

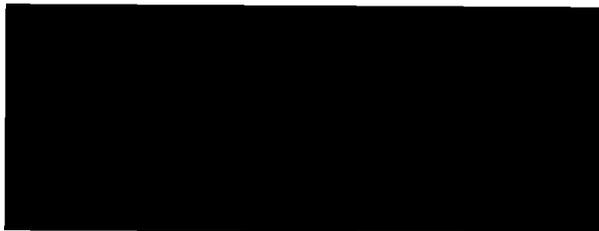
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



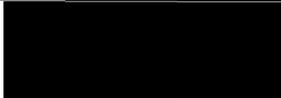
U.S. Citizenship and Immigration Services

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FILE:



Office: NEBRASKA SERVICE CENTER

NOV 17 2010
Date:

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:

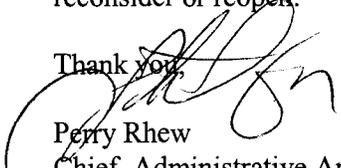


INSTRUCTIONS:

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is a book store. It seeks to employ the beneficiary permanently in the United States as a book store 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 March 30, 2009 denial, the 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. On appeal, we have identified an additional ground of ineligibility in that the petitioner failed to sufficiently document that the beneficiary has the requisite experience for the position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states 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

¹ The petitioner filed a motion to reopen this decision on April 30, 2009. The director affirmed the previous decision and denied the petition in a decision dated June 5, 2009.

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 6, 2006. The proffered wage as stated on the ETA Form 9089 is \$22.04 per hour (\$45,843 per year). The ETA Form 9089 states that the position requires two years of experience in the position offered, which includes “issu[ing] work schedules and assign[ing] employees specific duties. Price merchandise, coordinate sales promotion activieies [sic] and direct employees preparing merchandise displays. Supervise sales, take inventory, reconcile cash with sales receipts, keep operating records for accountant. Order merchandise and answer customer complaints or inquiries.”

The AAO maintains plenary power to review each appeal on a *de novo* basis. *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.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 1975 and to employ 35 workers. According to the tax returns in the record, the petitioner’s fiscal year is the same as the calendar year. On the ETA Form 9089, 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, 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 following evidence of the beneficiary’s employment:

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).

- The 2006 Form W-2 stated that the petitioner paid the beneficiary \$14,433.81.
- The 2007 Form W-2 stated that the petitioner paid the beneficiary \$19,648.46.
- The 2008 Form W-2 stated that the petitioner paid the beneficiary \$14,777.12.³

The petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage in any of these years. As such, the petitioner must prove that it had the ability to pay the difference between the actual wage paid and the proffered wage from 2006 to 2008. Therefore, the petitioner would need to show its ability to pay an additional \$31,409 in 2006, \$26,194 in 2007, and \$30,766 in 2008.

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, 881 (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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS 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

³ As the wages paid represent less than half of the proffered wage, it is unclear whether the W-2 statements represent payment of wages for full-time employment or whether the beneficiary has been employed on a part-time basis. The job offer must be for full-time employment. 20 C.F.R. § 656.3.

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, 558 F.3d 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*, 719 F.Supp. 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 13, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (“RFE”).⁴ The petitioner submitted its 2005 and 2006 tax returns in response to the RFE and its 2007 tax return on appeal.⁵

- In 2006, the Form 1120 stated net income of \$0.
- In 2007, the Form 1120 stated net income of \$52,119.

USCIS electronic records show that the petitioner filed eight other Form I-140 petitions (two were duplicative for a total of six beneficiaries), which have been pending during the time period relevant to the instant petition. 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 simultaneously, the petitioner must produce

⁴ The tax returns in the record are for Inn of the [REDACTED], which has a different address than the one provided for the petitioner on the Form I-140. The Inn was mentioned as part of the petitioner’s name, the Employee Identification Numbers are the same, and the petitioner submitted a Fictitious Business Name Statement for the Inn of the Seventh Ray to do business as the named petitioner, The Spiral Staircase, so we accept the tax returns in the record as being those of the petitioner.

⁵ The 2005 Form 1120 covers a time prior to the priority date, so will be considered only generally.

