

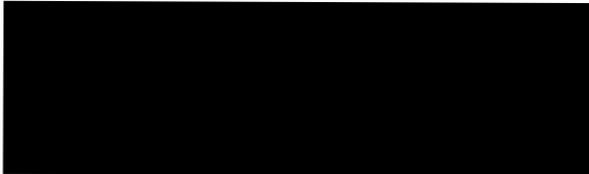
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: OCT 01 2009  
SRC 07 215 53758

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center on February 28, 2008. The petitioner filed an untimely appeal received on April 16, 2008 that the director considered as a Motion to Reopen or Reconsider (MTR). The director denied the MTR on May 8, 2008. The petitioner then submitted a second appeal/motion to reconsider on June 10, 2008. The matter is now before the Administrative Appeals Office (AAO). The matter will be remanded to the director for further consideration of the petitioner's ability to pay the proffered wage based on its claimed paid wages, or based on the audited financial statements submitted to the record with the initial petition and on appeal.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted a partial copy of its audited tax statement from [REDACTED] and [REDACTED], Ridgeland, Mississippi for tax years 2006 and 2007. This evidence is viewed as sufficient to reopen the proceedings.

With the initial petition, the petitioner submitted an audited Financial Statement for May 29, 2005 and May 30, 2004 report written by [REDACTED] and [REDACTED] with accompanying notes to financial statements. The petitioner also submitted a brochure for SouthFresh Farms, with no address indicated, and its Form 1065, U.S. Return of Partnership Income for tax year 2005. This document indicated SouthFresh Farms, LLC was a 24 percent partner in the petitioner.

In two Requests for Evidence (RFE) dated November 27, 2007 and December 15, 2007, the director requested the petitioner's tax return for tax year 2006, an audited financial statement for 2006 or an annual report for 2006. In response, the petitioner submitted two identical letters from [REDACTED] SouthFresh Aquaculture LLC, written on SouthFresh Catfish Processors, Inc. letterhead, located in Eutaw, Alabama. In his letters dated December 8, 2007 and January 8, 2008, respectively [REDACTED] stated that the purpose of the letter was to inform USCIS of the petitioner's ability to pay the proffered wage. [REDACTED] noted that the petitioner's gross sales in 2006 were \$69,971,000 with net income of -\$36,778. [REDACTED] noted that the petitioner's 2006 paid wages totaled \$9,624,000.<sup>1</sup> The director did not refer to [REDACTED] references to the petitioner's paid wages for 2006 in his decision, but rather stated that while indirect evidence of the petitioner's ability to pay the proffered wage *may be* considered, (emphasis in director's decision), it was incumbent upon the petitioner to provide direct evidence such as annual reports, federal tax returns, or audited financial statements. Although the petitioner provided the director with an audited tax statement for tax year 2005, the priority year, the director did not comment on this document or on [REDACTED]s assertions with regard to total wages paid.

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<sup>1</sup> The record is not clear how [REDACTED] arrived at this figure. Based on the petitioner's 2006 Form 1065, the petitioner's wages and salaries of \$1,829,706 noted on page one of the Form 1065, combined with cost of labor expenses of \$7,434,213 listed in Schedule A equal \$9,263,919.

The petitioner in its first appeal/motion submitted a letter from ██████████ SouthFresh Aquaculture, LLC, Oxford, Mississippi, dated March 25, 2008. In this letter, the CFO reiterates his comments with regard to the petitioner's gross income of \$69,971,632, total profit of \$10,233.568 and salaries and wage for 2006 that totaled \$1,829,706. ██████████ added that the petitioner had current assets in 2006 of \$5.7 million dollars. The petitioner also submitted its 2006 Form 1065 that indicated ordinary business loss of \$821,907, and net current assets of -\$5,517,229.<sup>2</sup> Counsel asserts that the petitioner submitted its response to the director's RFE in the form of a letter from its CFO because the petitioner has over 100 fulltime employees. Counsel states that since the director denied the I-140 petition because the petitioner failed to submit its 2006 tax returns, it was submitting the 2006 tax document on appeal.

In a decision dated May 8, 2008, the director stated that the petitioner's appeal would be considered as a Motion to Reopen. The director examined the petitioner's 2006 tax return and determined that it did not establish that the petitioner had the ability to pay the proffered wage. The director did not comment on the letters submitted to the record by the petitioner's Chief Financial Officer. The director affirmed his decision to deny the petition.

On second motion, the petitioner submits an additional letter from ██████████ dated June 8, 2008. In this letter, the CFO reiterates his comments with regard to the petitioner's gross income, total profit, salaries and wages, and current assets for 2006. ██████████ also states that on Page Four of the 2006 tax return, the amounts in column b and d, line number one,<sup>3</sup> are both misclassified. ██████████ states that the petitioner operates from a line of credit rather than a checking account. The petitioner also submits an additional Independent Auditors' Report dated November 5, 2007 that examined the petitioner's balance sheets as of May 27, 2007 and May 28, 2006. This statement is accompanied by page two of the statements that lists assets and liability and members' equity. This document identifies total current assets of \$14,461,912 in May 2006 and \$17,044,920 in May 2007, and total current liabilities of \$12,114,330 in May 2006 and total current liabilities of \$13,826.790 in May 2007. In both years, the petitioner shows positive current assets of over \$2,000,000.

