

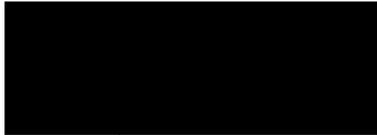
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Be

Date: **JUL 26 2011**

Office: TEXAS SERVICE CENTER

FILE: 

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, with a fee of \$630. 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as a barn foreman. 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 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 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.

As set forth in the director's June 19, 2008 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.

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

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, 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 12, 2007. The proffered wage as stated on the ETA Form 9089 is \$32,219 per year. The ETA Form 9089 states that the position requires two years of experience in the proffered position.

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

From the petitioner's Form 1040 tax returns in the record, the petitioner appeared to be structured as a sole proprietorship, however, the petitioner's bank statements submitted state the petitioner's name followed by an "LLC." Florida state filings show that the petitioner is a limited liability company and has been structured as such since August 25, 2006. *See* <http://www.sunbiz.org/index.html> (accessed June 22, 2011). On the petition, the petitioner claimed to have been established in 2002 and to currently employ 25 workers. On the ETA Form 9089, signed by the beneficiary on February 20, 2007, the beneficiary claimed to work for the petitioner since July 1, 2004.

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2007 onwards. The petitioner submitted a 2007 W-2 Form which shows that the beneficiary was paid wages of \$16,660 in that year, \$15,559 less than the proffered wage. Thus, the petitioner must establish the ability to pay the difference between wages paid to the beneficiary and the full proffered wage in 2007, with that sum being \$15,559. The petitioner submitted tax documentation

¹ 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).

stating that the beneficiary was paid \$5,525 through March 31, 2008.² The petitioner would have to establish the ability to pay the difference between wages paid to the beneficiary and the full proffered wage for that year (\$26,694).

USCIS records show that the petitioner has filed 11 Form I-140 petitions for workers beginning in the 2007 priority year through 2010. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from each beneficiary's respective priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).³

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 (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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food*, 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*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

² The petitioner submitted additional information in December 2010, subsequent to filing the appeal, but did not submit any additional W-2 Statements for the beneficiary.

³ The director noted in his decision that the petitioner sponsored multiple workers and would need to establish its ability to pay each worker. On appeal, the petitioner submitted a listing of seven Form I-140 petitions filed by it (at that time, four petitions were subsequently filed) stating the proffered wage for each worker and the wages actually paid in 2007, along with copies of the 2007 W-2 Forms for those seven workers. According to the figures stated by the petitioner, total Form I-140 wages due all seven sponsored workers in 2007, including the beneficiary, were \$158,932. The petitioner states that it paid all sponsored workers \$137,702 (one worker was not employed by the petitioner), which is \$21,230 less than the full proffered wages stated by the petitioner. The record contains a copy of a state filing for quarterly wages paid for only the first quarter of 2008, but no later documentation about wages paid to other sponsored workers during any subsequent quarter in 2008 or subsequent year.

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 petitioner owns and operates a horse farm. Based on evidence in the record, the director treated the petitioner as a sole proprietorship. With a sole proprietorship, the petitioner’s adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner’s ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss from Farming, and are carried forward to the first page of the tax return. See <http://www.irs.gov/publications/p225/ch03.html> (accessed June 1, 2002). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary’s proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner’s gross income.

The director considered the sole proprietor’s adjusted gross income.

- The proprietor's 2007 tax return states adjusted gross income (Form 1040, line 37) of (\$310,351).

As previously noted, however, based on Florida State records, the petitioner was organized as a single-member limited liability company.⁴ Therefore, the petitioner's net income is reported on the member's IRS Form 1040, Schedule F at line 36 (Net farm profit or loss). The record before the director closed on May 13, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return would have been the most recent return available. The petitioner's 2007 tax return states a line 36, net income of (\$197,910)^{5,6} and is not sufficient to pay the proffered wages of all sponsored workers, or the difference between the wages paid and the remainder of the proffered wages.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage. Counsel specifically states that the director failed to consider the value of thoroughbred horses owned by the petitioner in determining the ability to pay, including the petitioner's ability to pay the difference between the proffered wage and wages actually paid to the present beneficiary, as well as the value in relation to the sole proprietor's personal living expenses and existing business expenses.

⁴ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a single member LLC, is considered to be a sole proprietorship for federal tax purposes.

