

identifying data deleted to
prevent identity theft and
invasion of personal privacy

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

PUBLIC COPY

B6



FILE: [REDACTED]
SRC 07 050 51701

Office: TEXAS SERVICE CENTER

Date: OCT 28 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:



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 R. Hew
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 sustained.

The petitioner is a freight forwarding company.¹ It seeks to employ the beneficiary permanently in the United States as a public relations specialist. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2006 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes 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 October 1, 2007 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)(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 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). 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).

¹ Extensive documentation submitted to the record establishes that the petitioner's business operations focuses on freight forwarded to The Philippines.

Here, the Form ETA 9089 was accepted on May 16, 2006. The proffered wage as stated on the Form ETA 9089 is \$19.46 per hour (\$40,476.80 per year). The Form ETA 9089 states that the position requires a bachelor's degree in communications and twelve months of work experience.

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.²

With the I-140 petition, the petitioner submitted its Form DE-6 Quarterly Wage and Withholding Report for the first quarter of 2006 that lists the quarterly wages of 24 employees, including the beneficiary. This document indicates the beneficiary earned \$6,360 during the first quarter of 2006. In response to the director's RFE dated July 17, 2007, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return, for 2006, as well as the petitioner's Forms DE-6 for the second, third, and fourth quarters of tax years 2006, and for the first and second quarters of 2007. All Forms DE-6 indicate the beneficiary earned \$36,360 each quarter.

On appeal, counsel submits the petitioner's checking bank statements from CitiBank, San Francisco for May to December 2006; and from July to September 2007; and the petitioner's Forms 1120 for tax years 1999 to 2005.³ Counsel also submits the beneficiary's W-2 Wage and Tax Statements for tax years 2002, 2003, 2005, and 2006.⁴ Finally in Exhibit M, counsel submits extensive Internet documentation and newspaper articles on the Forex Group and the Balikbayan phenomenon. An article from the *Philippine Post*, (undated) entitled "Door to Door, Heart to Heart", describes the history of the group of businesses, mentioning that the Forex cargo business is stronger on the West Coast, with headquarters in Los Angeles. Another article dated February 1, 2006 published on the online *Manila Bulletin*, entitled "BAGahe replaces the Balikbayan box" describes a new Forex business concept of a Filipino weatherized tote bag. A National Public Radio transcript from

² 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).

³ These documents show the petitioner's net income, as identified on line 28, taxable income before net operating loss deduction and special deductions, as follows: \$160,821 in 1999; \$269,107 in 2000; \$98,096 in 2001; \$87,196 in 2002; \$99,485 in 2003; \$144,719; and -\$78,191 in 2005.

⁴ No W-2 Form was submitted for tax year 2004. The petitioner submitted the beneficiary's Form 1040 for tax year that indicated she earned \$26,500 in that year. A document entitled "W-2 Detail Report-2004" accompanies the Form 1040 indicating that the petitioner paid the beneficiary her wages in 2004. The submitted W-2 Forms indicate the petitioner paid the beneficiary \$19,283.53 in 2002; \$17,276 in 2003; \$25,440 in 2005; and \$25,440 in 2006.

November 2007 describes the Balikbayan gift box program and mentions the petitioner's Philippines based company. A *Washington Post* article from 2007 discusses the history of the establishment of the Forex Company, initially as a money transfer facility during the Marcos regime and then as a cargo shipping business. A final Internet article is a press release from the Philippine Consulate General in New York dated February 26, 2007 advising on how to provide assistance to victims of Typhoon Reming in Bicol, The Philippines. The articles states that cargo forwarding companies Forex and Port Jersey had already cooperated with a local group for the shipment of donations. Counsel submits an excerpt from the petitioner's website at [REDACTED] that describes the petitioner's cargo operations and a network of affiliates, including an online branch. Counsel also submits excerpts from a website produced by a student from a University of Maryland Material Culture that focused on the Balikbayan program and mentions the petitioner's business as one of the leading cargo businesses with offices in seven different countries.

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 January 17, 1991, to have a gross annual income of \$6,154,188, and to currently employ 28 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 9089, signed by the beneficiary but not dated, the beneficiary claimed to have worked for the petitioner since November 16, 2001.

On appeal, counsel cites *Matter of Sonogawa*, 12 I & N Dec. 612, 1967, and states that the director should have considered other relevant evidence and the petitioner's circumstances such as past growth of the business, and reasonable expectations of future growth when he considered the petitioner's ability to pay the proffered wage. With regard to the petitioner's negative net income and net current assets in 2006, counsel notes the petitioner's available cash assets at the beginning and at the end of 2006 identified on the petitioner's Schedule L. Counsel lists the cash assets identified on the petitioner's Schedules L in its tax returns for tax years 1999 to 2005 and states that the petitioner's cash deposits are expected to remain high.

Counsel also states that the petitioner has over twenty employees and has never defaulted in payment of their salaries. Counsel notes the following salaries and wages paid by the petitioner, based on the petitioner's tax returns: \$456,852 in 1999, \$415,280 in 2000; \$542,912 in 2001; \$620,643 in 2002; \$919,013 in 2003; \$1,005,552 in 2004; \$1,018,325 in 2005; and \$955,688 in 2006.

