

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



B6

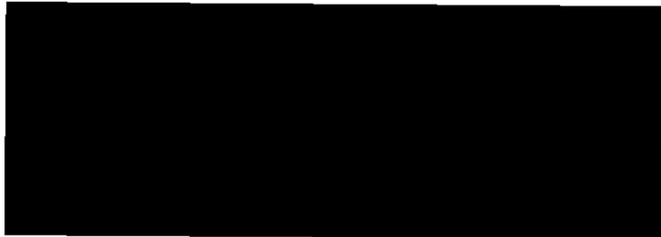
FILE:  Office: NEBRASKA SERVICE CENTER

OCT 04 2010

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director in accordance with the following.

The petitioner is a seafood exporter. It seeks to employ the beneficiary permanently in the United States as a production manager. As required by statute, the petition is accompanied by an 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 paid the beneficiary the proffered wage or that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing to the present. 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 May 28, 2009 denial, the single 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)(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 from 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).

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.¹

The petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2003 and to currently employ 30 workers. According to the tax returns in the record, the petitioner was incorporated on June 1, 2004 and its fiscal year begins on July 1st and ends on June 30th. The ETA Form 9089 was accepted on May 23, 2007. The proffered wage as stated on the ETA Form 9089 is \$50,000 per year based on a 40-hour week. The ETA Form 9089 states that the position requires a bachelor's degree in any field and foreign language skills. The Job Order Specification Sheet and the Prevailing Wage Request Form state that the applicant must read, write and speak Japanese.

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. In the instant case, the beneficiary claimed on his ETA Form 9089 that he was employed 40 hours per week by the petitioner as a production manager from April 1, 2007 to the date that the labor certification was filed, May 23, 2007. The beneficiary's IRS Form W-2 Wage and Tax Statements for 2007 and 2008 stated compensation of \$35,200 and \$38,400, respectively. Therefore, for the years 2007 and 2008, the petitioner has not established that it employed and paid the beneficiary the full proffered wage. For 2007, the petitioner must show that it can pay the remaining \$14,800 in wages, and in 2008, the petitioner must show that it can pay the remaining \$11,600 in wages.

¹ 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).

For the periods ending January 11, February 8, March 15, and April 12, 2009, the beneficiary's rate of pay is shown as \$3,200. The pay check does not indicate whether the wage amount shown is earned per week or month. On appeal, counsel states that the beneficiary is paid monthly, at \$3,200 per month. The petitioner's check register from January 10, 2009 onward lists the beneficiary's name showing payment of \$3,200 from January 15, 2009 until May 14, 2009. Therefore, if payment continued throughout 2009, the annual salary paid to the beneficiary for 2009 would amount to \$38,400. The petitioner has not established its ability to pay the beneficiary's proffered annual wage of \$50,000 based on this documentation.

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*, --- 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). 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*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay

wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

The record before the director closed on May 8, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). Specifically, the director requested the petitioner’s annual report, United States tax return, or audited financial statement for 2006, 2007, and if available, 2008 as well as the beneficiary’s W-2 statements. The RFE also noted that the petitioner should submit copies of the beneficiary’s four most recent pay vouchers for 2009 identifying both the beneficiary and employer by name and specify the beneficiary’s gross/net pay; income received year-to-date, income tax deductions withheld and the length of the pay period. As of that date, the petitioner’s 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2006, the petitioner’s Form 1120 stated net income of \$8,464.²
- In 2007, the petitioner’s Form 1120 stated net income of \$13,629.
- In 2008, the petitioner’s Form 1120 stated net income of \$15,473.

The submission of the beneficiary’s IRS Form W-2 for 2007 and 2008 did not establish the petitioner’s ability to pay the proffered wage for those years. Even when combining the petitioner’s net income of \$13,629 and the wages it paid to the beneficiary of \$35,200 in 2007, which amounts to \$48,829, the petitioner still has not established its ability to pay the proffered wage, \$50,000. However, the combined amounts would be only \$1,171 less than the proffered wage. However, when adding the petitioner’s net income of \$15,473 and the wages it paid to the beneficiary of \$38,400 in 2008, which amounts to \$53,873, the petitioner has established its ability to pay the proffered wage in 2008.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ A corporation’s year-end current assets are shown

² The petitioner’s income tax return covers July 1, 2006 to June 30, 2007, which includes one month following the May 2007 priority date.

³ 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,

on Schedule L, lines 1 through 6. 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 returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2006, the petitioner's Form 1120 stated net current assets of \$51,690.
- In 2007, the petitioner's Form 1120 stated net current assets of -\$12,828.
- In 2008, the petitioner's Form 1120 stated net current assets of \$8,455.

The petitioner could not have paid the remainder of the proffered wage of \$14,800 from its net assets in 2007. Therefore, the petitioner has not established its ability to pay the proffered wage in 2007. It has established only its ability to pay the proffered wage in 2008.

