

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**PUBLIC COPY**

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**

B6

FILE:

[REDACTED]  
SRC-07-148-51409

Office: TEXAS SERVICE CENTER

Date:

APR 19 2010

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

**INSTRUCTIONS:**

Enclosed please find 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 concerning your case 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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition filed by the petitioner in this case was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be upheld and the appeal will be dismissed.

The petitioner is a construction company specializing in electrical jobs. It seeks to employ the beneficiary permanently in the United States as an estimator. As required by statute, the petition is accompanied by a ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage, and denied the petition accordingly.

The record shows that the appeal is properly and timely filed, 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 22, 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 Form ETA 750 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 Form ETA 750 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).

The Form ETA 750 was initially accepted on September 20, 2002. The petitioner subsequently filed an ETA Form 9089 to seek to utilize the filing date from the previously submitted Form ETA 750 and the ETA Form 9089 was certified on January 31, 2007 with the filing date of September 20, 2002. The proffered wage as stated on the certified ETA Form 9089 is \$16.41 per hour (\$34,132.80 per year). The ETA Form 9089 states that the position requires an associate's degree in electrical engineering or electronics engineering and six months of experience in the job offered. On the petition, the petitioner claimed to have been established in 1986,<sup>1</sup> to have a gross annual income of \$1,200,000, to have a net annual income of (\$8,000), and to currently employ 15 workers.<sup>2</sup> On the ETA Form 9089 signed by the beneficiary, the beneficiary claimed to have worked for the petitioner in the proffered position since February 1, 2002.

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>3</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, 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).

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, although the ETA Form 9089 states that the petitioner has employed the beneficiary in the proffered position since February 1, 2002, the

---

<sup>1</sup> The petitioner's tax returns in the record show that it was incorporated on March 5, 1999.

<sup>2</sup> On the ETA Form 9089, the petitioner, however, claimed to have 20 employees.

<sup>3</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).

petitioner submitted its DE-6 quarterly reports and the beneficiary's paystubs for 2007 only. The beneficiary's paystubs and the petitioner's quarterly reports show that the petitioner employed and paid the beneficiary at the level of \$700 per week which is greater than the proffered wage. Therefore, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2007. However, the record does not contain any other documentary evidence showing that the petitioner paid the beneficiary any amounts from the priority date in 2002 through 2006. Counsel relies on the figure of \$264,220 salaries and wages paid to employees in establishing the petitioner's ability to pay the proffered wage in 2006. However, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the proffered wage in 2002 through 2006.

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).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. In response to the director’s request for evidence, the petitioner claimed that it is a sole proprietorship, not a corporation. The petitioner’s assertion is misplaced. According to the tax returns in the record, the petitioner’s fiscal year is based on calendar year. The record before the director closed on September 27, 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 record contains the petitioner’s tax returns for 2003 through 2006. These tax returns demonstrate the petitioner’s net income for 2003 through 2006, as shown in the table below.

- In 2003, the Form 1120S stated net income<sup>4</sup> of (\$1,509).
- In 2004, the Form 1120S stated net income of \$2,737.
- In 2005, the Form 1120S stated net income of (\$8,411).
- In 2006, the Form 1120S stated net income of \$12,379.

Therefore, for the years 2003 through 2006, the petitioner did not have sufficient net income to pay the instant beneficiary the proffered wage of \$34,132.80.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the

---

<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. However, 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 23 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

petitioner's current assets and current liabilities.<sup>5</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 2002 through 2006 as shown below.

- In 2002, the Form 1120S stated net current assets of (\$136,770).<sup>6</sup>
- In 2003, the Form 1120S stated net current assets of (\$226,503).
- In 2004, the Form 1120S stated net current assets of \$38,705.
- In 2005, the Form 1120S stated net current assets of \$55,673.
- In 2006, the Form 1120S stated net current assets of \$71,330.

For the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage while the net current assets in 2004, 2005 and 2006 were sufficient for the petitioner to establish its ability to pay the instant proffered wage in each of these years.

Therefore, from the date of the Form ETA 750 was accepted for processing by the DOL, the petitioner had established that it had the continuing ability to pay the instant 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.

On appeal, counsel asserts that in the instant case, the petitioner filed the underlying ETA Form 9089 in December 2006, and therefore, assessment of the financial performance of the petitioner should start in 2006.

Counsel's reliance on materials about the DOL's new regulations concerning labor certifications (PERM) in determining the priority date is misplaced. The regulation at 8 C.F.R. § 204.5(d) provides that the priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL and the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. In this case, the record shows that the petitioner filed a Form ETA 750 on behalf of the beneficiary with a filing date of September 20, 2002 and filed another labor certification application on ETA Form 9089 through the DOL's new processing system in December 2006. The certified ETA Form 9089 Part A shows that the petitioner answered YES to the question "Are you seeking to utilize the filing date from a previously submitted Application for Alien Employment Certification (ETA 750)?" and also entered "09/20/2002" as the

---

<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.

