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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



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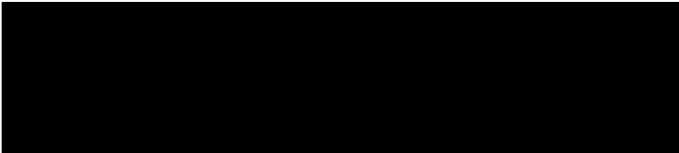
Date: **APR 17 2012** Office: TEXAS SERVICE CENTER

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail grocery store. It seeks to employ the beneficiary permanently in the United States as a butcher pursuant to 203(b)(3)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3)(A). 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 the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly.

On January 6, 2012, the AAO issued a Notice of Derogatory Information and Request for Evidence (NDI/RFE) to counsel and the petitioner informing the parties that a review of the website at <https://sccfile.scc.virginia.gov/BusinessEntity/BusinessEntitySearch.aspx>, accessed on December 27, 2011, indicated that the petitioner, [REDACTED] was no longer in business as its entity status was listed as "terminated."

The AAO informed the parties that if the petitioner was no longer an active business, the petition and its appeal to this office have become moot.<sup>1</sup> Therefore, the AAO requested that the petitioner provide evidence (invoices, most recent bank statement, most recent federal or Virginia quarterly wage report, etc.) demonstrating that the petitioning business is not inactive and had current business activity. In addition, the AAO informed the parties that the record did not contain sufficient evidence demonstrating the petitioner's continuing ability to pay the proffered wage to the beneficiary since the priority date. The AAO noted that the petitioner had only submitted its Forms 1120, U.S. Corporate Income Tax Return, for 2005, 2006, and 2007, as well as a Form W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner in 2007, and requested that the petitioner provide its complete federal tax returns or audited financial statements for 2008, 2009, and 2010. The AAO also requested that the petitioner submit all Form W-2 statements or Forms 1099-MISC, Miscellaneous Income, issued to the beneficiary in 2005, 2006, 2008, 2009, 2010, and 2011.

In response, counsel submits sufficient evidence, including a certificate of good standing from the Commonwealth of Virginia, bank statements, and tax documents, to establish that the petitioner is currently an active business. Counsel submits the petitioner's Form 1120 tax returns for 2008, 2009, and 2010, and Form W-2 statements issued by the petitioner to the beneficiary in 2008 and 2009. Counsel notes that the petitioner only employed the beneficiary when he had valid employment authorization from United States Citizenship and Immigrations Services (USCIS) in 2007, 2008, and 2009, and had not employed the beneficiary either before 2007 or after 2009.

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<sup>1</sup> Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. 8 C.F.R. § 205.1(a)(iii)(D) (which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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 DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on November 21, 2005. The proffered wage as stated on the ETA Form 9089 is \$32,386.00 per year. The ETA Form 9089 states that the position requires no education, no training, and two years of experience in the offered job of butcher.

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.

The evidence in the record of proceeding reveals that the petitioner is a C corporation. The petitioner indicated on the Form I-140 petition at part 5, section 2 that it was established on September 3, 2004, currently employs 3 workers, and has gross annual income of \$482,636.00. According to the tax returns in the record, the petitioner's fiscal year runs with the calendar year. At part K of ETA Form 9089 where beneficiaries are asked to list their work experience, the beneficiary claimed to have worked as a butcher for [REDACTED] from March 1, 1988 to December 1, 1990.

On appeal, counsel asserted that the petitioner possessed the continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel acknowledged that the petitioner operated at a loss in 2006, but noted that the petitioner possessed sufficient business assets and excess funds in its bank account to pay the proffered wage in 2006. Counsel submitted bank statements dated January 31, 2006 and June 30, 2006 for the petitioner's business checking account in support of the appeal.

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, 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.

Counsel and the petitioner acknowledge that the beneficiary only worked for the petitioner when he allegedly possessed valid employment authorization from USCIS in 2007, 2008, and 2009, and did not work for the petitioner in 2005, 2006, 2010, and 2011. The record contains Form W-2 statements reflecting employee compensation paid to the beneficiary by the petitioner as follows:

- 2007 – \$5,397.60 (\$26,988.40 less than the proffered wage of \$32,386.00)
- 2008 – \$26,988.00 (\$5,398.00 less than the proffered wage of \$32,386.00)
- 2009 – \$24,289.20 (\$8,096.80 less than the proffered wage of \$32,386.00)

The petitioner did not pay any wages to the beneficiary in 2005, 2006, 2010 and 2011 and failed to establish that it paid the beneficiary the full proffered wage of \$32,386.00 in 2007, 2008, and 2009. Although the petitioner must demonstrate the ability to pay the full proffered wage from 2005 to 2011, it must be noted that the petitioner is only obligated to show that it could have paid the difference between the proffered wage and wages already paid in 2007, 2008, and 2009.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 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 [REDACTED] 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.

