



U.S. Citizenship  
and Immigration  
Services

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DEC 09 2009

FILE: LIN 06 150 52819 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:

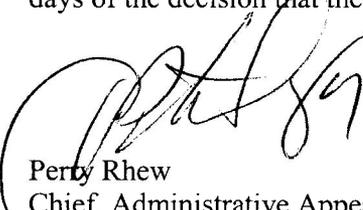
PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perty Rhew  
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 dismissed.

The petitioner is a landscaping firm. It seeks to employ the beneficiary permanently in the United States as a groundskeeper. 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.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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 procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 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). Here, the ETA Form 9089 was accepted on August 9, 2005.<sup>1</sup> The proffered wage as stated on the ETA Form 9089 is \$8.57 per hour (\$17,825.60 per year). There is no indication on the ETA Form 9089 that the petitioner has employed the beneficiary.

On Part 5 of the I-140, Immigrant Petition for Alien Worker, which was filed on April 21, 2006, the petitioner states that it is a landscaping business and was established on February 3, 1992. It further indicates that it currently employs 165 workers. It reports gross annual income of \$7,737,508 and net annual income of \$154,894.

In support of its ability to pay the proffered salary of \$17,825.60 per year, the petitioner provided copies of its 2004 and 2005 Form 1120S U.S. Income Tax Return for an S Corporation.<sup>2</sup> The tax returns indicate that the petitioner's fiscal year is a standard calendar year. The returns contain the following information:

	2004	2005
Net Income (Form 1120S)	\$152,916	\$62,955
Current Assets (Sched. L)	\$552,744	\$652,139
Current Liabilities (Sched. L)	\$427,460	\$683,506
Net Current Assets	-\$125,284	-\$ 31,367

As the 2005 return covers the August 9, 2005 priority date of this petition, it is more pertinent to determining the petitioner's ability to pay the proffered wage. As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible resource out of

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<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

<sup>2</sup> 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 IRS Form 1120S. Where an S corporation 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, credits, deductions or other adjustments, net income is found on line 17e\* (2003, 2004) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

<sup>3</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

which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>4</sup>

The director issued a request for evidence on August 1, 2006. In addition to requesting the petitioner's 2005 tax return, the director requested a list of all I-140 petitions that the petitioner had filed, identifying the proffered wage and providing copies of their respective 2005 Wage and Tax Statements (W-2s) or Form 1099(s). The director noted that the petitioner's evidence must establish that it had the ability to pay the proffered wage in all beneficiaries sponsored on the I-140s. It informed the petitioner that if it was unable to demonstrate the ability to pay the proffered wage in all petitions filed, it should identify the petition(s) that it wished to withdraw.

Besides providing its 2005 corporate tax return, the petitioner submitted a list of 35 aliens including the proffered wages and receipt numbers. Counsel's transmittal letter asserts that the depreciation deduction of \$331,296 should be considered in determining the petitioner's ability to pay the proffered wage. Counsel also indicates that not all employees whose wages are claimed on line 8 of the 2005 tax return are still employed by the petitioner.

The director denied the petition on January 22, 2007, declining to add the depreciation or other expenses back to the petitioner's net income and concluding that the petitioner had not established its continuing ability to pay the proffered wage in view of the multiple I-140 petition beneficiaries it had sponsored.

On appeal, counsel submits a letter from [REDACTED] the petitioner's president. Counsel also provides a copy of an unaudited financial statement covering the three and nine month period ending September 30, 2006. Counsel reiterates that the petitioner's depreciation expense as a non-cash deduction should be added back to the petitioner's 2005 net income. He also cites figures reflecting the petitioner's net current assets and stockholders equity shown on the financial statement submitted on appeal and emphasizes that the overall gross revenues and size of the petitioner's operations.

