

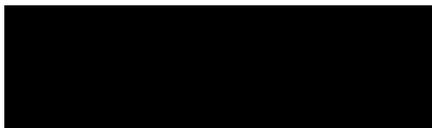
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Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090

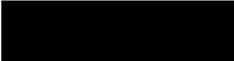


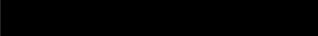
U.S. Citizenship  
and Immigration  
Services

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Date: **JUL 27 2011** Office: NEBRASKA 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, Nebraska Service Center and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real estate services company. It seeks to employ the beneficiary permanently in the United States as a loan processor. 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, 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 11, 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.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on November 16, 2006. The proffered wage as stated on the ETA Form 9089 is \$21.00 per hour (\$43,680 per year). The ETA Form 9089 states that the position requires a bachelor's degree in Accounting or Business Administration or equivalent and six months of experience as a loan processor or finance officer.

The AAO conducts appellate review 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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1990 and to currently employ 30 workers.<sup>2</sup> According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the ETA Form 9089, signed by the beneficiary December 3, 2006, the beneficiary claimed to have started working for the petitioner on January 6, 2005.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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'l Comm'r 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'l Comm'r 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 provided the following evidence of wages paid to the beneficiary:

- The 2006 Form W-2 shows that the petitioner paid the beneficiary \$29,854.60.
- The 2007 Form W-2 shows that the petitioner paid the beneficiary \$30,680.00.

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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).

<sup>2</sup> The California Employment Development forms state that the petitioner had 10-11 employees in 2007 and 14-17 employees in 2006

- The 2008 Form W-2 shows that the petitioner paid the beneficiary \$30,680.00.

As the amount paid in each year is less than the proffered wage, the petitioner must show its ability to pay the difference between the actual wage paid and the proffered wage, which in 2006 was \$13,825.40, and in 2007 and 2008 was \$13,000.<sup>3</sup>

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*, 696 F. Supp. 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 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

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<sup>3</sup> The director in his decision stated the proffered wage as \$43,680 and the wages paid in 2006 as \$29,854 and the wages paid in 2007 and 2008 as \$30,680. However, he stated the difference between the wage paid and the proffered wage in 2006 as \$4,986 and in 2007 and 2008 as \$4,160.

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 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*, 719 F.Supp. at 537 (emphasis added).<sup>4</sup>

The record before the director closed with the receipt by the director of the petitioner's response to the Request for Evidence dated March 16, 2009. The petitioner provided its 2006 through 2008 tax returns in response to the RFE:

- In 2006, the Form 1120S stated net income<sup>5</sup> of -\$142,645.

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<sup>4</sup> On appeal, counsel argues that "a profitable company might have no taxable income because it was able to transmute income into [other outlets]." In addition, counsel cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), and *Resser v. Comm.'r*, 74 F.3d 1528 (7th Cir. 1996), for the proposition that "accounting entities such as depreciation and other reserves are intended to provide information valuable to investors and to minimize tax liability, but are not intended to tell a firm whether to hire another employee . . ." As stated by the court in *River Street Donuts*, "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, . . . even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages." *River Street Donuts*, 558 F.3d at 118. While the court in *Construction and Design* reviewed a petitioner's cash flow in determining its ability to afford the salary of a new employee, the court also noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." *Construction and Design Co. v. USCIS*, 563 F.3d at 595-596. The petitioner has not established where "the extra money... would be coming from." *Id.* At 596.

<sup>5</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2008) of Schedule K. See Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 22, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income and/or deductions shown on its Schedule K for each year, the petitioner's net income is found on Schedule K of its tax returns.

- In 2007, the Form 1120S stated net income of -\$367,026.
- In 2008, the Form 1120S stated net income of -\$8,773.

Therefore, the petitioner demonstrated insufficient net income to pay the difference between the actual wage paid and the proffered wage in any year.

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.<sup>6</sup> A corporation's year-end current assets are shown 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.

- In 2006, the Form 1120S stated net current assets of -\$22,972.
- In 2007, the Form 1120S stated net current assets of -\$54,538.
- In 2008, the Form 1120S stated net current assets of -\$179,043.

