

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

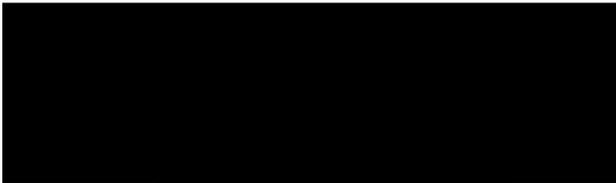
PUBLIC COPY

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



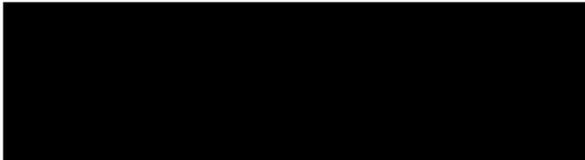
FILE: [REDACTED]
SRC 06 209 51600

Office: TEXAS SERVICE CENTER Date: **APR 23 2010**

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

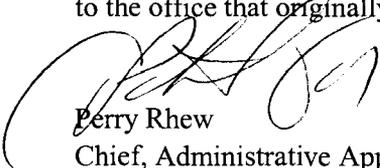
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further review and investigation and entry of a new decision.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a construction assistant. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (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.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.¹

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)(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(g)(2) states:

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

¹ 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.

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 petitioner must establish that its ETA Form 9089 job offer to the beneficiary is realistic. A petitioner's filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA Form 9089. The priority date is the date that the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Therefore, 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. Here, the ETA Form 9089 was accepted for processing on December 8, 2003. The proffered wage as stated on the ETA Form 9089 is \$43,514 per year. On Part K of the ETA Form 9089, signed by the beneficiary on June 21, 2006, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on June 27, 2006, the petitioner states that it was established on March 11, 2002, currently employs 7 workers, claims an annual gross income of \$1,005,821 and an annual net income of \$11,934.

As evidence of its continuing financial ability to pay the proposed wage offer of \$43,514 per annum, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2003, 2004, and 2005. The returns indicate that the petitioner files its tax returns using a fiscal year running from March 1st to February 29, 2004 of the following year. Thus the 2003, 2004 and 2005 cover the period from March 1, 2003 through February 28, 2006. The returns also contain the following information:

	2003	2004	2005
Net Income ²	\$ -0-	\$ 40,385	\$ 11,934

² For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28. (taxable income before net operating loss deduction and special deductions) USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine

Current Assets	\$ 128,778	\$361,434	\$ 151,401
Current Liabilities	\$ 2,510	\$ 26,725	\$ 140,405
Net Current Assets	\$ 126,268	\$ 334,709	\$ 10,996

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.³ It represents a measure 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 provided copies of 2004 and 2005 Wage and Tax Statements (W-2s) issued by the petitioner to five employees in 2004 and seven workers in 2005. W-2s for the beneficiary were not included with these employees. Further supplied are copies of the petitioner's quarterly federal tax returns for the first two quarters of 2006.

Following a review of the petitioner's net income and net current assets, the director determined that although the petitioner had demonstrated the ability to pay the proffered wage of \$43,514 in 2003 and 2004, it had not established its ability to pay the proposed wage offer in 2005. The director denied the petition on February 26, 2007.

On appeal, the petitioner, through counsel submits a letter from its accountant, [REDACTED] [REDACTED] advocates adding back the depreciation expense of \$69,109 as taken on the petitioner's 2005 tax return because it represents a one-time, non-cash section 179 deduction, and not a gradual straight line depreciation deduction over the 15-year course of useful life of the designated equipment. [REDACTED] states that a difference of \$64,402 results as a difference and should increase the petitioner's net income to \$76,436 for the 2005 tax year.⁴ Counsel adopts this theory and contends that this non-cash deduction reflects the actual net income to the petitioner. Counsel also asserts that the petitioner's gross income of almost \$10 million and gross payment to subcontractors

whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

³ 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.

⁴ This amount is the difference between the two methods of depreciation plus the petitioner's net income of \$11,934 as identified on line 28 of the 2005 tax return.

of approximately \$4 million, in addition to payment of in-house workers in 2005 establishes the petitioner's ability to pay the proffered wage.

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 the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record does not indicate that the petitioner employed or compensated the beneficiary during the relevant period.

USCIS electronic records do reflect that the petitioner is sponsoring an additional beneficiary on an I-140 filed on February 24, 2006 with a priority date of October 17, 2005 and a proposed wage offer of \$29,273 as a custom cabinet maker. Therefore, the petitioner must show that it had sufficient income to pay both wages as of the beneficiaries' respective priority dates and continuing until they gain lawful permanent residence.

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.

Counsel's assertions that USCIS should add back a depreciation deduction because it is elected as the result of a particular tax avoidance strategy will not be adopted or added back to the

petitioner's 2005 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).

In some cases, if circumstances warrant, 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 this case, as noted above, the petitioner established that it could pay the proffered wage in 2003 and 2004. It is additionally noted that the petitioner reported gross sales of over \$3,000,000 in 2003; approximately 4.4 million dollars in 2004; and approximately 9.6 million dollars in 2005, reflecting more than double its gross from the previous year. In 2005, its gross sales were additionally more than ten times the salaries and wages paid and it paid over 4 million dollars to subcontractors. Based on the petitioner's substantial business growth, and that it can establish its ability to pay in two of the three years submitted and the above evidence, it may be concluded that the circumstances warrant a positive finding as to the petitioner's ability to pay the proffered wage.

However, it is noted that the ETA 9089 job offer to the beneficiary must be realistic as of the priority date and remain so until the beneficiary obtains lawful permanent residence status. *See Matter of Great Wall*, 16&N Dec. 142 (Acting Reg. Comm. 1977). In this case, it is observed that the proffered wage of \$43,514 per year for the certified job of construction assistant offered to the beneficiary substantially exceeds each of the respective wages for all other workers in the petitioner's employ as shown by the submitted W-2s for 2004 and 2005. Further, the proffered salary exceeds the respective amounts shown as officers' compensation for each of the two listed corporate officers reported on the petitioner's 2005 federal tax return. We believe this issue merits the director's additional investigation and review as to the *bona fides* of the job offer as described in the record.

Based on the review of the petitioner's financial data for the relevant period, it may be concluded that the petitioner established that it had the continuing financial ability to pay the proffered wage. In view of the foregoing, the previous decision of the director will be withdrawn. The case will be remanded for further investigation and review of whether the petitioner established that the job offer to the beneficiary is realistic in view of the other compensation paid to the other workers and officers of the corporate petitioner. The director may request additional evidence from the petitioner. Similarly, the petitioner may provide additional evidence or argument within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

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