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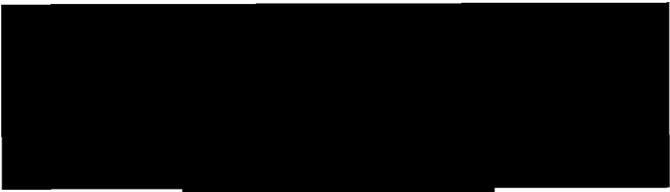
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **APR 07 2010**

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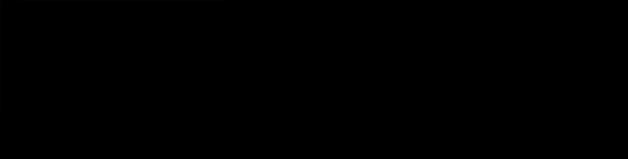
Petitioner:



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

Petry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment based visa petition was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an elderly residential care provider. It seeks to employ the beneficiary permanently in the United States as an elderly caregiver. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (ETA 9089) approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the ETA 9089 supported the visa classification sought. He also observed that the petitioner had not established that it had the ability to pay the proffered wage or that the beneficiary had the required work experience by the time of the priority date, and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petition merits approval.

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).

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 other 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.

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(l) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on May 10, 2007, indicates that the petitioner was established in 2004 and currently employs two workers. The petitioner sought visa classification (Part 2, paragraph e of I-140) of the beneficiary as a skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act. Part H, item 6 of the ETA 9089, however, which was submitted in support of this visa classification, required 12 months of work experience in the job offered as an elderly caregiver.

Citing 8 C.F.R. § 204.5(1)(2), and as mentioned above, the director observed that the certified position described on the ETA 9089 required 12 months of experience. As the visa classification sought on the I-140 petition designated the skilled worker category (paragraph e), the I-140 petition was not approvable because it was not supported by the appropriate ETA 9089. In order to be classified as a skilled worker, the ETA 9089 minimum requirements must be consistent with the visa classification sought and must require at least two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the ETA 9089 specified at least two years of training or experience.<sup>1</sup>

On appeal, counsel emphasizes that the petitioner has always sought applicants with at least two years of experience. Counsel further states that the beneficiary has two years of combined experience and training necessary for the proffered position.

Counsel's assertions are not persuasive. The ETA 9089 submitted to and certified by DOL specified that the offered position requires a minimum of twelve months of experience in the job offered, and not two years of experience. The only visa category that is consistent with these minimum requirements is that of an unskilled, other worker, as set forth on paragraph (g) of the I-140. The AAO concurs with the director's decision that the petition is not approvable as a skilled worker as requested by the petitioner. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee, select the proper category, and submit the required documentation.

The director noted additional grounds for denial in his decision. With respect to the petitioner's ability to pay the proffered wage, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) states:

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<sup>1</sup> The petitioner filed a prior petition for the instant beneficiary that was denied on the same basis.

*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 regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage. It must also demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the Form 750 is the initial receipt in the DOL's employment service system.<sup>2</sup> See 8 C.F.R. §

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<sup>2</sup> If the 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.

204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 9089 was accepted for processing on August 6, 2006. The proffered wage as set forth on the ETA 9089 is \$10.29 per hour, which amounts to \$21,403.20 per year.

It is noted that the beneficiary signed the ETA 9089 on April 21, 2007. One of the petitioner's two principal shareholders signed the ETA 9089, but the signature is undated.<sup>3</sup> The beneficiary claims on Item a of Part K of the ETA 9089 that she has worked as a caregiver for the petitioner since April 1, 2006.

In support of its ability to pay the proffered wage, in the underlying record and on appeal, the petitioner has provided copies of its 2006 and 2008 Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner did not submit a copy of its 2007 federal tax return or other financial information required by 8 C.F.R. § 204.5(g)(2). The returns provided indicate that the petitioner's fiscal year is a standard calendar year basis. The returns contain the following information:

Year	2006	2008
Net Income <sup>4</sup>	\$1,943	\$110,137
Current Assets	\$19,379	\$ 91,714
Current Liabilities	\$12,412	\$ 19,955
Net Current Assets	\$ 6,967	\$ 71,759

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.<sup>5</sup> It represents a measure

<sup>3</sup> This is the second I-140 submitted with this ETA 9089. The first I-140 was denied on February 1, 2007. No appeal was taken.

