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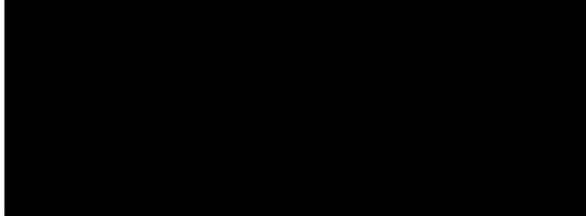
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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Services**

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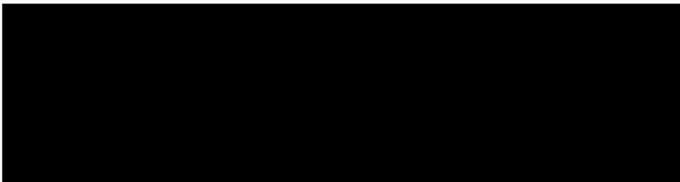
Office: TEXAS SERVICE CENTER Date:

APR 14 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant company. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (the DOL), accompanied the petition. 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.

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 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 unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 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 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 ETA Form 9089 was accepted on June 1, 2006. The proffered wage as stated on the ETA Form 9089 is \$11.24 per hour (\$23,379.20 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 at 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The petition was accompanied by the labor certification and the following relevant evidence: a letter statement from the petitioner's accountant dated January 17, 2006, and the petitioner's 2006 federal income tax return Form 1065.

On appeal, counsel submitted an explanatory letter dated April 21, 2008; a letter from the petitioner dated April 9, 2008; the petitioner's bank checking statements for the time period January 31, 2007, to December 31, 2007; and the petitioner's 2007 federal income tax return Form 1065.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in 2002 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on September 5, 2006, the beneficiary did claim to have worked for the petitioner from March 2, 2002, to May 26, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

² 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.

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).

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 beneficiary did claim to have worked for the petitioner from March 2, 2002, to May 26, 2006, but no Wage and Tax (W-2) or 1099-MISC statements were submitted by the petitioner.

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 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 petitioner’s tax returns stated its net income as detailed in the table below.

- In 2006, the petitioner’s Form 1065 stated net income of \$2,449.00.³
- In 2007, the petitioner’s Form 1065 stated net income of \$14,404.00.

Therefore, for the years 2006 and 2007, the petitioner did not establish that it had sufficient net income 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.⁴ The year-end current assets of an LLC being treated as a partnership 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 an entity’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 2006, the petitioner’s Form 1065 stated net current assets of <\$18,467.00>.
- In 2007, the petitioner’s Form 1065 stated net current assets of <\$265.00>.

Therefore, for the years 2006 and 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

³ For a LLC filing a form 1065 as a partnership, 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 business has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. However, the net incomes as found on line 1 of the Analysis of Net Income (Loss) of the Schedules K for 2006 and 2007 are the same figures as found on lines 22 of each tax year return.

⁴ 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.

On appeal, counsel asserts that the director made the petitioner's net current assets the only indicator of the petitioner's ability to pay the proffered wage contrary to the USCIS Internal Memorandum dated May 4, 2002. Counsel's assertion is not supported by the director's decision.

The USCIS Interoffice Memorandum (HQOPRD 90/16.45) relied upon by counsel for support of his assertion is commonly called the Yates' memorandum. It provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay based upon favorable evidence submitted according to the regulation at 8 C.F.R. § 204.5(g)(2). The director's decision dated February 27, 2008, provides an analysis of the evidence submitted in the record against a background of five regulations and approximately 11 court decisions all of which apply to the case. The director's decision not only discusses the petitioner's current assets and current liabilities, but its gross income, its business expenses, and business income to reach a decision in the matter.

According to counsel, the petitioner had cash available at year end that exceeded the amount of the proffered wage and this is proof of its ability to pay the proffered wage. According to counsel's explanatory letter dated April 21, 2008, "cash available at the year end" in 2006 is identified as the petitioner's gross income, and the partner's capital account. Counsel's contention is misplaced in both instances.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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 USCIS should have considered income before expenses were paid rather than net income.

The AAO notes that the petitioner in its letter dated April 9, 2008, also stated that the partners' capital accounts both in 2006 and 2007 were available to pay the beneficiary the proffered wage. Counsel has provided no regulation or court decision to support this contention. Since the petitioner did not submit any payroll evidence, the petitioner's assertion is not supported by evidence in the record even assuming that the capital account qualifies as a current asset, which it does not.⁵

While not a basis of this decision, according to the evidence submitted, it is not clear if the petitioner is offering the beneficiary full time employment. Although the petitioner submitted its checking statements for 2007, no payment has been identified in the statements as a wage or compensation payment despite the fact that in 2006 and 2007, the petitioner's Form 1065 tax returns stated salary and wage payments (i.e. line 9) of \$73,462.00 in 2006, and \$77,710.00 in 2007. Since the petitioner

⁵ Although the petitioner has not submitted its Operating Agreement, each member's capital contribution to the LLC increases that member's ownership interest and also increases his/her share of the LLC's profits. Based upon the evidence submitted, the individual partner shares the stated capital interest. A capital interest entitles the recipient to a share of liquidation proceeds if the LLC sells its assets and is liquidated. It is not a current asset.

has 11 employees, it is not clear if any of the employees were employed full time. Each employee, including the petitioner, was paid on average in 2006 \$6,678.36, and in 2007, \$7,064.55 according to the tax returns submitted.⁶

Counsel's reliance on the balances in the petitioner's bank accounts as evidence of the petitioner's ability to pay the proffered wage 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 or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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 was considered in determining the petitioner's net current assets.

Counsel has submitted a letter from the petitioner's accountant dated January 17, 2006, stating that the petitioner has the ability to pay the proffered wage despite the amortization expenses taken in 2004 and 2005. Intangible assets on a balance sheet are included as "other assets" and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles. An expense is not an asset. The accountant's opinion is misplaced. *See River Street Donuts, Id.* USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

⁶ The regulation at 20 C.F.R. § 656.3 states:

"Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. For purposes of this definition an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

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, despite counsel's contentions, the petitioner's net income and net current assets in 2006⁷ and 2007, were insufficient to pay the proffered wage. Although the petitioner's gross receipts increased 2006 to 2007, its cost of goods sold rose 125% over the same period, which along with a substantial rental expense, substantially reduced its net income in each year. There is a paucity of information in the record concerning the petitioner's business organization and finances. There is no information in the record concerning the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses that would account for its depressed net incomes in 2006 and 2007. No State of New York limited liability company

⁷ The AAO will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as audited monthly income statements or pay stubs, the petitioner has not submitted such evidence. Although the AAO notes that the director pro-rated the proffered wage in 2006, the AAO will not. The director's reasoning on this will be withdrawn. USCIS through the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

registration statement or operating agreement identifying the petitioner was submitted. It is not clear that the petitioner employed any full time workers. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not 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 not met that burden.

ORDER: The appeal is dismissed.