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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  
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

MAR 31 2011

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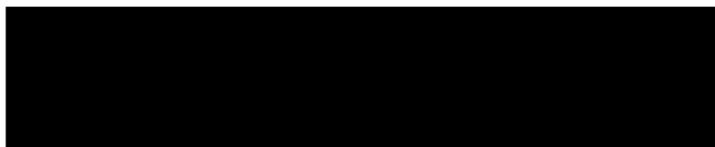
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A).

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 or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Thank you,

Penny Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center denied the preference visa petition as abandoned for the petitioner's failure to respond to the director's request for evidence. The petitioner submitted a response to the director's denial and established that it timely responded to the request for evidence. The director withdrew its initial decision by a Service Motion dated February 24, 2009 and issued a February 24, 2009 decision considering the RFE response. The petitioner submitted an appeal of the director's February 24, 2009 decision, which the director considered as an untimely appeal and treated as a motion to reopen. The director denied the motion to reopen and affirmed the February 24, 2009 decision in a decision dated June 25, 2009. As the petitioner submitted evidence to establish the appeal was timely filed, the director's June 25, 2009 decision will be withdrawn and the Administrative Appeals Office AAO will assume jurisdiction.<sup>1</sup> The appeal will be dismissed.

The petitioner is a horse farm. It seeks to employ the beneficiary permanently in the United States as a groom/equestrian maintenance person. 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 ability to pay the proffered wage from the date the labor certification was accepted onwards. 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 February 24, 2009<sup>2</sup> and June 25, 2009 denials, the issue in this case is

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<sup>1</sup> The AAO has exclusive jurisdiction over appeals of immigrant visa petitions based on employment such as the instant appeal. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) (which includes petitions for immigrant visa classification based on employment at 8 C.F.R. § 103.1(f)(3)(iii)(B)), with one exception - petitions for approval of schools under § 214.3 are now the responsibility of Immigration and Customs Enforcement (ICE).

The regulation 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii) and the instructions on the Form I-290B direct the petitioner to submit its brief and/or additional evidence directly to the AAO, not to the director. As such, only the AAO has access to and may review any additional evidence or brief submitted to this office in support of the appeal to determine if the late appeal meets the requirements of a motion to reopen or reconsider. Additionally, the governing regulations only permit the director to treat an appeal as a motion in the event the director will take favorable action. *See* 8 C.F.R. § 103.3(a)(2)(iii).

<sup>2</sup> On December 3, 2008, the director denied the petition on the grounds that the petitioner did not submit evidence in response to the director's request for evidence and the petition was thereby abandoned. By letter dated December 22, 2008, the petitioner responded by demonstrating that it

whether or not the petitioner demonstrated that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary 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 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 January 22, 2008. The proffered wage as stated on the ETA Form 9089 is \$15.09 per hour (\$31,387 per year).

The evidence in the record of proceeding does not show how the petitioner is structured. On the

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had, in fact, responded to the request for evidence in a timely fashion. The director withdrew the December 3, 2008 decision by a Service Motion dated February 24, 2009 and issued a February 24, 2009 decision considering the evidence submitted by the petitioner with the original petition and also in response to the request for evidence.

<sup>3</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 documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petition, the petitioner claimed to have been established in 1988 and to currently employ ten workers. On the ETA Form 9089, the beneficiary stated that he began working for the petitioner on February 28, 1997.

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 petitioner submitted no evidence that it employed or paid any wages to the beneficiary despite the beneficiary's claim that he has been employed with the petitioner since 1997. The record does not contain any W-2 statements, Forms 1099, or pay stubs to evidence that the petitioner paid the beneficiary any wages.

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. 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 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).

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 net current assets. USCIS will not consider the petitioner's total assets in the determination of the ability to pay the proffered wage, but rather the net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end

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<sup>4</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.

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 record before the director closed on October 16, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence.<sup>5</sup> As of that date, the petitioner's 2008 federal income tax return was not yet due. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may accept or request additional evidence in appropriate cases.<sup>6</sup> Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for 2007.<sup>7</sup> Although the 2007 tax return was for a period prior to the priority date, it could be used as general evidence of the petitioner's financial position in the absence of the petitioner's 2008 return. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner submitted no tax

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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.

<sup>5</sup> The director issued a decision dated December 3, 2008 denying the petition based on the failure to respond to the Request for Evidence. The petitioner moved to reopen the decision, submitting proof that its response had been received by the service. The petition was reopened by decision dated February 24, 2009.