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 Matter 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 Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage or wages paid for the beneficiaries of those petitions, about the current employment or immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. 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 in 2006, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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 2006 Form 1120 demonstrates net current assets of \$9,204. The petitioner 2007 Form 1120 demonstrates net current assets of \$4,881. This amount is insufficient to demonstrate the petitioner's ability to pay the difference between the actual wages paid and the proffered wage in that year plus the respective proffered wages to the other six beneficiaries.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has 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 that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Specifically, the petitioner submitted a letter from [REDACTED] which states that the corporation pays profit to her in the form of rent and "owner's perks for car, travel and office expense." [REDACTED] states that the land on which the petitioner's business is situated is owned by her and her husband jointly. [REDACTED]

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

submitted her 2007 personal tax return, Form 1040, which shows that she received rent from a number of different properties including one listed for "[REDACTED]". The petitioner has provided no evidence establishing the ownership of the property. Counsel attempts to use the assets of the individual shareholder as evidence of the petitioner's ability to pay, which as set forth above is improper. *See Matter of Aphrodite*, 17 I&N Dec. 530.

With respect to the claim of rent, for tax purposes, the corporate petitioner gets a deduction for the rents it pays to the shareholder (which is included in our calculation of net income), and the shareholder shows the rent payments as income on his or her IRS Form 1040, Schedule E. The shareholder also gets to claim depreciation for the property on IRS Form 1040, Schedule E. Essentially, counsel wants us take the net income figure from line 21 of page one of its Form 1120S, and add back rents from line 11. Rents are already accounted for in the calculation of line 21 net income, and there is no evidence that the petitioner could reduce the rent paid to the shareholder in order to pay the proffered wage. The petitioner must pay the fair rental value for the property. Rents below fair rental value may be adjusted by the IRS. *See I.R.C. § 482.*⁷ Therefore, rent figures have already been taken into account in looking at the petitioner's net income.

On appeal, [REDACTED] submitted a letter stating that the beneficiary is also "currently working full time in the position of the manager of the bookstore and is being paid \$50,000 a year ... having replaced [the] former bookstore manager [REDACTED] last year." The petitioner did not submit a Form W-2 or other evidence to document the beneficiary's wages at the rate of \$50,000 or evidence that the petitioner paid the prior bookstore manager an annual salary of \$50,000.

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 [REDACTED], 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*,

⁷ In any event, [REDACTED] Form 1040 includes no additional identifying information about the rental property including an address, and the petitioner submitted no additional evidence that [REDACTED] owns the property on which the petitioner is located including a deed or property tax records. 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)).

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.

The evidence here does not establish that the petitioner can pay the beneficiary's proffered wage in each applicable year. In considering the totality of the circumstances, the petitioner demonstrated several favorable factors including a growth in gross receipts as well as evidence of a favorable reputation in publications such as [REDACTED], the Los Angeles Times, the Santa Monica Mountains News and Arts Messenger, and toprestaurants.com. However, the petitioner's income and net current assets were minimal (including negative net current assets in 2005 and no income in 2006) and it has sponsored an additional six workers. In the absence of knowing the petitioner's total wage obligation for other sponsored workers and wages paid to those workers, we would be unable to conclude that the totality of the circumstances would warrant the petition's approval. 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. In any further filings, the petitioner should submit evidence concerning the proffered wage and wages paid to the other beneficiaries and evidence of its ability to pay the difference between the proffered wage and actual wage paid to those beneficiaries.

Additionally, although not raised by the director, the petitioner failed to establish sufficiently that the beneficiary had the required experience by the time of the priority date. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is July 31, 2007. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The skilled worker classification regulations contain a minimum requirement that the position require two years training or experience and to demonstrate that the beneficiary had the experience by the date that the labor certification was filed. The ETA Form 9089 requires two years of experience in the job offered and does not provide for experience in any related occupation. The letter concerning the beneficiary's experience was submitted from the co-owners of Thunderbolt Spiritual Books. This letter states that the beneficiary was employed with the book store from July 1998 to February 2001 as a "top manager." The letter does not indicate whether the beneficiary was employed in a full-time or part-time capacity in order to calculate the beneficiary's total length of experience nor does it include job duties of the position. The beneficiary did not indicate any additional experience on the Form ETA 9089⁸ and no other evidence of experience was submitted. As a result, the petitioner has not sufficiently established that the beneficiary had the requisite two years of full-time experience in the job offered at the time of the priority date.

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.

⁸ See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted.