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

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FILE: [REDACTED]
SRC 08 160 51350

Office: TEXAS SERVICE CENTER Date: JUN 19 2009

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)

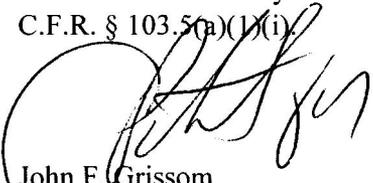
ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is a 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 a construction firm. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. As required by statute, an ETA Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.¹ 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated its financial ability to pay the proffered salary.²

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).

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. The ETA Form 9089 replaced the former Application for Alien Employment Certification filed on Form ETA 750. Employers that filed applications for labor certifications under the regulations in effect prior to March 28, 2005 are permitted to refile such applications for the identical job opportunity using ETA Form 9089 pursuant to the regulation at 20 C.F.R. § 656.17(d). This record of proceedings indicates that the petitioner refiled its labor certification application for the beneficiary because the original priority date of April 27, 2001 was retained on the ETA Form 9089.

² 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. The submission of additional evidence on appeal is allowed by the instructions to the 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).

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that its ETA Form 9089 job offer to the beneficiary is realistic as of the priority date and remained realistic until the beneficiary obtains lawful permanent residence. A petitioner's filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition subsequently filed based on the approved ETA Form 9089. The priority date is the date that the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. If the preference 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.

Here, the ETA Form 9089 was accepted for processing on April 27, 2001. The proffered wage as stated on Part G of the ETA Form 9089 is \$11.69 per hour, which amounts to \$24,315.20 per year.

There is no evidence on the ETA Form 9089 that the petitioner has employed the beneficiary. The beneficiary indicates on Part K of the ETA Form 9089 that he was self-employed from December 10, 2000 to August 23, 2005. He signed the ETA Form 9089 on May 21, 2007. On a biographic

questionnaire, (Form G-325) submitted in connection with his Application to Register Permanent Residence or Adjust Status and signed by the beneficiary on August 9, 2007, he indicates that he is employed by the petitioner at the “present time” but does not state a start date. Other evidence in the file suggests that the petitioner considered him to be an independent contractor in 2000 and 2001,³ but no documentation of compensation actually paid by the petitioner to the beneficiary has been submitted.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on April 21, 2008, the petitioner states that it was established in 1994, reports \$516,999 in annual gross income, \$266,686 in annual net income and currently employs five workers.

As evidence of its continuing financial ability to pay the proposed wage offer of \$24,315.20 per annum the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return, for 2001, 2002, 2003, 2004, 2005. A copy of the 2007 corporate tax return was submitted on appeal. The returns indicate that the petitioner files its tax returns using a fiscal year corresponding to a standard calendar year. The tax returns also contain the following information:

Year	2001	2002	2003	2004
Net Income ⁴	-\$ 2,756	-\$8,179	\$8,667	-\$24,762
Current Assets	\$27,346	\$8,450	\$9,372	\$18,114
Current Liabilities	\$ n/a	\$ n/a	\$ n/a	\$ n/a
Net Current Assets	\$ 27,346	\$8,450	\$9,372	\$18,114

³ Copies of two agreements executed on November 15, 2000 and December 31, 2000, respectively by the petitioner as a general contractor and the beneficiary as a subcontractor in connection with state workers compensation provisions are contained in the record. The duration of the agreement dated December 31, 2000 was one year.

⁴ The petitioner is a C corporation. For the purpose of this review of the petitioner’s Form 1120 corporate tax returns, the petitioner’s net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner’s taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner’s total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner’s taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Year	2005	2006	2007
Net Income	\$ 5,231	\$23,115	\$8,730
Current Assets	\$8,083	\$15,090	\$20,144
Current Liabilities	\$ n/a	\$ 2,113	\$ 1,816
Net Current Assets	\$ 8,083	\$12,977	\$18,328

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. 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.⁶

The petitioner further provided a letter, dated March 6, 2008, from [REDACTED], the petitioner's vice-president. [REDACTED] affirms the petitioner's ability to pay the proffered wage and notes that the company has always made payroll since it was incorporated in 1994 and has operated in a profitable manner. The petitioner also submitted copies of its bank statements covering the years from 2002 through 2007, and January 2008. On appeal, the remaining bank statements for 2008 were provided.