<sup>6</sup> *See* 8 C.F.R. § 103.2(b)(8)(ii), (iii):

*Other evidence.* If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.

*See also* 8 C.F.R. § 204.5(g)(2):

In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

<sup>7</sup> In response to the director's RFE, the petitioner stated that its 2007 tax return would not be required as the priority date is 2008 and that as 2008 had not yet concluded, the 2008 tax return was not available. The petitioner failed to submit the 2008 tax return on appeal although the brief on appeal was submitted in May 2009.

returns either with its original submission, in response to the director's request for evidence, or on appeal despite being specifically requested to do so by the director. The regulation also allows a petitioner to submit audited financial statements or annual reports. The petitioner did not submit either of these other forms of regulatory proscribed evidence.

Instead of tax returns, the petitioner submitted letters from [REDACTED] a certified public accountant who states that he has been the petitioner's accountant and tax advisor for eight years. The accountant's May 1, 2008 letter states that the petitioner's "net worth" was "over \$1,000,000 for the years 2007 and 2006." A letter dated October 6, 2008 states that the petitioner's "net assets are in excess of \$5 million." A letter from [REDACTED] dated May 19, 2009 states that the petitioner "has net current assets in the amount of \$8,391,628 in 2007 and \$6,056,589 in 2008. In addition, . . . the company has the wherewithal to pay the proffered wage of \$40,868.36 to [the beneficiary]." 8 C.F.R. § 204.5(g)(2) states that the ability to pay the proffered wage may be shown through the use of "copies of annual reports, federal tax returns, or audited financial statements." On appeal, counsel states that "[a]s the Petitioner's accountant is a Certified Public Accountant, his letter attesting the financial soundness and the amount of the Petitioner's current assets is the equivalent to an audited financial statement." An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. Accountants conduct different levels of examination into finances including reviews, which are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. Nowhere in [REDACTED] letters does it state that he conducted an audit of the petitioner's finances in 2008 continuing onward. Without a statement from [REDACTED] concerning the level of examination conducted on his part into the petitioner's finances, and an accompanying audited financial statement, insufficient evidence has been submitted to demonstrate that [REDACTED] based his comments on an audit as opposed to the general representations of management. Nothing states what specific documents or financial documentation he relied on to reach this conclusions in his letters. As a result, his letters are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

On appeal, the petitioner submitted an unaudited Income & Expense Statement for 2008. Counsel's reliance on unaudited financial records is misplaced. As stated above, 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. Additionally, the statements do not show or verify any of the amounts cited in the CPA's letters referenced above.

The petitioner also submitted two memos from William R. Yates, Associate Director of Operations of USCIS, dated May 4, 2004 and February 16, 2005, respectively. We first note that the May 4, 2004 memorandum from William Yates was rescinded by a memo dated May 14, 2005 from

William Yates. Secondly, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely is offered as guidance. Where the documentation submitted pursuant to 8 C.F.R. § 204.5(g)(2) is sufficient to render a decision, the director need not consider additional information.

As the petitioner points out in its response to the request for evidence, the February 16, 2005 memo states that a preponderance of the evidence standard is to be used. The record here does not contain any evidence to establish ability to pay as set forth at 8 C.F.R. § 204.5(g)(2). Lastly, the AAO's analysis complied with the Yates Memo guiding adjudications of petitioning entities' continuing ability to pay the proffered wage through the following three-tiered analysis:

Adjudicators should make a positive ability to pay determination on an I-140 under the following circumstances:

- The petitioner's net income is equal to or greater than the proffered wage;
- The petitioner's net current assets are equal to or greater than the proffered wage; or
- The employer submits credible, verifiable evidence that the petitioner is both employing the beneficiary and has paid or is currently paying the proffered wage.

The memorandum then states the acceptance of any other type of financial information is discretionary on the part of the adjudicator. The burden is on the petitioner to show that the financial information pursuant to 8 C.F.R. § 204.5(g)(2) is insufficient to demonstrate the petitioner's true financial situation. The petitioner presented no evidence specified under 8 C.F.R. § 204.5(g)(2) here to allow an accurate calculation of net income or net current assets and, following the above analysis, failed to demonstrate that it had sufficient net income, net current assets, or that it paid the beneficiary the proffered wage (or any wages).

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 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 submitted no evidence pursuant to 8 C.F.R. § 204.5(g)(2) to demonstrate its financial position. In addition, the petitioner did not submit evidence of its reputation to liken its situation to the one presented in *Sonegawa*. Without any reliable evidence concerning the petitioner's financial position, we are unable to determine whether it had the ability to pay the proffered wage. 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.