<sup>6</sup> The petitioner did not submit its tax return for 2002. This office takes figures from Column (b), Beginning of tax year, Schedule L of Form 1120S for 2003 as the petitioner's net current assets at the end of 2002.

previous filing date in Part A, Item 1-A. The ETA Form 9089 was certified on January 31, 2007 with the filing date of September 20, 2002. The record does not contain any documentary evidence showing that the petitioner or counsel requested that DOL change the filing date to December 2006 as counsel now claims. The record also shows that the priority date in December 2006 was not current when the instant petition was filed in April 2007. However, counsel concurrently filed an I-485 application for the beneficiary with the instant petition based on the priority date of September 20, 2002. The evidence in the record does not support counsel's assertion that the petitioner obtained a new priority date in December 2006 for the instant petition. Instead, all evidence shows that the petitioner intended and kept the September 20, 2002. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner wanted a new filing date for the ETA Form 9089, it should have indicated on the form when filing in December 2006. 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 the instant case, the priority date is September 20, 2002, and therefore, the petitioner must establish continuing ability to pay the proffered wage from the priority date of September 20, 2002 to the present.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax return, annual report or audited financial statements for 2002. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, counsel asserts that since the petitioner is currently paying the beneficiary at the proffered wage rate since 2007, it has established continuing ability to pay the proffered wage beginning on the priority date citing the language in the field adjudicator's manual. However, this interpretation is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), which requires a petitioning entity to demonstrate *continuing* ability to pay the proffered wage beginning on the priority date. Thus, the petitioner must show its ability to pay the proffered wage not only in 2007, when counsel claims it actually began paying the proffered wage, but also from 2002 through 2006.

Beyond the director's decision and counsel's assertions on appeal, the AAO has found an additional ground to conclude that the petitioner failed to establish continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-

145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) for seven more workers from 2002 to 2007.<sup>7</sup> Therefore, the petitioner would need to demonstrate its ability to pay three proffered wages in 2002, two in each of the years 2003, 2004 and 2005, and three in 2006 including the instant beneficiary.

The record does not contain any documentary evidence showing that the petitioner paid the full proffered wages to all the beneficiaries of the approved petitions in their relevant years. As previously discussed, the petitioner's tax return shows that the petitioner's net current assets were negative in 2002 and thus, did not have sufficient net current assets to pay a single proffered wage. The petitioner failed to demonstrate that it had sufficient net income to pay the proffered wage because it did not submit its annual report, tax return or audited financial statements for 2002. In 2003, the petitioner had negative net income or net current assets. The petitioner had net current assets of \$38,705 in 2004 and \$55,673 in 2005 respectively which were not sufficient to pay the two full proffered wages.<sup>8</sup> Although the petitioner's net current assets of \$71,330 in 2006 were sufficient to pay two proffered wages, they were still insufficient to pay the three proffered wages the petitioner was obligated to pay that year. The petitioner failed to establish its ability to pay all proffered wages in 2002 through 2006 through an examination of wages paid to the beneficiaries, or its net income or net current assets.

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

---

<sup>7</sup> USCIS records show that the petitioner filed seven Form I-140 immigrant petitions in addition to the instant petition: three petitions were approved, three of them were denied and one is still pending. The detailed information about three approved immigrant petitions is as follows:

- WAC-00-052-52899 filed on December 13, 1999 with the priority date of April 11, 1997, and approved on February 9, 2001. The beneficiary was adjusted to lawful permanent resident status on July 30, 2002.
- WAC-03-115-53496 filed on July 14, 2003 with the priority date of July 2, 1999, and approved on May 17, 2005. The beneficiary was adjusted to lawful permanent resident status on July 13, 2006.
- SRC-06-170-52799 filed on May 4, 2006 with the priority date of January 13, 2006, and approved on June 12, 2006. The beneficiary's adjustment of status application is still pending with USCIS.

<sup>8</sup> The AAO assumes that proffered wages in those approved petitions are at least the same as the one in the instant case based on the fact that all of them were offered the EB32 professional positions.

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 *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, given the record as a whole, the petitioner's history of filing petitions (eight immigrant petitions and 31 nonimmigrant petitions from a company with 15 employees) and the fact that the petitioner did not yield sufficient profits to pay a single proffered wage in any single year from 2002 to 2006, the AAO must take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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 wages.

Counsel's assertions on appeal cannot overcome the director's finding in the decision to deny the petition. The evidence newly submitted on appeal cannot 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.