid to one of the owners would be available to pay the proffered wage as of the end of the year ending May 31, 2008, however no actual documentation such as a statement from the respective officer indicating willingness to forego his compensation, an individual Form 1040 or evidence of personal expenses or liabilities has been provided so it is unclear how such a calculation would be considered. 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)).

Although it is recognized that the beneficiary's 2007 W-2 wages were based on a calendar year and the tax returns' net income and net current assets are based on fiscal years, it is clear that the 2006

³According 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.

fiscal year reflected both negative figures for net income and net current assets and did not clearly show sufficient funds to cover any shortfall of between the proffered wage and any actual wages paid. Therefore, from the date the ETA Form 9089 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.

On appeal counsel submits a copy of a letter from the petitioner's accountant discussing the petitioner's fiscal year end income ending in May 2008 and adding back already expensed 2009 fertilizer and seed to the net income. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Counsel's assertions on appeal relevant to depreciation,⁴ adding back seed and fertilizer⁵ and the value of equipment cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner, particularly in regard to the fiscal year as shown on the 2006 corporate tax return, that demonstrates that the petitioner did not have the continuing ability to cover the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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 (Reg. Comm. 1967). 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

⁴As noted above, with respect to somehow adding back depreciation, "[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); see also *River Street Donuts, LLC v. Napolitano*, 558 F.3d at 118.

⁵ This office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose.

outside of a petitioner's net income and net current assets. USCIS may consider such factors as the established historical growth of a petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry. In the instant case, the record contains three tax returns. The petitioner's total income declined from 2005 to 2006 and then increased in 2007. All three tax returns exhibit substantial negative net current assets. The petitioner claims only three employees. Although the petitioner has been in business for a long time and may be a going concern, the facts in this case do not present such unique, analogous circumstances as were present in *Sonegawa*. Nothing establishes a historical record upon which we could find favorably. Thus, assessing the overall 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.

For the separate and independent reasons as stated above, this petition may not be approved. The evidence submitted does not establish that the petition was properly signed by employer, the alien and the attorney and the petitioner has not demonstrated that it has had the continuing ability to pay the proffered wage from the priority date onward.

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.