Counsel states that if the petitioner must be able to show it had the ability to meet the salary on a monthly or daily basis, the petitioner could also establish this. Counsel lists the petitioner's average daily balance for the petitioner's bank statements from May 2006 to December 2006, and states that the petitioner's average daily balance for this entire time is \$94,376.60. Counsel notes that this is more than enough to pay the proffered daily salary of \$155.68 per day.⁵

⁵ Counsel utilized the beneficiary's hourly wage of \$19.46 times eight hours a day to arrive at this figure.

Counsel also states that the director should take into consideration that the petitioner is part of the Forex Group, a business with more than 70 offices and affiliates throughout the world, and that its business is closely interlinked with the operation of other Forex companies. Counsel discusses the position of the petitioner within the Forex group, describing it as the third Forex Cargo company created by Forex Group have been established three years after the first Forex Cargo company in 1989. Counsel asserts that California is considered the biggest market for the Forex Group and as a result the Forex Group relies heavily on the petitioner to service its customers in California and neighboring states.

Counsel states that the petitioner's real financial condition cannot be assessed without considering the business situation of the Forex Group as a whole. Counsel states that it is common for a group of companies to have inter-company transactions or share or allocate costs for activities, business expenses, or projects that benefit all or several members of the group. Counsel notes that the petitioner's 2006 tax return shows items such as expenses for customs and distributions in Manila, dues from affiliates, and investment in other Forex companies. Counsel states that the tax returns of such companies are not necessarily reflective of their financial condition as it relates to its ability to pay the proffered wage. Counsel notes that even with a negative net income in 2006, the petitioner did not cut down business, declare insolvency or bankruptcy or close down, and its competitive edge and popularity among Filipinos makes any of these scenarios unlikely to happen.

Counsel also discusses the petitioner's good reputation among the Filipino community in the United States and refers to the various newspaper articles submitted to the record that mentions either the Forex Group, or the petitioner's cargo operations specifically.

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, United States 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 (Reg. Comm. 1967).

Counsel's reliance on the balances in the petitioner's Citibank bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current

assets.

Counsel on appeal suggests that the financial resources of other Forex companies or offices affiliated with the petitioner be considered in determining the petitioner's ability to pay the proffered wage. The petitioner would have to establish much more clearly the business relationship between any other offices or its corporate headquarters before the AAO could examine this factor any further. If the various offices listed in Internet excerpts are established as distinct corporations, their financial resources cannot be utilized to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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 established that it employed and paid the beneficiary the following wages: The submitted W-2 Forms indicate the petitioner paid the beneficiary \$19,283.53 in 2002; \$17,276 in 2003; \$25,440 in 2005; and \$25,440 in 2006. The AAO notes that the priority year for the instant petition is 2006, and thus, the beneficiary's W-2 Forms for previous years are not dispositive of the petitioner's ability to pay the proffered wage as of 2006. With regard to 2006, the petitioner did not pay the beneficiary the full proffered wage, and has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$40,476.80, namely, \$15,036.80.

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 (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*, 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 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 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on August 30, 2007 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 was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2006 was -\$158,421. Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages 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 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.⁶ A 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 tax returns demonstrate its end-of-year net current assets for 2006 was -\$107,152. Therefore, for the year 2006, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

From the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had 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.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel refers to the petitioner's cash assets and the use of the financial resources of other companies in the Forex Group to establish the petitioner's ability to pay the wage. However, as previously discussed, neither approach is a viable alternative. Counsel's assertions on appeal with regard to these issues cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

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

⁶According 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.

design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 has been in business since 1991,⁷ and has twenty-eight employees. The tax returns submitted to the record for the years 1999 to 2006 reflect that the petitioner paid consistent and significant levels of wages and salaries, as well as employee benefits programs expenses, and officer compensation, during these years. The petitioner's tax returns indicate the petitioner paid the following salaries and wages: \$456,852 in 1999, \$415,280 in 2000; \$524,912 in 2001; \$620,643 in 2002; \$919,013 in 2003; \$1,005,552 in 2004; \$1,018,325 in 2005; and \$955,688 in 2006. The petitioner also paid the following amounts of officer compensation: \$749,650 in 1999; \$639,400 in 2000; \$633,600 in 2001; \$577,720 in 2002; \$266,569 in 2003; \$252,400 in 2004; \$208,000 in 2005, and \$200,000 in 2006. The petitioner's gross receipts during tax years 1999 to 2006 were over \$6,000,000.

All tax returns, with the exception of the priority year and 2005, also indicate significant positive net incomes that historically support the petitioner being a viable business entity. On appeal, counsel submits extensive Internet documentation on the petitioner's (and other affiliated companies or corporations) profile within the U.S. community and in the Philippines, as well as the ongoing viability of the backbone of their principal cargo shipping business, namely, the Balikbayan program. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had 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 met that burden.

ORDER: The appeal is sustained.

⁷ Both the I-140 and the petitioner's tax returns indicate this year of establishment, although the Internet articles indicate an earlier business presence in California.