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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: Office: NEBRASKA SERVICE CENTER

MAY 20 2011

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility which seeks to employ the beneficiary permanently in the United States as a home health aide. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (USDOL), accompanied the petition. 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.

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.

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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 was accepted for processing by any office within the employment system of the USDOL. See 8 C.F.R. § 204.5(d). The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the ETA Form 9089 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted on August 29, 2007. It lists the proffered wage as \$8.79 per hour, (\$18,283.20 per year).

The petitioner is a single-member limited liability company (LLC)¹ established in 2006 which claimed to employ one worker when the Form I-140 was filed. The owner's IRS Form 1040, U.S.

¹ An LLC with only one member is classified as an entity "disregarded as separate from its owner" for the purpose of filing a federal tax return. See Internal Revenue Service, Taxation of Limited

Individual Income Tax Return, for 2007 reports the profit or loss from the business on her Schedule C under the name [REDACTED]. The Form 1040 reflects the business operates on a calendar year basis. On the ETA Form 9089, accepted for processing by USDOL on August 29, 2007, she did not claim to have worked for the petitioner.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

A certified labor certification establishes a priority date for any immigrant petition later based on the ETA Form 9089. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. In [REDACTED] response received March 11, 2009, in part, to the director's January 28, 2009 Request for Evidence (RFE), the petitioner stated that the beneficiary was currently employed by the LLC, that she was receiving \$2,500 per month, and that she would be issued an IRS Form W-2, Wage and Tax Statement, for 2009. She also stated that "but as of now she doesn't have a social security number to do that." The AAO notes the petitioner has not submitted any documentary evidence such as the beneficiary's IRS Forms W-2, Wage and Tax Statement, or Forms 1099-MISC, Miscellaneous Income, establishing that the beneficiary was actually employed by the petitioner during the requisite period.

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from 2007 to the present.

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.*

[REDACTED] Publication 3402 (Rev. 3-2010), at 3, available at [REDACTED] p. [REDACTED] If the only member of an LLC is an individual, as indicated by the record in this case, the income and expenses of the LLC are reported on the member's IRS Form 1040, Schedules C, E, or F, unless the LLC elects to be treated as a corporation.

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.

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).

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).

The petitioner's net income is reported on the member's IRS Form 1040, Schedule C at line 31. The petitioner's net income for 2007 was -\$34,626.

For 2007 and onward, the petitioner has not established that it had sufficient net income to pay the proffered wage. Therefore, from the date the ETA Form 9089 was accepted for processing by the USDOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage.

The petitioner submitted a statement for her business [REDACTED] account ending in [REDACTED] showing a balance of \$1,250 as of October 20, 2008. She also sent statements for her personal [REDACTED] account ending in [REDACTED] showing a balance of \$11,065.89 as of January 18, 2007 and \$2,923.82 as of March 19, 2007. However as the petitioner is a single-member LLC, not a sole proprietorship, USCIS considers net income on Schedule C. However, AAO does not consider personal bank accounts outside of the business. Because an LLC is a separate and distinct legal entity from its owners and members, the assets of its members or of other enterprises or business entities 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). As noted by the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), "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." It is noted even had these person bank statement been considered, the petitioner did not present evidence of sufficient funds to support the beneficiary's proffered wage in 2007. In response to the director's second RFE dated January 28, 2009, the petitioner acknowledged that her 2007 IRS Form 1040, U.S. Individual Income Tax Return, had been submitted for the record and stated that she would forward her 2008 tax return when it became available. However, no further tax returns have been submitted for the record.

Counsel argues that the losses incurred by the petitioner as shown on its tax returns are caused by the taking of depreciation and other deductions which are for artificial losses that are being allowed for tax purposes. Counsel indicates that the "loss" shown on some tax returns may be caused by the taking of depreciation, bad debts, or other deductions for tax purposes to reduce the tax consequences to the employer is embodied in a case decided by the AAO in 1995. 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). Therefore, the case cited by counsel in support of his argument is not binding or relevant in this matter.

The thrust of counsel's argument is that depreciation and other deductions should be added back into the petitioner's net income in considering the petitioner's ability to pay the proffered wage. However, as discussed above, this approach has already been rejected by both USCIS and the federal courts. See, e.g., [REDACTED]. Counsel also states that the AAO should follow the guidance of a USCIS memorandum dated May 4, 2004 which states, in part, that a petition should be approved where the petitioner is employing the beneficiary and is currently paying the proffered wage. As stated above, the petitioner has not shown that the beneficiary has been paid the proffered wage in 2007 or beyond. Counsel states it should be observed that one of the expenses of the employer is its salary expense. Counsel further states that "As you analyze the over all trend of the salary expenses of the employer, comparing the salary expenses, is an indicator that the business of the employer is stable as the employer hired more employees and was able to pay more salaries to

more employees as its business continued over the years of its operation. This is indicative that the employer has funds to pay the proffered wage.” It is noted that the petitioner’s 2007 tax form showed no wages being paid to employees during that year (although there is an amount listed for “contract labor”). On the petition, the petitioner claimed to employ one worker in December 2007. However, there is no evidence in the record supporting this claim. Unsupported assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 Sonegawa, supra*. The petitioning entity in [REDACTED] had been in business for over 11 years. 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 *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 this case, the petitioner has not established an ability to pay the beneficiary the proffered wage through net income or business assets. The petitioner has not established the LLC’s historical growth, the occurrence of any uncharacteristic business expenditures or losses, its reputation within the industry or whether the beneficiary is replacing a former employee or an outsourced service. 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 beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.