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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS2090  
Washington, DC 20529-2090

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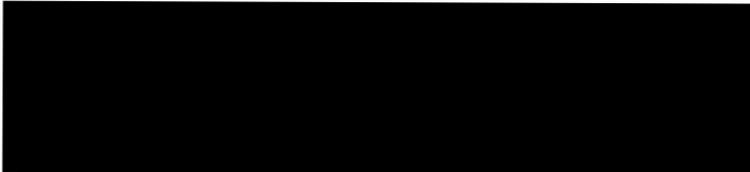
JUL 20 2009

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto care business. It seeks to employ the beneficiary permanently in the United States as a database administrator. 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 record demonstrated that the appeal was properly filed, 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 September 21, 2007, the single 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 January 6, 2007. The petitioner filed the Form I-140 on February 8, 2007, and the petitioner identified on that form is Kapiolani Express Auto Center, Inc., 1111 Kapiolani Blvd., Honolulu, Hawaii. The proffered wage as stated on the Form ETA 9089 is \$68,182.00 per year.

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>1</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 9089 Application for Permanent Employment Certification approved by DOL; a copy of a webpage accessed on July 20, 2006, from the website <<http://hbe.hawaii.gov>> providing business information concerning the petitioner; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2005 and 2006; a letter from counsel dated August 20, 2007; and, copies of documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$25,974.00 and \$583,460.00 respectively. On the ETA 9089, signed by the beneficiary on January 25, 2007, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that "[The director] failed to consider all the acceptable avenues to determine that the petitioner could pay the proffered wage as stated in the Labor Certification. An incorrect determination was made as to the taxable income of the petitioner."

Accompanying the appeal, counsel submits a legal brief, and a supplemental brief dated April 14, 2009, including the following additional evidence: a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2005 and 2006;<sup>2</sup> a "Declaration of [REDACTED]"

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<sup>1</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>2</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2005 and 2006 federal income tax returns generally.

(the petitioner's accountant) dated April 3, 2009; a statement of cash flows for 2005 and 2006; and a copy of a webpage from the Internet website <http://www.financial-dictionary.com> accessed on April 10, 2009, with a definition of depreciation.

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 ETA 750, 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, U.S. 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 (BIA 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Reliance on the petitioner's gross sales and profits 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.

Counsel's supplemental brief contains examples of a table of calculation for two hypothetical companies that demonstrates the effect of disallowing depreciation as an expense by not considering it as a deduction. The petitioner's appellate argument that depreciation expenses should be considered as cash (in combination with the petitioner's net income for years prior to the priority date) is misplaced. 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). Therefore, the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

The petitioner did not submit tax returns from the priority date, tax year 2007, and onwards to demonstrate the petitioner’s ability to pay.<sup>3</sup> As stated below, since the director requested evidence of the petitioner’s ability to pay the proffered wage from the priority date, there is a paucity of evidence concerning the petitioner’s net income. If the net income the petitioner demonstrates it had available during the 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 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.<sup>4</sup> A

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<sup>3</sup> In 2005, the petitioner’s Form 1120 tax return stated net income of \$25,974.00. In 2006, the petitioner’s Form 1120 tax return stated net income of \$11,358.00.

<sup>4</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

corporation's year-end current assets are shown on Schedule L, lines 1 through 6 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 did not submit tax returns from the priority date, tax year 2007, and onwards to demonstrate financial information through a showing of its net current assets to evidence the petitioner's ability to pay.<sup>5</sup>

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>6</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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

<sup>5</sup> The petitioner's net current assets during 2005 and 2006 were \$20,383.00, and \$11,358.00 respectively.

<sup>6</sup> 8 C.F.R. § 204.5(g)(2).

*Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. Counsel has not submitted tax and payroll records for 2007 or onwards and has not established a case for application of *Matter of Sonogawa*. Unusual circumstances have not been shown to exist in this case to parallel those in *Sonogawa*.

According to counsel, only 2006 financial information should be considered in this matter “as the labor certification was filed on January 6, 2007.” Counsel’s assertion is misplaced. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not submitted tax returns, audited financial statements, and annual reports for years from the priority date. When petitions on their face do or do not demonstrate eligibility for the preference visa classification sought the director may review and act upon the petition as submitted.

On appeal, counsel submitted a USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. Although counsel has not otherwise referenced the memo, the applicable portion to this case states in part that “If the required initial evidence does not establish ability to pay, the USCIS adjudicator may deny the petition since the petitioner has not met his or her burden to establish eligibility for the requested benefit.” Further, as this present appeal demonstrates, the petitioner may introduce additional evidence and introduce case precedent in support of its position in a *de novo* review.

According to counsel, and a “Declaration of [REDACTED] (the petitioner’s accountant) dated April 3, 2009, the director should not have relied upon the petitioner’s net income for 2005. Counsel is correct in part. According to regulation<sup>7</sup> and *Matter of Katigbak, Id.*, evidence must be submitted from the priority date. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

The director in his request for evidence (RFE) dated August 2, 2007, requested that the petitioner submit evidence that it had the financial capability to pay the proffered wage on the date it filed the Form ETA 9089 Application for Permanent Employment Certification that is on January 6, 2007. The petitioner should have submitted the documents in response to the director's request for evidence.<sup>8</sup> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner’s failure to submit these documents cannot be excused.

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<sup>7</sup> 8 C.F.R. § 204.5(g)(2)

<sup>8</sup> The director should have dismissed or rejected the petition or appeal for this reason. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Counsel, through the petitioner's account, has submitted statements of cash flow for years 2005 and 2006. Financial evidence for years prior to the priority date is insufficient evidence of the petitioner's ability to pay *after* the priority date. In a generally accepted accounting principles (GAAP) based cash flow statement, the sources of cash are disclosed. The general categories are cash received from operations, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, present an analysis of the financial health of a business. With not an internally generated report as its basis, and no evidence submitted *from* the priority date, the statements of cash flow can have little probative value in the determination of the ability to pay the proffered wage.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.