- 1) The AAO issued a notice of intent to deny on September 14, 2009. We noted that USCIS electronic records indicate that from 2001 to 2008, the petitioner has sponsored multiple beneficiaries. Therefore, the petitioner must show that it has had sufficient continuing net

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one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>4</sup> A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

income or net current assets as expressed in a corporate federal tax return, audited financial statement or annual report in order to cover all of the respective wages beginning at the priority date of each sponsored beneficiary. Alternatively, it must show that it has paid the respective proffered wage to each beneficiary as of the individual priority date. We found that as the record currently stands, the petitioner has not demonstrated this ability. This office afforded the petitioner 30 days to respond to the notice of intent to deny and notified the petitioner to include the following documentation if it elected to respond to the notice:

1. Copies of federal tax returns, *audited* financial statements, or annual reports (based on audited financials) of the corporate petitioner as of the priority date of August 9, 2005 to the present if not already provided to the record, together with copies of the petitioner's state quarterly wage reports for all quarters of 2005 through the first quarter of 2009, which identify the employee and individual wages paid for each quarter.
2. A list of all foreign workers, immigrant or non-immigrant, employed by the petitioner beginning in 2005 and continuing to the present, together with the receipt, number, title, description of his/her duties, proffered wage, priority date, wages paid, date of hire, date of termination, reason for termination, copies of W-2s, Form 1099s or pay stubs indicating past, current, and year-to-date wages, and current pending status of I-140 (i.e., whether pending before USCIS or the AAO).
3. A list of the corporate petitioner's shareholders and officers beginning at inception and continuing to the present.

As of this date, this office has received no response to the notice of intent to deny. The failure to respond to a request for evidence or to a notice of intent to deny by the required date may result in the petition being summarily denied as abandoned, denied based on the record, or denied for both reasons. *See* 8 C.F.R. 103.2(b)(13). 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).

It is additionally noted that pursuant to 8 C.F.R. § 204.5(g)(2), evidence of a petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. Additional evidence may be submitted but is generally not an acceptable substitute for the documentation required by the regulation. The regulation makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited, compiled financial statements that counsel submitted with the appeal are not probative of a petitioner's ability to pay a proffered wage because a compilation is based on the representations of management compiled into standard form.

It is further noted that while the regulation at 8 C.F.R. § 204.5(g)(2) provides that the director may accept a statement from a financial officer of the organization which establishes the employer's

ability to pay the proffered wage, it is discretionary and does not prohibit USCIS from reviewing other factors relating to a petitioner's ability to pay the certified wage.

One of those factors is whether and what extent a petitioner may have filed for multiple beneficiaries. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA Form 9089 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. As stated above, a petitioner's filing of a labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA Form 9089. The priority date is the date that the Application for Permanent Employment Certification was accepted for processing by any office within the employment service system of DOL. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that each job offer was realistic as of the respective 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).

As referenced above, either the petitioner's net income or net current assets can be examined to determine how many proposed salaries it can support. Ability to pay may also be demonstrated by actual payment of the respective certified wage(s) as set forth on the approved labor certification. This applies to other pending petitions as well. It is the petitioner's burden to demonstrate eligibility for all pending petitions as of their respective priority date(s). Otherwise an employer could file ten petitions with the same or similar priority dates and obtain approval of all ten based on the same financial data even though it could only pay one proffered salary.

If the petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will also examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105 (D. Mass. 2007).

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 116. “[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).

It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, the petitioner’s two tax returns provided to the record show declining net income for each of the 2004 and 2005 calendar year(s) and net current assets are reflected as losses in each year. Moreover, the petitioner failed to respond with additional documentation of subsequent years as set forth in the AAO’s notice of intent to deny and failed to establish that sufficient funds have been available to sponsor the multiple beneficiaries for whom it has filed petitions. As noted above, failure to respond to a notice of intent to deny may be grounds for denial of the petition and failure to submit evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(13), (14). No other reputational factors or evidence of a framework of successful

or profitable years was presented that was sufficient to overcome the evidence contained in the record.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.