U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

Date: OCT 18 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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,

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 bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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.

As set forth in the director's denial, the 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on March 2, 2009.[1] The proffered wage as stated on the ETA Form 9089 is $12.84 per hour ($26,707 per year). The ETA Form 9089 states that the position requires two years experience in the proffered position.

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 in 1998, to have an unstated gross annual income and to currently employ 3 workers. According to the tax returns in the record, the petitioner's fiscal year runs from October 1st to September 30th. On the ETA Form 9089, signed by the beneficiary on February 27, 2009, the beneficiary did not claim to have worked for the petitioner.[3]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application 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

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[1] The ETA Form 9089 lists the petitioner as [redacted]. The Form I-140 lists the petitioner as [redacted]. Informal documents in the record suggest that [redacted] is a [redacted], Inc. In any further filings, the petitioner should submit evidence to confirm the [redacted] and that both companies operate under the same tax identification number in order for us to accept the tax returns of [redacted], Inc. as evidence of the petitioner's ability to pay. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

[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).

[3] The beneficiary states on ETA Form 9089 that he has been "self employed" as a baker for 20 hours per week from April 1, 2003 to February 27, 2009 (just prior to the March 2, 2009 labor certification filing).

A labor certification must be for full-time employment. 20 C.F.R. § 656.3.

evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 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'l Comm'r 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, or any wages for that matter, from the priority date. The petitioner submitted, on appeal, an amended 2010 tax return (Form 1040X) for the beneficiary and his spouse. That tax return shows an adjusted gross income of $34,580. The petitioner did not submit, however, a W-2 Form supporting the tax return to show that the petitioner paid these wages to the beneficiary and nothing in the record shows that the petitioner paid the beneficiary any wages in that year, or in any other year as stated above. Further, the petitioner submitted no evidence that the amended tax return was filed with the Internal Revenue Service.[4] The tax return is, therefore, of little evidentiary value.

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.

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[4] Additionally, we note that the beneficiary amended his tax return after the petition was denied, which raises questions regarding the timing of the change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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." [redacted] 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 record before the director closed on January 11, 2011 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 2010 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2009 is the most recent return available.[5] The petitioner's tax return demonstrates its net income for 2009, as shown in the table below.

- In 2009, the Form 1120 stated net income of $5,798.[6]

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[5] As noted above, the petitioner must establish the relationship of [redacted]., Inc. and Angel Azul Bakery to confirm that the companies are the same and operate under the same tax identification number for the tax returns to be properly accepted to show the petitioner's ability to pay.

[6] The petitioner submitted, on appeal, an amended corporate tax return for 2009. The amended return did not, however, change the net income or net current assets from the original return. As

- The petitioner's 2008 tax return covers the time period October 1, 2008 to September 30, 2009. As noted above, the priority date for the present petition is March 2, 2009. Thus, the 2008 tax return considers financial information relevant to the present petition, from the priority date through September 30, 2009. This tax return shows a net income of $11,361, which is not sufficient to pay the proffered wage.[7]

Therefore, the petitioner's 2008 and 2009 tax returns did not state sufficient net income to pay 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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 tax years 2008 and 2009 as shown in the table below.

- In 2009, the Form 1120 (tax year October 1, 2009 through September 30, 2010) stated net current assets of $25,901.
- In 2008, the Form 1120 (tax year October 1, 2008 through September 20, 2009) stated net current assets of $24,825.

Therefore, for the tax years 2008 and 2009, the petitioner's tax returns did not state sufficient net current assets to pay the proffered wage.

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stated above, the petitioner also submitted, on appeal, an amended personal tax return (Form 1040) for the beneficiary. Nothing in the record shows that either the beneficiary's amended tax return or the petitioner's Form 1120 amended tax return were filed with the Internal Revenue Service. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[7] The petitioner also submitted the first page of its Form 1120 for tax years 2006 and 2007. That information will be considered only generally in a totality of the circumstances analysis as those returns are before the priority date.

[8] 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.

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.

Counsel states, on appeal, that the petition was denied because the petitioner did not establish its ability to pay the proffered wage, and that the petitioner had complied with the director's request for evidence. Counsel submits, on appeal, the petitioner's amended tax return for 2009 and the beneficiary's amended tax return for 2009. Counsel states no additional basis for the appeal.

As previously noted, the petitioner's amended tax return for 2009 did not result in a change to the net income or net current assets stated on the original tax return. The 2009 tax return, as amended, does not state sufficient net income or net current assets to pay the proffered wage. As noted above, the beneficiary's tax return is insufficient to establish the petitioner's ability to pay as it was not accompanied by any W-2 Form to verify that the petitioner paid these wages to the beneficiary.

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'l Comm'r 1967). The petitioning entity in [redacted] 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 [redacted] The petitioner's clients had been included in the lists of the best-dressed [redacted] The petitioner lectured on fashion design at design and fashion shows throughout the United States and at [redacted] The Regional Commissioner's determination in [redacted] was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in [redacted], 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 had neither sufficient net income nor net current assets to pay the full proffered wage. The petitioner's 2008 and 2009 tax returns and partial copies of its 2006 and 2007 tax returns show that the petitioner has gross receipts associated with a small business and either low or negative net income.[9] The petitioner states that it has three employees, however, it paid

[9] The petitioner did not submit Schedule L's for those years. While not required, as these years are

minimal total salaries to all employees ranging from $26,972 to $40,476 (with all employee wages only slightly above the proffered wage), and the tax returns show $0 paid in officer compensation. Nothing shows that the petitioner paid the beneficiary any wages. While the difference in net current assets and the proffered wage is not a substantial amount, nothing in the record as it currently stands would warrant a finding based on the totality of the circumstances. Nothing shows that the "amended" tax returns submitted were filed with the Internal Revenue Service. The Form 1040 is insufficient to establish that the petitioner paid the beneficiary any wages absent a W-2 Form issued by the petitioner to the beneficiary or other reliable evidence of wages paid. The record does not establish a period of sustained growth and profitability which would establish the petitioner's ability to pay the proffered wage from the priority date onward. Should the petitioner seek to rely on the totality of the circumstances in any further filings, the petitioner would need to submit evidence to establish historical growth, to include prior tax returns with all schedules, its reputation in the industry, or address any short term uncharacteristic business expenses or losses as nothing in the record addresses these factors. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner would have the ability to pay the proffered wage from the priority date onward. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petition may not be approved because the petitioner filed the Form I-140 for a professional employee which requires possession of a minimum of a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3). The ETA Form 9089, however, was certified for a skilled worker requiring two years of experience in the proffered position. There was no education requirement noted on 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Here, the Form I-140 was filed on June 29, 2010. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional worker possessing at a minimum a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree. Part 2.f. of Form I-140 is designated for filing a petition for a skilled worker (requiring at least two years specialized training or experience).

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before the priority date, without Schedules L, we are unable to calculate the petitioner's net current assets to ascertain any historical growth.

In this case, the labor certification indicates that there are no education or training requirements for the proffered position. The labor certification requires only two years of experience in the proffered position. However, the petitioner requested the professional worker classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the petition requires a minimum of a bachelor's degree such that the beneficiary may be found qualified for classification as a professional.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.