[REDACTED] “[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.” [REDACTED]

The petitioner's Form 1120 tax returns list its net income as shown in the table below.

- In 2005, the Form 1120 stated net income<sup>1</sup> of \$34,324.00
- In 2006, the Form 1120 stated net income of <\$4,546.00.><sup>2</sup>
- In 2007, the Form 1120 stated net income of \$2,764.00.
- In 2008, the Form 1120 stated net income of \$640.00.
- In 2009, the Form 1120 stated net income of <\$145.00.>

<sup>1</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

<sup>2</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

- In 2010, the Form 1120 stated net income of \$4,501.00.

Although the petitioner did have sufficient net income to pay the proffered wage of \$32,386.00 in 2005, it did not have sufficient net income to pay the proffered wage in 2006 and 2010. Further, the petitioner did not possess sufficient net income to pay the difference between the proffered wage and wages already paid to the beneficiary in 2007, 2008, and 2009.

As an alternate means of determining the ability of the petitioner to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a corporate entity's current assets and current liabilities.<sup>3</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 corporation is expected to be able to pay the proffered wage using those net current assets. The tax returns of the petitioner demonstrate its end-of-year net current assets as shown in the table below.

- In 2005, the Form 1120 stated net current assets of \$48,521.00.
- In 2006, the Form 1120 stated net current assets of \$27,225.00.
- In 2007, the Form 1120 stated net current assets of \$32,403.00.
- In 2008, the Form 1120 stated net current assets of \$40,679.00.
- In 2009, the Form 1120 stated net current assets of \$47,344.00.
- In 2010, the Form 1120 stated net current assets of \$53,163.00.

The petitioner established that it had sufficient net assets to pay the full proffered wage in 2005 and 2010 and to pay the difference between the proffered wage and wages already paid in 2007, 2008, and 2009. Nevertheless, the petitioner did not have sufficient net current assets to pay the proffered wage in 2006.

Counsel acknowledged that the petitioner operated at a loss in 2006, but noted that the petitioner possessed sufficient business assets and excess funds in its bank account to pay the proffered wage in 2006 on appeal. Counsel submitted bank statements dated January 31, 2006 and June 30, 2006 for the petitioner's business checking account in support of the appeal. However, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to pay the proffered wage to the beneficiary in 2006. In addition, the balances in this account are well below the proffered wage and include negative balances, checks returned for insufficient funds, and overdraft charges in both of these statements. Finally, it cannot be considered to be credible that the petitioner

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<sup>3</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.

would liquidate any business assets to pay the proffered wage as such assets are needed by the petitioner to conduct regular day-to-day operations rather than a readily available and convertible asset.

Furthermore, counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL on November 21, 2005, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage in 2006 through an examination of wages paid to the beneficiary, or its net income, or net current assets.

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. 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.

The petitioner's clients had been included in the lists of the . 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, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Nor has the petitioner included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owner is willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's 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.

Beyond the decision of the director, the record in this case also lacks sufficient evidence as to whether the beneficiary met the experience requirement of the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

In the instant case, the record contains an employment letter that has been submitted in an effort to substantiate the beneficiary's claimed qualifications. To meet the qualifications however, the employment letter must include the following: the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). According to the labor certification, the position requires two years of experience in the offered job of butcher.

As noted previously, the beneficiary claimed to have worked as a butcher for [REDACTED] at part K of ETA Form 9089 where beneficiaries are asked to list their work experience. The petitioner submitted a letter containing the letterhead of the [REDACTED] and the illegible signature of an individual who is listed as the proprietor of this establishment in support of the claim that the beneficiary has the required two years of experience in the offered job of butcher. In this letter, the proprietor stated that the beneficiary had worked in this shop as a butcher from March 1988 to December 1990. The proprietor of [REDACTED] indicated that the beneficiary was an efficient butcher who had knowledge and experience with traditional butcher tools including the meat saw and cleaver while maintaining a clean environment. Although this letter indicates that the beneficiary was employed for approximately two years and ten months by this employer, the proprietor of [REDACTED] did not provide a specific description of the beneficiary's duties. Further, the proprietor of [REDACTED] is not identifiable by name as the signature contained in this letter is illegible. Finally, the beneficiary claimed that he worked as a

butcher for [REDACTED] but the letterhead of the employment letter submitted in support of the beneficiary's claimed employment listed the name of the establishment where the beneficiary worked as [REDACTED]. The record is absent any explanation for this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, it has not been credibly established that the beneficiary has the requisite two years of experience in the offered job of butcher. 8 C.F.R § 204.5(g)(1) and (1)(3)(ii)(A).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.