On appeal, the petitioner submitted another copy of its Form 1120, 2007 U.S. Corporation Income Tax Return which is marked "amended." Counsel states that the 2007 tax return was adjusted since there was a mistake by the accountant. The petitioner's 2007 tax return now shows its net income as \$17,129. The petitioner's net current assets now amount to -\$9,328. By amending the petitioner's net income from \$13,629 to \$17,129, the petitioner would be able to show that it had enough funds to pay the proffered wage in 2007. However, nothing shows that the 2007 tax form has been officially amended and that the petitioner filed the amended return with the Internal Revenue Service (IRS). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Absent verification that the amended return has been filed with the IRS, the new figures on the petitioner's 2007 income tax return showing the petitioner's net income as \$17,129 instead of \$13,629, and -\$9,328 instead of -\$12,828 in net current assets cannot be considered.

The petitioner also submitted its 2005 Form 1120, U.S. Corporation Income Tax Return. The petitioner's 2005 tax return is for the time period before the priority date and would not establish the petitioner's ability to pay from the May 23, 2007 priority date onward. The petitioner's 2005 return will be considered generally.

The record contains three letters and unaudited financial statements signed by [REDACTED] certified public accountant, that reflects the petitioner's income and expenses of the corporation for the years ending June 30, 2006, 2007 and 2008. The unaudited financial statements reflect the net incomes as \$4,980.88, \$3,941.56 and \$8,708.92, respectively. The statements have not been audited. 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.

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.

The petitioner provided its Profit and Loss Detail Statements for July 2006 through June 2007, July 2007 through June 2008 and July 2008 through June 2009. Again, the profit and loss and balance statements have not been audited. 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.

Moreover, the net income reflected on the petitioner's income and expense and profit and loss statements for 2006, 2007 and 2008 when compared to the net income reported on the petitioner's corporate tax returns differs and therefore, are material to the petitioner's claim. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. No evidence of record resolves this inconsistency. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The documentation does not establish the petitioner's ability to pay the proffered wage.

The petitioner provided invoice statements showing that the petitioner is responsible for the payment of the beneficiary and his family's health insurance coverage for the years 2007, 2008 and 2009 and a description sheet listing office furnishing amounting to \$4,000. Counsel states that the beneficiary receives these benefits and housing support, a company auto and auto insurance. The record contains copies of the beneficiary's 2007 and 2008 Form W-2s. Counsel states that these benefits are not included in the beneficiary's Form W-2s. The AAO considers gross wages paid as exhibited on the W-2 forms, and does not add back cafeteria plan⁴ deductions, or consider fringe benefits paid.⁵ Fringe employment benefits not in the form of wages that the beneficiary receives from the petitioner are not included to determine the petitioner's ability to pay the proffered wage. An employer's guaranteed basic rate of pay must meet the prevailing wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax 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 (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

⁴ Information about cafeteria plans can be found at the IRS website: <http://www.irs.gov/govt/fslg/article/0,,id=112720,00.html>. (accessed September 29, 2010).

⁵ The Board of Alien Labor Certification (BALCA) generally concurs that fringe benefits would not be included as additional compensation for determining the prevailing wage rate. *See In re: Matter of Koba Corporation*, 91-INA-11 (BALCA May 29, 1991).

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 states on Form I-140 that it was established in 2003 and currently employs 30 individuals. Although the petitioner's tax returns show fairly low net income and net current assets for all the years represented, the petitioner's 2008 tax return reflects that the petitioner's gross receipts have doubled to over \$4 million from \$1.9 million in fiscal year 2005. Additionally, the petitioner has employed and paid partial wages to the beneficiary from the time of the priority date and onward. The petitioner can establish its ability to pay in 2008 and is only \$1,711 short of the proffered wage in 2007 when considering net income and wages paid combined. Thus, in assessing the totality of the circumstances in this individual case, based on the petitioner's substantial growth, high gross receipts and partial wage payment, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

Thus, in assessing the totality of the evidence submitted, the petitioner has established that it had the continuing ability to pay the proffered wage from the priority date, May 23, 2007, through the present.

However, beyond the decision of the director, the petitioner has not established that the beneficiary met the education and language requirements of the labor certification at the time of filing, May 23, 2007. Therefore, the petitioner may not currently be approved.

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 (9 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).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on May 23, 2007.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have a bachelor's degree and knowledge of a foreign language to perform the job duties. The Job Order Specification Sheet and the Prevailing Wage Request Form state that the applicant must read, write and speak Japanese.⁶

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information about the beneficiary, he represented that he received a bachelor's degree in physical education from Pacific Union College, Angwin, California, in 1997. The petitioner must submit evidence that the beneficiary obtained his bachelor's degree and met the language requirements before May 23, 2007. The regulations at 8 C.F.R. § 204.5(1)(3)(ii)(C) state in pertinent part that if the petition is for a professional, the petition must be accompanied by evidence that the beneficiary holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the beneficiary is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the beneficiary is a member of the professions the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation. The petitioner has not provided an official college transcript or any other evidence to show the beneficiary had the requisite education at the time of filing the labor certification on May 23, 2007. Therefore, the petitioner did not to establish that the beneficiary had the required education and met the language requirement listed on ETA Form 9089, Section H, item 4, and item 11, before the priority date.

As the petitioner can establish its ability to pay based on a totality of the circumstances, the petition will be remanded to the director to allow the petitioner an opportunity to address the issue of the beneficiary's qualifications. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

⁶ We note that Form I-140 states that the beneficiary was born in Japan. However, nothing in the record shows his full residence history and that he was raised in Japan, went to school and worked in Japan as opposed to another country to adequately conclude that he meets the required language skills.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore, the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.