

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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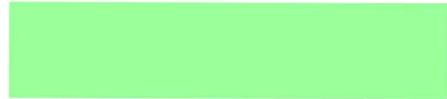


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **FEB 21 2014** OFFICE: TEXAS SERVICE CENTER



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition on February 1, 2013. The petitioner filed an appeal which the director considered as a motion to reopen and reconsider. The director again denied the petition on August 26, 2013. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an information technologies business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as an advanced degree professional 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, 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 in the decisions dated February 1, 2013 and August 26, 2013 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 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 August 26, 2013 denial, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

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).

Here, the ETA Form 9089 was accepted on March 8, 2011. The proffered wage as stated on the ETA Form 9089 is \$81,848.00 per year. The ETA Form 9089 states that the position requires a master's degree in engineering, computer science, MIS or CIS or in the alternative, a bachelor's degree and five years of work experience as a programmer analyst, software developer or systems designer (at least 12 months experience must be in software development or systems design). The petitioner is also willing to accept a foreign educational equivalent.

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.<sup>1</sup>

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.<sup>2</sup> On the petition, the petitioner claimed to have been established in 1999 and to currently employ 34 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, the beneficiary claimed to have worked for the petitioner since December 21, 2009.

In response to the director's denial dated February 1, 2013, the petitioner submitted a list containing the names, receipt numbers, and dates of filing for 14 current Form I-140 sponsored beneficiaries, 2 resigned Form I-140 sponsored beneficiaries, and 2 future Form I-140 sponsored beneficiaries.

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<sup>1</sup> 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).

<sup>2</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

In response to the AAO's Request for Evidence (RFE) dated December 26, 2013, with respect to the petitioner's ability to pay the proffered wage, the petitioner submitted the following documentation:

- A copy of the beneficiary's Tax Return Transcripts issued by the Internal Revenue Service (IRS) for 2010, 2011, and 2012;
- A copy of the beneficiary's IRS Forms W-2 for the 2007, 2008, 2009, 2010, 2011, and 2012 tax years;
- A copy of the petitioner's IRS Forms 1065, U.S. Return of Partnership Income, for the 2007, 2008, 2009, 2010, 2011, and 2012 tax years;
- A list containing the names, dates of hire, receipt numbers, priority dates, approval dates, and status of 21 Form I-140 sponsored beneficiaries;
- A copy of IRS Forms W-2 issued to the Form I-140 sponsored beneficiaries for the 2010, 2011, and 2012 tax years;
- A list containing the names, hiring dates, job titles, required H1-B LCA wages, actual offered wages, and receipt numbers of 34 H1-B sponsored beneficiaries;
- A copy of the Form 9035, Labor Condition Application for Nonimmigrant Workers, for the above noted H1-B sponsored beneficiaries.

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, 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 Sonogawa*, 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. In the instant case, the petitioner submitted copies of IRS Forms W-2 as listed below:<sup>3</sup>

- In 2011, the Form W-2 stated wages of \$98,599.00 (exceeds the proffered wage).
- In 2012, the Form W-2 stated wages of \$75,700.00 (a deficiency of \$6,148.00).

<sup>3</sup> Although the director considered the wage amounts for the 2010 tax year, this is before the priority date of March 8, 2011; and therefore, will be considered generally in determining the petitioner's ability to pay the proffered wage under the totality of the circumstances.

- In 2013, the Earnings Statement stated year-to-date wages as of January 31, 2013 of \$15,500.00 (a deficiency of \$66,348.00).

If, as in this case, 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011). 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*, 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. *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).

The petitioner submitted copies of its 2011 and 2012 tax returns. The priority date is March 8, 2011. The proffered wage is \$81,848.00. The petitioner’s tax returns stated its net income as detailed in the table below:

- In 2012, the petitioner’s Form 1065 stated net income of \$117,973.00.<sup>4</sup>

Although the net income amount for 2012 exceeded the proffered wage amount, USCIS electronic records indicate that the petitioner has filed additional immigrant petitions since it was established in 1999. Consequently, USCIS must also take into account the petitioner’s ability to pay the beneficiary’s wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions, the petitioner would need to establish that it has the ability to pay combined salaries of the beneficiaries.

The petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition was the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)

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<sup>4</sup> For an LLC taxed as a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner’s Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) or page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>. (indicating that Schedule K is a summary schedule of all partners’ shares of the partnership’s income, deductions, credits, etc.). In the instant case, the petitioner’s Schedule K has relevant entries for additional income, credits, deductions, or other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant matter, the director and the AAO specifically requested that the petitioner submit evidence to establish its ability to pay the beneficiary and the sponsored beneficiaries the proffered wage amounts for the relevant years. 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 the AAO in the RFE dated December 26, 2013, the petitioner failed to provide copies of the sponsored beneficiaries' Forms ETA 750 and ETA Forms 9089, labor certifications and a list of the sponsored beneficiaries' proffered wage amounts, salaries paid in 2011 and 2012, exact dates of employment, and status of each petition as requested by the AAO. Although the petitioner submitted, in response to the AAO's RFE, copies of IRS Forms W-2 for its other employees for the 2010, 2011, and 2012 tax years, this evidence is insufficient to demonstrate its ability to pay the proffered wage of the beneficiary and the proffered wage of the sponsored beneficiary. Without the proffered wage data requested, the AAO is unable to determine whether or not the wage amounts are equal to or exceed the proffered wage amounts listed on the labor certifications. This information would have demonstrated the amount of salaries and wages paid to the sponsored beneficiaries in comparison to the proffered wage amounts, and further reveal the petitioner's ability to pay the proffered wage. 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).

Therefore, for the year 2012, the petitioner did not establish that it had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage to the instant beneficiary and the beneficiaries of the other immigrant visa petitions.

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.<sup>5</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 stated its net current assets as detailed in the table below.

- In 2012, the petitioner's Form 1065 stated net current assets of -\$399,510.00.

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<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage in 2012.

Thus, 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 of the instant petition and the other sponsored workers the proffered wages as of the priority date of each petition through an examination of wages paid to the beneficiary and the sponsored beneficiaries, or its net income or net current assets.

On appeal, counsel for the petitioner asserts that the petitioner has submitted sufficient evidence to demonstrate that it does possess the ability to pay the proffered wage. Counsel further asserts that the evidence should be viewed in its entirety. Counsel asserts that the director's decision is in error in that it is based upon the petitioner's failure to submit evidence that was never requested, and that the director's NOID violated the regulations because it did not specify the type of evidence required, nor did it give the petitioner adequate notice and sufficient information to respond. Counsel cites to 8 C.F.R. § 103.2(b)(8); *Matter of Estime*, 19 I&N Dec. 450 (1987); and *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) in support of the assertions.

Although counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request specific evidence before denying the petition, the cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal and in response to the AAO's Request for Evidence (RFE) dated December 26, 2013; and therefore, it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Counsel's assertions and the evidence presented on appeal and in response to the AAO's request for evidence do not outweigh the evidence of record that demonstrates that the petitioner could not pay 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 Sonogawa*, 12 I&N Dec. 612. 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 *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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage as of the priority date. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in 2012 that would have directly affected its ability to pay the proffered wage.

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

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.