<sup>4</sup> Where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation 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, credits, deductions or other adjustments, net income is found on line 18 (2006, 2008) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 18 (2006, 2008) of Schedule K.

<sup>5</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.

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.

The petitioner also submitted copies of its Form 941, Employer's Quarterly Federal Tax Return for each quarter of 2006. The first two quarters of the quarterly tax returns indicate that the petitioner paid wages, tips and other compensation to 30 and 32 workers, respectively. The last two quarters of 2006, the petitioner reports paying wages, tips and other compensation to 50 and 52 workers, respectively. Incomplete copies of its state wage and withholding reports for the same period were also provided. Their list(s) of employees do not include the beneficiary's name. It is unclear why the petitioner claimed only two employees on Part 5 of the I-140. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner employed the beneficiary, however, no evidence of compensation paid has been provided.

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 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).

It is further noted that USCIS electronic records indicate that the petitioner has filed at least thirteen petitions for foreign workers during the relevant period. The petitioner has not provided information relating to the wages paid or the proffered wage of other beneficiaries that it has sponsored. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 9089 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. Otherwise an employer could file ten petitions with the same or similar priority dates and obtain approval of all ten based on the same financial data even though

it could only pay one proffered salary. In this case, as set forth above, the tax returns provided suggest that in 2008, the petitioner could cover the instant proffered wage through either the petitioner's net income or net current assets. However, confirmation of this ability to pay cannot be made absent the submission of information relating to the other beneficiaries.

Moreover, as indicated above, in 2006, neither the petitioner's net income of \$1,943 nor its net current assets of \$6,967 was enough to cover the proffered wage of \$21,403.20. Further, as noted above, the petitioner has not provided any financial information for 2007. In view of the foregoing, the petitioner has not established that it has had the continuing ability to pay the proffered salary.

It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in Time and Look. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, it may not be concluded that petitioner's business operations have presented the kind of framework of profitability such as that discussed in *Sonogawa*. As noted above, although the petitioner's net income and net current assets increased from 2006 to 2008, as stated above, the record is incomplete without the petitioner's other financial information and information related to the multiple beneficiaries that it has sponsored. Moreover, it is noted that the petitioner was established less than three years before filing the ETA 9089. The petitioner has not demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in *Sonogawa*. The petitioner also did not submit any evidence of reputation similar to *Sonogawa*.

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 August 6, 2006. (Emphasis added). Demonstrating that the petitioner's ability to pay in selected years is insufficient as the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time and must demonstrate that the ability to pay encompasses all of its sponsored workers as of their respective priority dates. Therefore,

based on the foregoing, the petitioner has failed to establish its continuing ability to pay the certified wage.

Relevant to the beneficiary's employment experience as an elderly caregiver, the petitioner submitted one employment verification letter. It is dated March 1, 2006 and is signed by [REDACTED] of Laguna Hills, California. The letter states that the beneficiary "has been an independent contractor of [REDACTED] since July 2004 to the present."<sup>6</sup> The letter does not describe the beneficiary's job duties or even affirm if she acquired experience as an *elderly* caregiver. The letter merely states that she performed outstanding care giving functions and received good feedback. Moreover, the state corporate online database indicates that an entity by the name of [REDACTED] in Irvine, California with [REDACTED] stated as an agent for service of process, has been dissolved.<sup>7</sup> It is unclear if this was the same entity but it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It may not be concluded that the petitioner has established that the beneficiary acquired the requisite twelve months of work experience as an elderly caregiver as set forth on the ETA 9089. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on a review of the underlying record and the evidence submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for a skilled worker visa classification initially sought by the petitioner. Additionally, there was insufficient evidence to establish that the petitioner has the continuing ability to pay the proffered wage or that the beneficiary had obtained the requisite twelve months of work experience as set forth on the labor certification. Therefore, the appeal will be dismissed on these bases.

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.

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<sup>6</sup> These dates conflict with the dates listed on ETA Form 9089 where the beneficiary states that she worked for [REDACTED] from July 22, 2004, but ended her employment on December 16, 2005. As the labor certification was not filed until August 2006, the reason for the discrepancy in dates is unclear.

<sup>7</sup> See <http://kepler.sos.ca.gov/cbs.aspx> (Accessed 3/22/10).