Following a review of the petitioner's net income and net current assets as contained in its 2001 to 2006 corporate tax returns, the director denied the petition on March 12, 2009. He concluded that from 2002 through 2006, neither the petitioner's net income nor its net current assets was sufficient to pay the proffered wage of \$24,315.20.

On appeal, counsel contends that the petitioner's bank statements, as net current assets, demonstrate the petitioner's ability to pay the proffered wage and requests that the petitioner's overall circumstances be considered in determining that the cash illustrated by the petitioner's average monthly balances was sufficient to show the petitioner's ability to pay the proffered wage.

⁵ According 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.

⁶ 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.

Counsel also cites *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) in claiming that a petitioner may show the ability to pay out of its adjusted gross income or other available funds.

Counsel's assertions are not persuasive. It is noted that petitioner in *Ubeda v. Palmer* was a sole proprietorship. Unlike the corporate petitioner in this case, a sole proprietorship does not exist as a legal entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore a sole proprietor's adjusted gross income, and other personal assets are also considered as part of the petitioner's ability to pay. It is further noted that while the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material such as bank account records to be submitted "in appropriate cases," bank records show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. Further, the petitioner has not established that its bank statements somehow represent funds in addition to the cash assets listed on line 1 of Schedule L of the corresponding tax return, which have already been considered in calculating the petitioner's net current assets. The petitioner's assertion that it has operated in a profitable manner and that the ending balances reflected on the petitioner's bank statements do not outweigh the evidence reflected on the petitioner's corporate tax returns or should be accepted as probative of the petitioner's ability to pay the proffered wage in lieu of the information set forth on the tax returns as required by 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. In this matter, as mentioned above, the beneficiary failed to state on the ETA Form 9089 that he has worked for the petitioner. The petitioner has not provided any evidence of compensation paid to the beneficiary.

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 (or net current assets) as reflected on the petitioner's federal income tax return(s), 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., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985);

Ubeda v. Palmer, supra. Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to other employees in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that 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).

Based on the 2001 corporate tax return, the petitioner net current assets of \$27,346 was sufficient to cover the \$24,315.20 certified wage and establish its ability to pay in this year.

In 2002, neither the petitioner's net income of -\$8,179 nor its net current assets of \$8,450 was sufficient to pay the proffered salary or establish its ability to pay.

In 2003, each of the petitioner's net income of \$8,667 and net current assets of \$9,372 was not enough to demonstrate the ability to pay the proffered wage of \$24,315.20.

In 2004, neither the petitioner's net income of -\$24,762 nor its net current assets of \$18,114 was sufficient to pay the proffered salary or establish its ability to pay in this year.

In 2005, neither the petitioner's net income of \$5,231 nor its net current assets of \$8,083 was sufficient to pay the proffered salary or establish its ability to pay the certified wage of \$24,315.20.

In 2006, neither the petitioner's net income of \$23,115 nor its net current assets of \$12,977 was sufficient to pay the proffered salary or establish its ability to pay.

Finally, in 2007, whether considering the petitioner's net income of \$8,730 or its net current assets of \$18,328, neither amount was enough to cover the proffered salary. The petitioner failed to demonstrate the ability to pay the beneficiary's proposed wage offer in this year.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is April 27, 2001. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Therefore, from the date the ETA Form 9089 was accepted for processing by DOL, 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, its net income, or net current assets except for 2001.

In some circumstances, 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). That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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 this matter, the petitioner has not persuasively established that the principles set forth in *Matter of Sonogawa* should apply. Although the petitioner has been in business since 1994, except for 2001, when its net current assets could cover the proffered wage, it has consistently reported either losses in net income or modest profits. Its net current assets have never exceeded the amount set forth in 2001. It cannot be concluded that this represents the kind of framework of profitability such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual and unique business, reputational or other circumstances exist in this case, which are analogous to the facts set forth in that case.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* 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.

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.