The second motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted, namely, the petitioner's audited report for tax years 2006 and 2007.

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<sup>2</sup> For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K have relevant entries for additional income in both years and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

<sup>3</sup> The petitioner's officer apparently refers to Page Four, Line One of Schedule L, Cash.

The petitioner is a partnership involved in catfish processing. It seeks to employ the beneficiary permanently in the United States as a fish filleter. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, accompanied the petition. The AAO notes that the record contains two Forms 9089, one accepted by the Department of Labor (DOL) on June 23, 2005, with the beneficiary identified as [REDACTED]. The petitioner substituted [REDACTED] for the original beneficiary on a second ETA Form 9089 submitted to the United States Citizenship and Immigration Services (USCIS). This Form ETA 9089 is signed by the beneficiary on May 22, 2007, and by counsel on June 28, 2007, with the instant I-140 petition submitted to USCIS on July 9, 2007.<sup>4</sup>

As set forth in the director's February 28, 2008 denial, 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)(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 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. In a case where the prospective United States employer employs 1000 or more workers, the director may accept a statement from a financial officer of the organization which establishes the

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<sup>4</sup> An interoffice memorandum written by Donald Neufeld, USCIS Acting Associate Director, Domestic Operations, provides guidance that the prohibition of the filing of labor certification substitutions request would take effect on July 16, 2007. Since the petitioner filed the substituted Form ETA 9089 and I-140 petition prior to July 16, 2007, the beneficiary substitution will be accepted. See Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final rule, Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities or Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, Revisions to Adjudicator's Field Manual (AFM): Chapter 22.2(B0 General Form I-140 issues, (AFM Update AD07-20), HQ 70/6.2, ADO7-20, June 1, 2007.

prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit-loss statement, bank account records, or personnel records, may be submitted by the petitioner or requested by the [United States Citizenship and Immigration Services (USCIS)].

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 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 June 23, 2005. The proffered wage as stated on the Form ETA 9089 is \$7.25 per hour (\$15,080 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>5</sup>

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.<sup>6</sup> On the petition, the petitioner claimed to have been established on June 22, 2000 and to currently employ 450 workers. According to the audited statements in the record, the petitioner's fiscal year may run from May 30 of one year to June 1 of the following year, while the

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<sup>5</sup> 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).

<sup>6</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

petitioner's tax returns do not establish any particular fiscal year. On the Form ETA 9089, signed by the beneficiary on May 22, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 (Reg. Comm. 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 did not establish that it employed the beneficiary during the relevant period of time.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

The record before the director closed on January 14, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return is the most recent return available. The petitioner has not submitted its 2007 tax return to the record, but has submitted a partial copy of the petitioner’s audited financial statement for the years ending in May 2006 and 2007. The petitioner’s tax returns for 2005 and 2006 as stated previously are -\$484,904 and -\$821,907. Therefore, for the years 2005 and 2006, the petitioner did not establish that it had sufficient net income to pay the proffered wage. With regard to the petitioner’s audited financial statement for the period ending May 2007 submitted on second motion, this document does not address the petitioner’s net income. Therefore the petitioner cannot establish whether it had sufficient net income in 2007 to pay 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. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>7</sup> A partnership’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership’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 tax returns stated its net current assets as detailed in the table below.

In 2005, the petitioner’s Form 1065 stated net current assets of -\$6,786,437, and net current assets of -\$5,517,229. However, the petitioner’s audited statements for May 2004 and May 2005 indicate

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<sup>7</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

total net assets of \$14,701,872 and total current liabilities of \$12,440,800 as of May 2005, which indicates net current assets for over \$2,000,000. The petitioner's audited financial balance sheets indicate total current assets of \$14,461,912 and total current liabilities of \$12,114,330, with net current assets of over \$2,000,000 in tax year 2006; and total current assets of \$17,044,920 and total current liabilities of \$13,826,790 with net current assets of over \$3,000,000 as of May 2007. Thus, the petitioner's audited documents indicate that the petitioner had sufficient net current assets during 2005, 2006 and 2007 to pay the beneficiary's proffered wage.

USCIS records indicate that the petitioner has filed 32 petitions during the period of time from 2006 to 2008, with the majority filed during 2007 and 2008. Some of these petitions have been approved while others have been denied or returned to USCIS as undeliverable mail. With regard to multiple beneficiaries, the petitioner must show that it has sufficient income to pay all the wages at the priority date.

The record is not clear why the director did not examine the petitioner's audited 2005 financial statement submitted with the initial petition in his consideration of the petitioner's ability to pay the proffered wage. Nor does the record explain why the director did not accept the petitioner's letter from its Chief Financial Officer with regard to the scale of wages paid to its employees, or ask for further evidence as to the claimed number of employees in the second RFE sent to the petitioner.

The AAO also notes that 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.

In the instant case, the petitioner claims a significant number of employees as well as a significant amount of gross profits in its business operations during the relevant period of time. The director

may wish to have the petitioner further explain whether the claimed 450 employees are the petitioner's direct employees or are the employees of the various partners in the petitioner's LLC structure, in examining the totality of the circumstances in this individual case.

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

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.