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



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AUG 03 2009

File:

[REDACTED]  
LIN 06 181 53373

Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner: [REDACTED]  
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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the Nebraska Service Center.

The petitioner operates a custom woodworking business. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, certified by the U.S. 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 AAO notes that the Form ETA 9089 was not signed by counsel, the beneficiary, or the petitioner. To be valid, the Form ETA 9089 must be signed by counsel, the alien beneficiary, and the petitioner at Section L, Section M, and Section N respectively. *See* 20 C.F.R. § 656.17(a)(1).

The record demonstrates that the appeal was properly filed, was timely, and made 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 dated May 22, 2007, the basis for denial of this case was 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. The second issue in this case was that the Form ETA 9089 was not signed by counsel, the beneficiary, or the petitioner.

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 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 Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by the DOL national processing center. *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 Form ETA 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 Form ETA 9089 was accepted on November 14, 2005 and certified on April 26, 2006.<sup>1</sup> The proffered wage as stated on the Form ETA 9089 is \$14.29 per hour (\$26,007.80 per year).<sup>2</sup> The Form ETA 9089 states that the position requires two years of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 9089 Application for Permanent Employment Certification approved by the DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2005 and 2006; the beneficiary's IRS Form W-2 Wage and Tax Statements for 2005 and 2006 issued by the petitioner in the amounts of \$21,727.50 and \$22,209.00 respectively; the petitioning company's president's IRS Forms 1040 for 2005 and 2006; financial information regarding the petitioner's fluctuating line of credit amounts available to it from 2005 to 2007; the beneficiary's pay stubs for work performed for the petitioner in 2007<sup>4</sup>; and documentation concerning the beneficiary's qualifications.

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<sup>1</sup> It has been over three and a half years since the Application for Alien Employment Certification has been accepted and the proffered wage established. The petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

<sup>2</sup> The AAO notes that the proffered wage is based upon a 35-hour work week.

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

<sup>4</sup> The AAO notes that these pay stubs constitute insufficient evidence of wages paid, because there is no evidence included with them that their corresponding checks were cashed and processed by a bank.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1993 and to employ five workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The gross annual income stated on the petition was \$570,000.00. The petitioner did not list its net annual income on the petition. On the Form ETA 9089, which the beneficiary failed to sign, the beneficiary claimed to have worked for the petitioner since April 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition later based on the Form 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). 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner 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 paid the beneficiary the full proffered wage from the priority date.

Counsel submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2005 and 2006 issued by the petitioner in the amounts of \$21,727.50 and \$22,209.00 respectively. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$26,007.80 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$4,280.30 and \$3,798.80 in 2005 and 2006.

On appeal, counsel asserts that USCIS should prorate the salary the beneficiary earned in 2005 from the priority date onward and determine that the petitioner had the ability to pay the proffered wage for that year. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

If the petitioner does not establish that it 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. 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 that exceeded the proffered wage 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.

The record before the director closed on April 5, 2007 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 federal income tax return for 2007 was not completed. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2005 and 2006, as shown in the table below.

- In 2005, the IRS Form 1120S stated net income of -\$27,993.00.<sup>5</sup>
- In 2006, the IRS Form 1120S stated net income of -\$14,668.00.

The petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for 2005 and 2006.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A

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<sup>5</sup> The AAO notes that where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

<sup>6</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes

corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1120S 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 net current assets during 2005 were -\$49,411.00.
- The petitioner's net current assets during 2006 were -\$99,025.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for 2005 and 2006 even if the petitioner's net current assets are combined with wages paid to the beneficiary.

Accordingly, from the priority date or when the Form ETA 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets.

USCIS electronic records show that the petitioner filed one other Form I-140 petition which has been pending during the time period relevant to the instant petition. If the instant petition were 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) (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 Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The other petition submitted by the petitioner is still in the RFE process and has neither been approved nor denied. The record in the instant case contains no information about the proffered wage for the beneficiary of that petition, about the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. Furthermore, no information is provided about the current employment status of the beneficiary, the date of any hiring, and any current wages of the beneficiary. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner or to other beneficiaries for whom the petitioner might wish to submit Form I-140 petitions based on the same approved Form ETA 9089 labor certification.

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and salaries). *Id.* at 118.

Counsel urges USCIS to consider the financial information regarding the petitioner's fluctuating line of credit amounts available to it from 2005 to 2007 submitted as evidence of the petitioner's ability to pay. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities that regularly fail to show profits and typically rely upon individual or family assets and states that the petitioning company's president's personal assets may be used to pay the difference in the wages paid to the beneficiary and the proffered salary. Counsel does not state how the DOL's Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

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 *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.

The petitioner has been in business since 1993 and made average gross sales in 2005 and 2006 of \$500,000.00. It employs five workers currently.

Counsel has submitted the petitioning company's president's IRS Forms 1040 for 2005 and 2006 and presents a signed statement from this individual stating that he is willing to forego his salary or compensation if additional funding is needed to pay the beneficiary his proffered wage. In the instant case, the petitioning company's president supports only himself and his wife. They have no additional dependents.<sup>7</sup> In 2005, his adjusted gross income of \$94,081.00 covers the difference between wages actually paid and the proffered wage, which is \$4,280.30. The difference between wages actually paid and the proffered wage in 2005 is only approximately 2.9% of the total salaries that the petitioner paid its employees that year. In 2006, his adjusted gross income of \$112,051.00 covers the difference between wages actually paid and the proffered wage, which is \$3,798.80. The difference between wages actually paid and the proffered wage in 2006 is only approximately 2.7% of the total salaries that the petitioner paid its employees that year. It is probable that the petitioning company's president could support himself and his family on \$89,800.70 for 2005 or \$108,252.20 for 2006, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that the petitioner has met that burden.

The AAO again notes that the Form ETA 9089 was not signed by counsel, the beneficiary, or the petitioner. To be valid, the Form ETA 9089 must be signed by counsel, the alien beneficiary, and

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<sup>7</sup> The AAO notes that the petitioning company's president has not submitted a list of his family's regular monthly expenses, which the AAO would typically require. However, because the differences between wages actually paid and the proffered wage for 2005 and 2006 are so relatively low, the AAO will instead use the information contained within the IRS Forms 1040 for its analysis of the petitioning company's president's ability to pay.

the petitioner at Section L, Section M, and Section N respectively. *See* 20 C.F.R. § 656.17(a)(1). The AAO finds the appeal to be otherwise sustainable.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The petition is remanded to the director of the Nebraska Service Center for further action in accordance with the foregoing and entry of a new decision.