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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  
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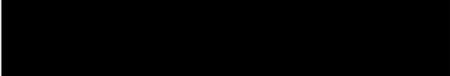


Office: NEBRASKA SERVICE CENTER

Date: NOV 10 2010

IN RE:

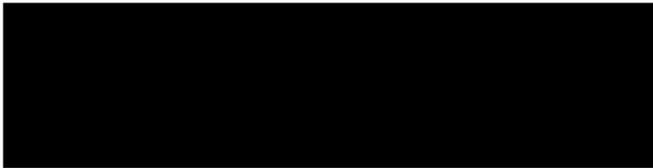
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an 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 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. 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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter was 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 home health aide (caregiver) pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and therefore, denied the petition.

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 the decision. Further elaboration of the procedural history will be made only as necessary.

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 upon appeal.<sup>1</sup>

As set forth in the director's November 12, 2008 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 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.

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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 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). However, counsel did not submit any additional evidence on appeal but a brief.

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 January 2, 2007. The proffered wage as stated on the ETA Form 9089 is \$18,283.00 per year. On the petition, the petitioner claims that it has been in the business since 2006 and has four employees. 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 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 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. The petitioner submitted the beneficiary's paystubs for June, July and August of 2008. These paystubs show that the petitioner paid the beneficiary at the rate of \$1,700 per month for these three months in 2008. The paystubs do not reflect the beneficiary's year-to-date yearnings. On appeal, counsel did not submit any evidence showing that the petitioner continued to pay the beneficiary at the same level for the rest of the year in 2008. Without further evidence, the AAO cannot consider the paystubs as primary evidence that the petitioner paid the full proffered wage in 2008. The petitioner demonstrated that it paid a partial proffered wage in 2008, and therefore, the petitioner must demonstrate that it could pay the beneficiary the full proffered wage in 2007 and the difference of \$13,183 between wages actually paid to the beneficiary and the proffered wage in 2008 with its net income or net current assets.

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). On appeal, counsel's reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

On appeal, counsel asserts that the petitioner's depreciation deduction should be considered in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on depreciation deduction is misplaced. 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).

As alternate method, USCIS also reviews the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand,

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<sup>2</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.

inventories, and receivables expected to be converted to cash within one year. 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax return in the record, the petitioner's fiscal year is based on calendar year. The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2007. The petitioner's 2007 tax return demonstrates its net income and net current assets as below.

- In 2007, the Form 1120 stated net income<sup>3</sup> of \$4,135<sup>4</sup> and net current assets of \$8,434.

For 2007, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the full proffered wage. The record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements for 2008. Without these documents, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the difference of \$13,183 between wages actually paid to the beneficiary and the proffered wage that year.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL in 2007, the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wages through examination of wages paid to the beneficiary and the petitioner's net income or net current assets.

In response to the director's request for evidence (RFE) dated September 2, 2008, counsel submitted the petitioner's Profit & Loss for January through December 2007. However, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record also contains bank statements on the petitioner's business checking account for 2007. Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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

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<sup>3</sup> 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.

<sup>4</sup> The director erred in stating that the petitioner's net income for 2007 was (\$4,135), however, this error does not alter the ultimate outcome of the appeal.

at 8 C.F.R. § 204.5(g)(2) is inapplicable 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 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 that was considered in determining the petitioner's net current assets.

Moreover, 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 and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, USCIS records show that the petitioner filed additional Immigrant Petitions for Alien Worker (Form I-140) for three workers (one was approved and the other two were withdrawn)<sup>5</sup> in 2007. Therefore, the petitioner is obligated to demonstrate its ability to pay two proffered wages for 2007 and 2008. In response to the director's RFE, counsel provided the proffered wage information (\$18,283 per year) for this approved petition, the beneficiary's W-2 form for 2007 and paystubs for 2008. The W-2 form shows that the petitioner paid the beneficiary of the approved petition \$12,600 in 2007 and the paystubs show that the petitioner paid the same beneficiary \$1,500 per month in January, February and March of 2008. The paystubs do not reflect the beneficiary's year-to-date yearnings. On appeal, counsel did not submit any evidence showing that the petitioner continued to pay the beneficiary of the approved petition at the same level for the rest of the year in 2008. Without further evidence, the AAO cannot consider the paystubs as primary evidence that the petitioner paid the full proffered wage in 2008. The petitioner demonstrated that it paid this beneficiary a partial proffered wage in 2007 and 2008, and therefore, the petitioner must demonstrate that it could pay the beneficiary the differences of \$5,683 in 2007 and \$13,783 in 2008 respectively between wages actually paid to the beneficiary and the proffered wage with its net income or net current assets.

While the petitioner had sufficient net current assets to pay the beneficiary of the approved petition the difference of \$5,683 between wages actually paid to that beneficiary and the proffered wage in 2007, the petitioner did not have sufficient net income or net current assets to pay the instant beneficiary the difference between wages actually paid to the instant beneficiary and his proffered

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<sup>5</sup> The detail information about the approved petition is as follows:

-- [REDACTED] filed for [REDACTED] on June 27, 2007 with the priority date of March 13, 2007 and approved on April 25, 2008.

wage that year. The record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements for 2008. Without these documents, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary of the approved petition the difference of \$13,783 between wages actually paid to that beneficiary and the proffered wage as well as to pay the instant beneficiary the difference of \$13,183 between wages actually paid to that beneficiary and the proffered wage that year. Therefore, the petitioner failed to establish its ability to pay all proffered wages for 2007 and 2008.

USCIS may also 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 the instant case, while the petitioner demonstrated that it had sufficient net current assets to pay the beneficiary of the approved petition the difference between wages actually paid to that beneficiary and the proffered wage in 2007, it failed to establish its ability to pay all proffered wages in 2007 through examination of wages paid and its net income or net current assets. The petitioner failed to submit regulatory-prescribed evidence to establish that it had sufficient net income or net current assets to pay all beneficiaries their proffered wages for 2008. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2007 and 2008 were uncharacteristically unprofitable years for the petitioner. In addition, given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

On appeal, counsel refers to a decision issued by the AAO concerning the depreciation deduction, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel's assertions on appeal cannot overcome the ground of denial in the director's December 10, 2008 decision. The petitioner failed to establish that it had the continuing ability to pay all proffered wages beginning on the priority date and continues to the present. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.