⁵ As noted above, a sole proprietor must establish the ability to pay not only the proffered wage[s] of his or her employee[s], but his or her necessary living expenses and those of any dependents. Based on the belief that the petitioner was a sole proprietor, the director requested, in an April 1, 2008 request for evidence, that the petitioner provide a "statement of monthly expense for the family of the owner of the petitioner." Examples of requested expenses were provided. Although specifically requested, the petitioner did not provide those expenses in response to the director's request for evidence. The director noted in his June 19, 2008 decision denying the present petition that the sole proprietor's living expenses were not provided and, as such, it could not be determined whether the sole proprietor would have sufficient income to sustain herself after payment of the wages of sponsored workers. In the case of a limited liability company, however, the personal expenses and personal assets of the petitioner's owner would not be considered. Although the petitioner's corporate status is different than that identified by the director, the basis of the decision remains the same; that the evidence fails to establish the petitioner's ability to pay the proffered wage.

⁶ The record additionally contains the petitioner's 2006 federal tax return, which states Schedule F, line 36 income as (\$51,743). Although this return is before the priority date, it will be considered generally.

Counsel states that the petitioner owned thoroughbred race horses that could be sold to generate sufficient income to pay the wages of all sponsored workers. Counsel also states that the director violated 8 C.F.R. § 103.2(b)(8) by denying the petition, in part, based on the petitioner's failure to establish its ability to pay the proffered wage of other sponsored workers when the director did not request additional evidence in this regard.

Regarding counsel's contention on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence on the petitioner's ability to pay the wages of other sponsored workers before denying the petition, the cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. As the record did not establish the petitioner's ability to pay for the instant beneficiary, the director was not required to request evidence on the additional sponsored workers.

The petitioner submitted copies of business bank records for the months of January, February and March 2008 in support of its ability to pay the proffered wage. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's business bank statements somehow reflect additional available funds that were not considered in preparation of its Schedule F, Form 1040. It is also noted that bank records were not provided for any portion of 2007 or any period after March 2008. The bank statements do not establish the ability to pay the difference between the proffered wage and the wages paid to the present beneficiary or other sponsored workers from respective priority dates onward.

The petitioner submitted, on appeal, an equine appraisal prepared by [REDACTED] [REDACTED] found the fair market value⁷ of horses owned by the petitioner to be \$1,453,500. These assets, however, are assets of the petitioner's farming (horse training) operation, which supports the petitioner's business.⁸ They are not the type of readily liquefiable assets that are normally relied upon by petitioners to pay the wages of employees. It is also unclear from the record whether the assets of the farming (horse training) operation are subject to lien or otherwise

⁷ The record also contains a written appraisal from [REDACTED] the petitioner's equine assets. In doing so, [REDACTED] defined "fair market value" to be "the price a horse would bring when offered under normal sale conditions by a willing seller and purchased by a knowledgeable and willing buyer in a sale that occurs at an appropriate time and place for that particular horse." He also states that many factors can cause discrepancies between appraised figures and actual sale prices, including market fluctuations, the timing and location of the sale, and the horse's preparation, among other factors. He also cites change in a horse's performance, age and physical condition as potentially affecting the eventual sale price.

⁸ Sale of livestock is listed on Schedule F, line 1, and already factored into Schedule F, net farm profit or loss.

unencumbered. It should also be noted, as reflected on Schedule F, Form 4797 of the petitioner's 2007 tax return, that some horses sell at a loss, and therefore, the appraised value may not represent the amount obtained.

The petitioner submitted a copy of a real estate tax bill in support of its ability to pay the proffered wage. A tax bill does not establish the fair market value of real estate, nor can it be ascertained from a tax bill whether the property is subject to lien or encumbrance. A home is not a readily liquefiable asset. Further, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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 (Reg. Comm. 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, the petitioner states that the petitioner's business is growing and prosperous. The petitioner, however, provided no documentation of sustained growth or profitability since the petitioner's establishment in 2002. In a letter addressed to the petitioner's attorney, the petitioner's certified public accountant, [REDACTED] stated that the petitioner had substantial startup costs and losses when the business was established and that those losses are being carried over to subsequent tax years resulting in losses for tax purposes in subsequent years. [REDACTED] noted that

net operating losses are expected in the industry for the first five to seven years of operation due to the timing of income recognition. The petitioner, however, submitted no evidence of any such losses or the tax returns for any years affected by those losses or tax returns after 2007, so that an examination of the petitioner's potential sustained profitability or growth could be examined. Further, *Sonegawa* was intended to address short-term downturns in business not protracted multi-year start up costs or losses. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuous ability to pay the proffered wage of the beneficiary and other sponsored workers from their respective priority dates onward. The petitioner has filed for eleven workers and must establish the it can pay the wage of all sponsored workers. From the record, it cannot do so. Thus, assessing the totality of the circumstances in this individual case, and based upon the foregoing, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage of the present beneficiary or other sponsored workers from their respective priority dates onward.

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.