Therefore, the petitioner did not demonstrate sufficient net current assets to pay the difference between the actual wage paid and the proffered wage in any year from the priority date onward.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had 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.

The petitioner also submitted profit and loss statements for 2006 and 2008. 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 represent 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.

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<sup>6</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.

On appeal, [REDACTED], a 50% shareholder of the petitioner submitted a declaration dated July 6, 2009 stating that the salary paid to her and her husband, [REDACTED], the other 50% shareholder of the petitioner, would be available to pay the proffered wage as would the charitable donations made in each year. The Forms W-2 and the tax returns in the record demonstrate that the petitioner paid its owners \$81,080 in 2006, \$950 in 2007, and \$10,070 in 2008 and made charitable contributions in the amount of \$29,920 in 2006, \$15,229 in 2007, and \$26,122 in 2008.<sup>7</sup> However, the petitioner's owners presented no evidence that they were financially capable of foregoing any compensation from the petitioner. Further, the petitioner did not submit evidence establishing that [REDACTED] was willing to forgo his compensation from the petitioner. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, officer compensation paid by the petitioner will not be considered in the determination of the petitioner's ability to pay the proffered wage.<sup>8</sup>

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<sup>7</sup> The charitable contributions appear to have been made in cash according to the Schedule K-1s attached to the returns. However, the petitioner cannot change those contributions now in an effort to establish its ability to pay the proffered wage. 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'r 1988).

[REDACTED] also notes that the petitioner is a cash basis taxpayer and that over \$20,000 in accounts receivable are not reflected on the petitioner's Schedule L. A cash basis taxpayer recognizes revenue when it is received, and expenses when they are paid. See <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed March 28, 2011). Alternatively, accrual based taxpayers involves reports income in the year earned and deducts or capitalizes expenses in the year incurred. [REDACTED] argument seeks to use an accrual based logic of accounts receivable to a cash basis taxpayer. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as [REDACTED] advocates. 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. at 176.

<sup>8</sup> [REDACTED] also states that the petitioner paid \$29,433 to the shareholders' pension plans in 2006, \$8,070 in 2007, and \$7,435 in 2008. Counsel and [REDACTED] assert that these payments could have been used instead to pay the proffered wage. The petitioner submitted no evidence to show that these payments were discretionary instead of mandatory, and has not established that the funds were available to pay the proffered wage in 2006, 2007 and 2008. Going on record without supporting

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'l Comm'r 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.

On appeal, counsel argues that the petitioner has a historical record of profitability and "has a realistic expectation that it will generate enough business that would exceed the proffered salary of workers that will be hired to be able to meet its business projects." In support of this proposition, counsel cites *The Matter of Oriental Pearl Restaurant*, 92-INA-59 (BALCA 1993), but counsel does not state how DOL precedent is binding in these proceedings. 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). Although counsel states that the years 2006 and 2007 were unusual years for the petitioner due to the housing crisis, the petitioner has offered no evidence to support this statement. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We additionally note that the petitioner's net income and net current assets in 2004 and 2005 were both negative, its net income in 2003 was minimal with negative net current assets, and its net income in 2002 was negative with minimal net current assets.<sup>9</sup> Although counsel on appeal notes that the

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documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

<sup>9</sup> The 2005 Form 1120S in the record states that the petitioner's net income was -\$92,977 and net current assets were -\$47,901. The 2004 Form 1120S in the record states that the petitioner's net income was -\$22,142 and its net current assets were -\$23,367. The 2003 Form 1120S in the record

petitioner's tax returns demonstrated an increase in gross revenue, it continued to demonstrate minimal or negative net income and net current assets. As a result, the net income and net current assets on the petitioner's tax returns after the priority date were in line with previous years, not anomalous. The petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. In addition, the petitioner submitted contracts from 2007 and stated that these contracts evidenced an increase in business which would, in turn, lead to a more solid financial position that would allow it to pay the proffered wage. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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 visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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states that the petitioner's net income was \$2,216 and its net current assets were -\$1,749. The 2002 Form 1120S in the record states that the petitioner's net income was -\$8,405 and its net current assets were \$4,807.