

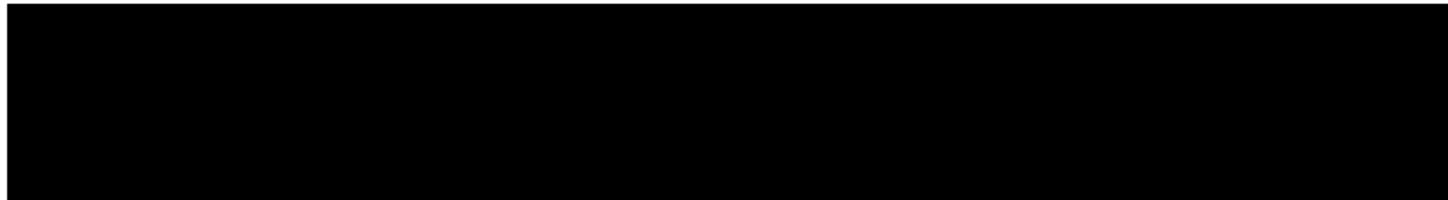
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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Office: NEBRASKA SERVICE CENTER

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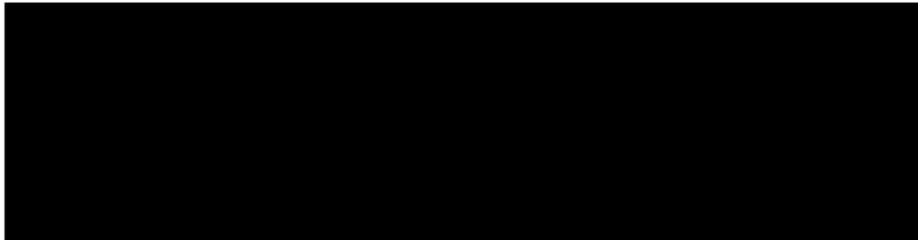
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 your 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by a 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 and denied the petition, accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner established its ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and 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 this decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are 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, 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 ETA Form 9089 was accepted on February 20, 2007. The proffered wage as stated on the ETA Form 9089 is \$7.71 per hour, which amounts to \$16,036.80 per year.<sup>1</sup> On Part B of the ETA Form 9089, signed by the beneficiary on February 20, 2007, it is not claimed that the petitioning business has employed the beneficiary.

On Part 5 of the Form I-140 petition, which was filed on June 22, 2007, the petitioner claims that it was established in 2005 and currently employs four (2) workers.<sup>2</sup>

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

The record indicates the petitioner is structured as a general partnership and files its tax returns on IRS Form 1065, U.S. Return of Partnership Income. The 2006 and 2007 returns provided indicate that the petitioner's fiscal year is a standard calendar year. They contain the following information:

2006

2007

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<sup>1</sup>The Form ETA 9089 also requires that the beneficiary have completed high school.

<sup>2</sup>United States Citizenship and Immigration Services (USCIS) electronic records reflect that the petitioner has filed four Immigrant Petition for Alien Worker (Form I-140) petitions, including for the instant beneficiary. Two were denied and one was approved in 2007 with a 2007 priority date. 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. The record in the instant case contains no information about the proffered wage of the approved beneficiary such as date of hiring, amount of certified wage, payment of compensation or any current wages of this beneficiary. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to any other beneficiaries of other petitions. In any further filings, pertinent evidence of the ability to pay multiple beneficiaries their proffered wage(s) as of their respective priority date(s) should be provided by the petitioner.

Net Income <sup>3</sup>	- \$95,057	-\$38,844
Current Assets (Sched. L)	\$ blank	\$ blank
Current Liabilities (Sched. L)	\$ blank	\$ blank
Net Current Assets	\$ n/a	\$ blank

As suggested in the above table, besides net income, 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.<sup>4</sup> It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its partnership return. If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

As indicated above, the petitioner did not complete Schedule L of its partnership return(s). Although permitted by IRS rules (line 5, Schedule B indicates that where total receipts and total assets are less than a stated threshold amount, a filer is not required to provide certain information including the completion of Schedule L) the omission of the petitioner's figures for current assets and current liabilities precludes consideration of net current assets in support of its ability to pay the proffered wage.

As noted above, neither of the figures for net income was sufficient to pay the proffered wage of \$16,036.80. In 2007, which is the year covering the priority date, the petitioner's -\$38,844 in net income was \$54,880.80 less than the proffered wage and did not demonstrate her ability to pay.

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<sup>3</sup>As a general partnership, the petitioner is structured as an entity in which the general partners participate fully in the profits, losses and management of the partnership and who are personally liable for its debts. *See Black's Law Dictionary* 582 (5th Ed., West 1983). For a partnership, where a partnership's income is exclusively from a trade or business, Citizenship and Immigration Services (CIS) considers net income to be the figure shown on Line 22 of the Form 1065. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of the Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See Instructions for Form 1065*, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>. In the instant case, the petitioner's Schedule K has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K.

