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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**

B6

[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER

Date: DEC 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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

The record shows that the appeal is timely and makes a specific allegation of error in law or fact.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.

As set forth in the director's denial, at issue in this case is whether 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.

¹ Counsel in this matter has filed the Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner. Counsel also signed the Form I-290B, Notice of Appeal or Motion. However, counsel failed to list the petitioner as the party filing the appeal on the Form I-290B. Instead, counsel indicated that the beneficiary was filing the appeal. U.S. Citizenship and Immigration Services' (USCIS) regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Nevertheless, the AAO in its discretion will accept this filing as there is evidence in the record noted herein that the petitioner consented to counsel's representation and to the filing of the appeal.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on January 28, 2008. The proffered wage as stated on the Form ETA 9089 is \$24,315 per year. The Form ETA 9089 states that the position requires 24 months of experience in the proffered job, as well as a willingness to work overtime and good references.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2003 and to currently employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 9089, signed by the beneficiary on May 5, 2008, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Here, the petitioner has not established that it

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

employed and paid the beneficiary the full proffered wage or any portion of the wage during any year in the relevant period of analysis.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 16, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). On appeal, the petitioner submitted the U.S. Internal Revenue Service (IRS) Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information and Other Returns, to support its claim that it had filed for an extension of time to file its 2008 tax return. However, the petitioner did not submit any evidence that this form was, in fact, filed with the IRS. Moreover, the letter from the petitioner’s stated Certified Public Accountant (CPA), [REDACTED],³ which was submitted on appeal, states that the petitioner would submit a copy of the 2008 tax return as soon as it is available.⁴ However, it is currently December 2010 and the petitioner still has not submitted a copy of its 2008 tax return. The petitioner’s income tax return for 2007 is the most recent return in the record. The petitioner’s tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- The 2006 Form 1120 states a net income of [REDACTED]
- The 2007 Form 1120 states a net income of [REDACTED]

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage of [REDACTED]. In addition, the petitioner failed to submit its 2008 tax return when it became available, as its agent asserted that it would. As such, the petitioner has not established an ability to pay the proffered wage using its net income in 2006, 2007 and 2008.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. The petitioner’s total assets, however, will not be considered in the determination of the petitioner’s ability to pay the proffered wage. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not,

³ In his letter, [REDACTED] stated that his office is located in [REDACTED]. The AAO telephoned the State of Maryland, Department of Labor, Licensing, and Regulation: CPA Verification of Licensure Office on December 8, 2010 regarding [REDACTED] CPA license. The representative there stated that the only [REDACTED] in that office’s records had allowed his CPA license to expire in 1994. This discrepancy in the record regarding [REDACTED] status as a CPA calls [REDACTED] statements into question; it also calls the remaining evidence in the record into question. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(which states that doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability of all evidence offered in support of the visa petition and that the petitioner must resolve any inconsistencies in the record by independent evidence, and attempts to explain without objective evidence will not suffice.)

⁴ [REDACTED] letter is not dated. USCIS received the letter with the appeal filed on May 15, 2009.

therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand. Its year-end current liabilities are shown on lines 16(d) through 18(d). If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006 and 2007, as shown in the table below.

- The 2006 Form 1120 reflects net current assets of [REDACTED]
- The 2007 Form 1120 reflects net current assets of [REDACTED]

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage. Also, the petitioner failed to submit its 2008 tax return when it became available, as its agent asserted that it would. Thus, for the years 2006, 2007 and 2008, the petitioner has not established that it had sufficient net current assets to pay the proffered wage.

Thus, the petitioner has not established that it has had the continuing ability to pay the beneficiary the proffered wage from the January 28, 2008 priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel indicated that the petitioner's bank statements in the record demonstrate the petitioner's ability to pay the proffered wage from the priority date onwards. Also the petitioner submitted on appeal a letter, which is not dated from its stated CPA, [REDACTED]⁶ that asserts that the petitioner's cash-on-hand as listed in its bank statements show an ability to pay the wage. Such assertions are not correct. First, bank statements are not among the three types of evidence, enumerated at 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 evidentiary material "in appropriate cases," here counsel and the petitioner have not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable 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

⁵According 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.

⁶As noted previously, according to the State of Maryland, Department of Labor, Licensing, and Regulation: CPA Verification of Licensure Office representative, that office's records indicate that [REDACTED] the petitioner's stated CPA, allowed his CPA license to expire in 1994.

funds reported on the petitioner's bank statements somehow denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

letter submitted on appeal which is not dated also indicates that because the petitioner has managed to remain in business for six years and to meet its financial obligations, it has shown that it has the continuing ability to pay the wage. In addition, indicated that the petitioner's assets demonstrate the continuing ability to pay the wage. Again, counsel has made similar assertions. First, as noted earlier, the petitioner's total assets will not be considered as being available to pay the wage. USCIS must balance total assets against the petitioner's liabilities as was done in the net current assets analysis above. Further, it is not sufficient for the petitioner to show that it has had sufficient funds to remain an active, ongoing business for six years. The petitioner must demonstrate that it had funds available to pay the proffered wage from the priority date onwards. See 8 C.F.R. § 204.5(g)(2).

In addition, the petitioner submitted a letter dated August 14, 2008 written by its stated CPA, , which asserts that the petitioner has the continuing ability to pay the proffered wage. However, has not provided financial documentation to show that from the priority date onwards, the petitioner has had funds available to pay the proffered wage. 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)). Unsupported assertions of the petitioner or its agents are not evidence. See *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence in the petitioner's tax returns indicates that the petitioner did not have funds available to pay the proffered wage from the January 28, 2008 priority date onwards. Assertions of the petitioner and its agents made in these proceedings have not overcome this evidence.

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.

Here, the record indicates that the petitioner was established in 2003 and that it has 4 employees. The petitioner failed to provide regulatory-prescribed evidence for its priority date year and the only other evidence in the record does not reflect that it is more likely than not that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. The petitioner did not establish that it experienced unusual growth since incorporating. The petitioner has not established: its reputation within its industry; the occurrence of any uncharacteristic business expenditures or losses; or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not shown 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 from the priority date onwards.

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.