

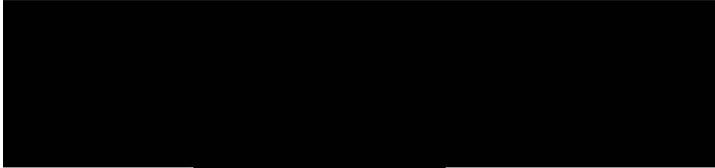


U.S. Citizenship
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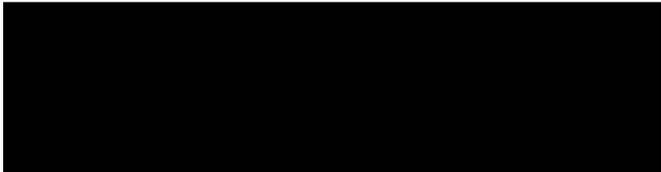
Date: **JUL 16 2009**

IN RE: Petitioner:
Beneficiary:



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:



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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner claims to be a site work contractor. It seeks to employ the beneficiary permanently in the United States as a civil engineer. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).

As set forth in the director's August 15, 2007 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The procedural history for this case is as follows: the labor certification submitted with the petition was filed with the DOL on August 25, 2003. The proffered wage stated on the labor certification is \$45,000.00 per year. The labor certification states that the position requires two years of experience in the job offered. On the labor certification, signed by the beneficiary on August 1, 2003, the beneficiary claimed to have worked for the petitioner since March 2003.

The petition was filed on May 4, 2007. On the petition, the petitioner claimed to have been established in 1989, to have a gross annual income of \$1,594,172.00, and to employ 10 workers.

On May 21, 2007, the director issued a request for evidence (RFE), instructing the petitioner to provide its federal tax returns, annual reports or audited financial statements for 2003 through 2006; the beneficiary's 2006 Form W-2, Wage and Tax Statement; and any other evidence of the petitioner's ability to pay the proffered wage.

The petitioner's August 3, 2007 response to the RFE contained the beneficiary's previously submitted Forms W-2 for 2003 through 2005, and the beneficiary's Form W-2 for 2006 issued by a different employer. The petitioner did not submit any federal tax returns, annual reports or audited financial statements.

On August 15, 2007, the director issued the denial, stating that the petitioner failed to establish its ability to pay the proffered wage from the August 25, 2003 priority date to the present.

The petitioner filed the appeal on September 17, 2007. In the accompanying brief, the petitioner claims that its failure to provide the requested documents was due to its prior attorney's incompetence. In support of its appeal, the petitioner submitted the following documents:

- Forms 1120S, U .S. Income Tax Return for an S Corporation, for 2001 and 2003 through 2005.
- Unaudited financial statements for the years ended 2003 through 2005.

- Petitioner's bank statements for May 1, 2007 through July 31, 2007.

The petitioner's supporting documents submitted on appeal will not be considered here. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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). In addition, the AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

However, in the instant case, the director's RFE specifically instructed the petitioner to provide these documents. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE.

Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

Therefore, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. This analysis will be based on the evidence properly submitted into the record of proceeding, which includes the following:

- Forms W-2 issued by the petitioner to the beneficiary for the years 2003 through 2005.
- Form W-2 issued by another employer to the beneficiary for 2006.
- Letter from the petitioner's accountant, dated July 20, 2007, stating that the petitioner had not yet filed its 2006 tax return and that "to the best of my knowledge and judgment, from information provided to me by officers of the Company, [the petitioner] has the ability to pay the proffered salary of \$45,000 per year to [the beneficiary]."
- Form 7004, Application for Automatic 6-Month Extension of Time to File Certain Business Income Tax, Information, and Other Returns.
- A Letter from the president of the petitioner, dated May 25, 2007, stating that the beneficiary ceased employment with the petitioner on September 2005, but that the petitioner continues to offer the beneficiary permanent employment upon the issuance of an employment authorization document.

- Experience letters stating that the beneficiary has been employed abroad as an engineer.
- Diploma and transcript from Ballarat University College, Australia, for a bachelor of engineering degree.
- Certificate of Membership issued by The Institution of Engineers, Australia.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. In order to classify the beneficiary as a professional or skilled worker, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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).

The regulation 8 C.F.R. § 204.5(g)(2) states:

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 also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

The record contains the beneficiary's Forms W-2 issued by the petitioner for 2003 through 2005. These documents state the wages paid to the beneficiary by the petitioner, as shown in the table below.

<u>Year</u>	<u>Wages Paid (\$)</u>	<u>Remaining Amount (\$)</u>
2003	30,207.57	14,792.43
2004	42,542.12	2,457.88

2005	22,504.28	22,495.72
2006	None	45,000.00

For the years 2003 through 2006, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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. 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 wage expense is misplaced. Showing that the petitioner's gross sales 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*, 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:

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).

However, the petitioner did not properly submit any tax returns, annual reports or financial statements to permit an analysis of its net income. Therefore, for 2003 through 2006, the petitioner did not establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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.¹ 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.

However, the petitioner did not submit tax returns, annual reports or financial statements to permit an analysis of its net current assets. Therefore, for 2003 through 2006, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wage paid, if any, and the proffered wage.

Therefore, the petitioner has 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.

In addition to the preceding analysis, 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*

¹According 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.

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 *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 claimed to have been established in 1989, to have a gross annual income of \$1,594,172.00, and to employ 10 workers. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. Other than its longevity, the petitioner has not established the existence of any circumstances to parallel those in *Sonogawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.²

²It is noted that even if the documents submitted on appeal were considered here, the appeal would still have been dismissed. The petitioner's tax returns state negative net income and net current assets figures for 2003, 2004 and 2005. Second, the petitioner did not provide a tax return, annual report or audited financial statements for 2006. The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). The petitioner's failure to provide this evidence is, by itself, sufficient cause to dismiss this appeal. Although the petitioner submitted evidence that it had not yet filed its 2006 tax return, this does not exempt it from the requirements of 8 C.F.R. § 204.5(g)(2). In the absence of a tax return, the petitioner still must submit an annual report or audited financial statement to establish its ability to pay the proffered wage. While additional

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.

evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In addition, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).