

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

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**

PUBLIC COPY



85

FILE:



Office: NEBRASKA SERVICE CENTER

Date: **SEP 28 2010**

IN RE:

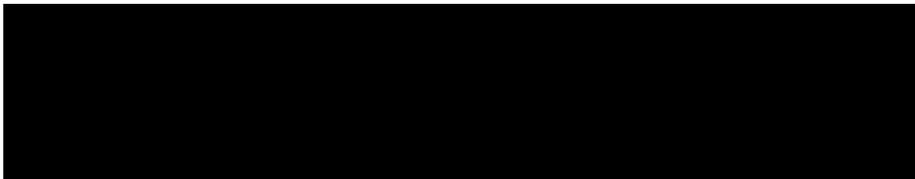
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a manufacturer. It seeks to employ the beneficiary permanently in the United States as a production manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

The record shows that the appeal is properly and timely filed, 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 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 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The ETA Form 9089 was accepted on May 31, 2006 and certified on June 5, 2006 on behalf of the beneficiary. The proffered wage as stated on the ETA Form 9089 is \$37.76 per hour (\$78,540.80 per year). On the petition the petitioner claimed to have been established in 2002, to have a gross annual income of \$1,500,000, and to currently employ 12 workers. On the ETA Form 9089, the beneficiary claimed to have worked for the petitioner since November 2003.

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.¹

In determining the petitioner's ability to pay the proffered wage during a given period, United States Citizenship and Immigration Services (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 submits the beneficiary's W-2 forms for 2006 through 2009. The beneficiary's W-2 forms show that the petitioner paid the beneficiary \$53,272.10 in 2006, \$42,777.80 in 2007, \$38,792.21 in 2008 and \$37,312.94 in 2009. Therefore, the petitioner established that it employed and paid the beneficiary a partial proffered wage in these relevant years, however, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the differences of \$25,268.70 in 2006, \$35,763.00 in 2007, \$39,748.59 in 2008 and \$41,227.86 in 2009 between wages actually paid the beneficiary and the proffered wage respectively.

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 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.

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

¹ 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 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).

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.² 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax return in the record, the petitioner’s fiscal year is based on calendar year. The record contains the petitioner’s federal income tax return for 2006. The petitioner’s tax return demonstrates its net income and end-of-year net current assets for 2006 as shown below.

² 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.

- In 2006, the Form 1120 stated net income³ of (\$108,716) and net current assets of (\$310,258).

For the year 2006, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the difference of \$25,268.70 between wages actually paid to the beneficiary and the proffered wage that year. The record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns, or audited financial statements to demonstrate that the petitioner had sufficient net income or net current assets to pay the differences of \$35,763.00 in 2007, \$39,748.59 in 2008 and \$41,227.86 in 2009 between wages actually paid the beneficiary and the proffered wage respectively.

The record contains the petitioner's financial statements for 2005 through 2007 submitted as evidence to establish its ability to pay the proffered wage. However, counsel's reliance on unaudited financial statements in determining its ability to pay the proffered wage is misplaced. The unaudited financial statements submitted in the record are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel also submitted bank statements for the petitioner's business accounts. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, any funds used in one month would no longer be available in future months. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

On appeal, counsel submitted an affidavit from [REDACTED] stating that as an officer of the petitioner, he is willing to forgo his officer's compensation of \$123,000 in 2006 to pay the beneficiary the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income and compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return, and therefore, the petitioner's figures for compensation of officers may be considered as additional financial resources

³ 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.

of the petitioner, in addition to its figures for ordinary income. However, in this case, the AAO cannot determine whether the sole shareholder is able to forgo his officer compensation to pay the beneficiary the proffered wage because the record does not contain any documentary evidence showing the sole shareholder's family's income and living expenses. Further, the sole shareholder's officer compensation in 2006 cannot establish the petitioner's ability to pay the proffered wage in 2007 through 2009.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL in 2006, 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. Thus, the petition cannot be approved.

In addition, On May 5, 2010, the AAO served the petitioner a request for evidence (RFE) requesting for further documentary evidence. The response was received on July 28, 2010. Among other things, this office specifically requested that the petitioner submit its annual reports, tax returns or audited financial statements for 2007 through 2009. The regulation at 8 C.F.R. § 204.5(g)(2) states that USCIS may request additional evidence in appropriate cases. Although specifically and clearly requested by this office, the petitioner declined to provide copies of its annual reports, tax returns or audited financial statements for 2007 through 2009. The annual reports, tax returns or audited financial statements would have demonstrated the amount of the petitioner's net income and net current assets and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

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. The fact that the petitioner declined to submit requested evidence to establish its ability to pay the proffered wage raises a doubt whether the job offer was a realistic one on the priority date and continues to the present.

In response to the AAO's RFE, counsel submits the sole shareholder's individual income tax returns for 2007 and 2008 and a statement of the sole shareholder's living expenses. However, the living expenses statement provided by the petitioner includes the sole shareholder's home mortgage payments and automobile loan payments only. Without a complete living expenses statement for the sole shareholder's family of five, the AAO still cannot determine whether the sole shareholder was able to forgo a substantive portion of his officer's compensation to pay the beneficiary in the relevant years. In addition, as previously mentioned, the petitioner failed to establish that its job offer to the beneficiary was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence because the petitioner failed to submit its regulatory-prescribed evidence for 2007 through 2009 to establish its ability to pay the proffered wage.

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 (BIA 1967). 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 failed to establish its ability to pay the proffered wage for 2006 and also failed to submit the requested evidence to establish its ability to pay the proffered wage for 2007 through 2009 despite this office specifically requested. The petitioner failed to demonstrate that the petitioner's business had any profitable year as of the year of the priority date to the present. 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 wages.

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.