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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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**U.S. Citizenship  
and Immigration  
Services**

B6

FILE:

Office: TEXAS SERVICE CENTER

Date: FEB 05 2010

SRC 07 067 51377

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, 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 sewing factory. It seeks to employ the beneficiary permanently in the United States as a sewing factory manager. 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 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, an 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.

Beyond the decision of the director, an additional issue is whether the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage as well as the proffered wages of all the beneficiaries that it sponsors beginning on the priority dates of the visa petitions.

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 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 March 15, 2006. The proffered wage as stated on the ETA Form 9089 is \$50,731.00 per year. The ETA Form 9089 states that the position requires 24 months experience.

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>1</sup>

On July 13, 2007, the director issued a Notice of Intent to Deny (NOID) instructing the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward. The director requested an IRS certified copy of the petitioner's 2006 federal tax return as well as the beneficiary's Wage and Tax Statements (W-2) for "2005-2006."

In response to the NOID, the petitioner submitted letters from counsel dated July 27, 2007, and August 22, 2007; W-2 statements issued by the petitioner to the beneficiary for 2005 and 2006, in the amounts of \$32,240.00 and \$43,680.00 respectively; and the petitioner's certified 2005 federal tax return.

On January 2, 2008, the director denied the Form I-140 petition. The petitioner appealed.

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 1993, to have a gross annual income of \$666,505.00, and to currently employ 30 workers. According to the tax returns in the record, the petitioner's fiscal year commences on October 1<sup>st</sup> and ends on September 30<sup>th</sup> of each year. On the ETA Form 9089, signed by the beneficiary on October 25, 2006, the beneficiary did claim to have worked for the petitioner from April 1, 2005, to March 15, 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United

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<sup>1</sup> 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).

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 which is \$50,731.00. The petitioner submitted Wage and Tax Statements (W-2) issued by the petitioner to the beneficiary for 2005 and 2006, in the amounts of \$32,240.00 and \$43,680.00 respectively. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 CIS, 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).

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 August 24, 2007, with the receipt by the director of the petitioner’s second submissions in response to the director’s NOID. As of that date, the petitioner’s 2006 federal income tax return was not yet due.<sup>2</sup> Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax return demonstrates its net income for 2005, as shown in the table below.

- In 2005, the Form 1120 stated net income of \$15,963.00.

Therefore for the 2005, the petitioner could not pay the proffered wage based upon an examination of the petitioner’s net income (form 1120, line 28), and the wages paid to the beneficiary by the petitioner in 2005.<sup>3</sup>

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 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, 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.

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<sup>2</sup> According to the single tax return in the record, the petitioner’s fiscal year commences on October 1<sup>st</sup> and ends on September 30<sup>th</sup> of each year.

<sup>3</sup> Net income of \$15,963.00 together with wages paid in 2005 of \$32,240.00 (i.e. \$48,203.00).

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 return demonstrates its end-of-year net current assets for 2005.

- In 2005, the Form 1120 stated net current assets of \$1,093.00.

Therefore for 2005, the petitioner could not pay the proffered wage based upon an examination of the petitioner's net current assets and the wages paid to the beneficiary by the petitioner in 2005.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the 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.

Counsel asserts in her brief accompanying the appeal that there are another ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date.

Counsel contends that the petitioner's "actual income" stated in the petitioner's 2005 federal tax return is \$40,819.00 which can be added to the petitioner's net income of \$15,963.00 to total \$56,782.00, and that this is proof of the petitioner's ability to pay the proffered wage. The AAO is unable to review and analyze counsel's contention. Counsel's assertion is misplaced. The AAO is unable to find in the record petitioner's reputed "actual income" figure of \$40,819.00. It appears that counsel is duplicating figures found on the petitioner's form 1120 for 2005.

In a letter dated July 27, 2007, counsel further contends that the beneficiary's wages in 2005, which are \$32,240.00, should be added to the petitioner's "available cash of \$11,209.00," and the petitioner's net income of \$15,963.00, to pay the proffered wage in 2005. Counsel's assertion is misplaced. Correlating the cash amounts stated in counsel's contention with the petitioner's tax return for 2005, it is clear that counsel is suggesting combining petitioner's net income for 2005 with the cash also received by the business for that year as stated on Schedule "L" as current assets. USCIS will consider separately, but not in combination, the net income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. To do so would be duplicative of petitioner's net income. Also, on Schedule "L" it is the net current asset figure that is important as calculated above. Again, counsel is disregarding the use of Schedule "L", that it is a

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<sup>4</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.

balance sheet that shows both current assets and current liabilities. Therefore, the cash and other current assets are reduced as is calculated above to reach the net current asset figure.

Counsel asserts that the petitioner could not produce the petitioner's 2006 tax return primarily because the petitioner's fiscal year covers the period, October 1, 2006, to September 30, 2007. The AAO notes that counsel dated the appeal January 24, 2008, which was filed on January 31, 2008, and did not submit the petitioner's 2006 tax return with the appeal although counsel has noted that the lack of the petitioner's 2006 tax return is an issue in this case. 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)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Counsel did not submit audited financial statements or an annual return for 2006. See 8 C.F.R. § 204.5(g)(2).

Counsel asserts that the net income from the petitioner's 2005 tax return may be added to the wages the petitioner paid the beneficiary in 2006, which is proof of the petitioner's ability to pay the proffered wage in 2005. Since the beneficiary's wages in 2006 are an expense on the petitioner's 2006 tax return, the 2006 wages cannot be retroactively added to the petitioner's prior year tax return.

In contradiction to the above contention, counsel desires to prorate the beneficiary's wages from a period five months and 14 days before the priority date (October 1, 2005) to the end of that year, and then add those prorated wages to a portion of 2006 (January 1, 2006 to September 30, 2006) for which wages was paid. According to counsel the total wage amount from this calculation may be added to the petitioner's net income for the petitioner's 2005 fiscal year to demonstrate the petitioner's ability to pay the proffered wage in 2005. Counsel offers no regulation or case precedent to support her contention. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred before and after the priority date. We will not, however, 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 monthly income statements or pay stubs, the petitioner has not submitted such evidence to correspond to counsel's prorated time periods.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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. 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 *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, the petitioner has only submitted a federal tax return for 2005 which does not demonstrate the petitioner's ability to pay the proffered wage by net income, net current assets or by wages paid to the beneficiary by the petitioner in 2005. The AAO notes that the petitioner stated gross receipts/sales in 2005 of \$666,505.00 but after total deductions of \$650,628.00, leaving net income for 2005 of \$15,963.00, there was insufficient funds to pay the proffered wage even considering wages paid to the beneficiary in that year.

Counsel did not adequately explain why it did not submit financial information according to the regulation at 8 C.F.R. § 204.5(g)(2) such as audited financial returns and annual reports. 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.

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 of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved 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. at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the ETA Form 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). According to the electronic records of USCIS, your organization has filed at least one other immigrant (USCIS Form I-140) petition. The petitioner has failed to submit sufficient evidence to demonstrate that it had the ability to pay the proffered wages for all the petitions pending, approved, or its beneficiary's adjustment application pending in one of the years, from the priority date through the present.

The petition will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.<sup>5</sup> In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not been met that burden.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997 at 1002 n. 9.