<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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

It is also observed that both of these returns were incomplete as they omitted Schedule 1 referenced on page 1. They also failed to establish the identities of all of the partners in the partnership. Only one Schedule K-1 was submitted with the 2006 return. It indicates that [REDACTED], who filed the Form I-140 petition on behalf of the petitioner, was an 82 percent partner at the beginning of 2006 and held a 60 percent share at the end of the year. The other owner(s) were not revealed by the submission of the relevant Schedule K-1. This applies to 2007 as well. [REDACTED] reflected as the 60 percent general partner in this year, but the other partners have not been identified on the tax return. It is noted that counsel indicated in her transmittal letter, submitted with the response to the director's request for evidence, that the petitioner was owned and operated by [REDACTED] and [REDACTED] as husband and wife. On appeal, however, counsel indicates that [REDACTED] owns 50 percent and [REDACTED] owns 50 percent of the petitioner. No clarification has been offered. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In addition to tax returns, in support of the petitioner's ability to pay the proffered wage, the petitioner has provided copies of the beneficiary's Wage and Tax Statements (W-2s) for 2007 and 2008. They reflect that the petitioner paid the beneficiary wages of \$9,345 in 2007 and \$16,907.50 in 2008.

In support of the petitioner's ability to pay the proffered wage, counsel has also provided copies of two car titles, and copies of a full reconveyance of title by a mortgage company relating to property owned in Alameda County, California by [REDACTED] and her husband. A copy of a grant deed indicating that [REDACTED] and her husband own property in Union City, Alameda County, California has also been provided. No legal description or address is provided with these copies so it is not clear if these documents relate to one or two pieces of real estate. No evidence of value or the existence of other encumbrances relating to either the vehicles or the real estate has been provided. Additionally, it is noted that the 2007 tax return indicates that [REDACTED] personal residence is located in Union City, California. While a general partner's individual assets may be considered in support of the general partnership, individual liabilities are also part of the consideration, as well. Moreover, it is noted that it is unlikely that a personal residence would be encumbered or sold to augment salary of a foreign worker. It is further noted that real property would not be part of this consideration as real estate is generally considered as a long term asset and would not be converted to cash during the ordinary course of business. It would not, therefore, become funds available to pay the proffered wage. Further, as noted herein, a 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.

Copies of the petitioner's bank statements for 2007 have additionally been submitted in support of the proffered wage. Copies for May and August 2007 have been omitted from this submission. The petitioner's reliance on bank statements is misplaced, particularly in view of the fact that the 2007 partnership return was incomplete and also failed to provide a Schedule L balance sheet. Bank

statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, selected bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L had the petitioner elected to complete this section.

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. As noted above, the petitioner employed and paid the beneficiary \$16,907.50 in 2008, which was sufficient to demonstrate its ability to pay the proffered salary in this year. In 2007, however, the beneficiary's W-2 reflects that she was paid \$9,345 or \$6,691.90 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given 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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at \*6 (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). 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. See *Taco Especial v. Napolitano*, --- F. Supp. 2d. at \*6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

Counsel asserts on appeal that the petitioner's ability to pay the proffered wage should consider that the depreciation expense is not an actual expense. However, 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. “[USUSCIS] 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 this case, as shown above, in 2007, the petitioner’s net income of -\$38,844 was not sufficient to cover the \$6,691.80 shortfall resulting from a comparison of wages paid to the beneficiary and the proffered wage of \$16,036.80. Additionally, no information has been provided relevant to the petitioner’s other beneficiary sponsored and approved in this year, as well as the additional two petitions filed. *See* footnote 2, herein. The petitioner has not established its continuing financial ability to pay the proffered salary as of the priority date as required by 8 C.F.R. § 204.5(g)(2).

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). In this respect, counsel asserts on appeal that the petitioner’s salary expense is an indicator of its stability because it was able to hire more employees and pay more salaries. We do not find that the record supports this assertion, as the 2006 tax return shows a salary expense of \$64,750, which declined to \$49,230 in 2007. Counsel’s undocumented assertions do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry.

In the instant case, as noted above, both the 2006 and 2007 tax returns reflect losses as net income. No evidence of net current assets was provided on the returns or on an audited financial statement. There is no evidence analogous to the unique business circumstances present in *Sonegawa* that would support approving the petition. Thus, assessing the petitioner's overall circumstances, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Upon review of the underlying record and the evidence and argument submitted on appeal, the AAO does not conclude that the petitioner has demonstrated that it has had the continuing ability to pay the proffered wage as of the priority date. 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, that burden has not been met.

**ORDER:** The appeal is dismissed.