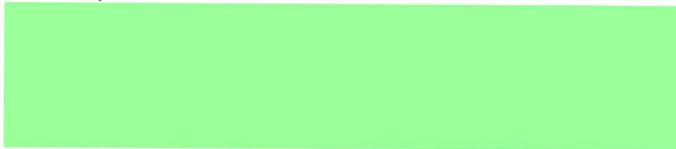




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUL 09 2012 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by 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 March 18, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation 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 June 22, 2006. The proffered wage as stated on the ETA Form 9089 is \$19.96 per hour (\$41,516.80 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal counsel submits a brief and copies of the U.S. Individual Income Tax Return (Form 1040) for [REDACTED] for 2006 and 2007.

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 2003 and currently to employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on July 12, 2007, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in his analysis of the petitioner's ability to pay because he did not consider the totality of the petitioner's financial circumstances. Under the rubric of totality of the petitioner's financial circumstances, counsel asserts that the director should have considered the personal income of the petitioner's majority shareholder as evidence of the petitioner's ability to pay the proffered wage.

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'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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided copies of IRS Form W-2 which it issued to the beneficiary in 2007 and 2008. The beneficiary's IRS Form W-2, Wage and Tax Statement, shows compensation received from the petitioner, as shown in the table below.

- In 2007, the Form W-2 stated compensation of \$1,100.00.²
- In 2008, the Form W-2 stated compensation of \$20,900.00.

In the instant case, the petitioner has not demonstrated that it employed or paid the beneficiary any wages in 2006. The petitioner has demonstrated that it paid the beneficiary a portion of the proffered wage in both 2007 and 2008. Therefore, while the petitioner must still demonstrate the ability to pay the beneficiary the full proffered wage in 2006, it must only demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage for 2007 and 2008, that difference being \$40,416.80 and \$20,616.80 respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *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 *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of

² On Form ETA 9089, signed by the beneficiary on July 12, 2007, the beneficiary did not claim to have worked for the petitioner. In her response to the director's January 14, 2009 request for evidence, counsel asserts that the beneficiary began working for the petitioner in December 2007.

the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on February 25, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net income³ of \$6,319.00.
- In 2007, the Form 1120S stated net income of \$541.00.

Therefore, for the year 2006, the petitioner did not demonstrate sufficient income to pay the beneficiary the full proffered wage. For the year 2007, the petitioner did not demonstrate sufficient net income to pay the beneficiary the difference between wages already paid and the full proffered

³ 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 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 6, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for 2006 or 2007, the petitioner’s net income is found on line 21 of the first page of Form 1120S for both years.

wage. The petitioner's federal income tax return for 2008 was not yet due as of the closing of the record. Therefore, the petitioner could not demonstrate the ability to pay the difference between wages already paid and the full proffered wage for that 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.⁴ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S, Schedule L stated net current assets of \$10,445.00.
- In 2007, the Form 1120S, Schedule L stated net current assets of \$12,847.00.

Therefore, for the year 2006 the petitioner did not demonstrate sufficient net current assets to pay the beneficiary the full proffered wage. For the year 2007 the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the full proffered wage.

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.

Counsel asserts on appeal that the director erred in his analysis of the petitioner's ability to pay because he did not consider the totality of the petitioner's financial circumstances. Under the rubric of the totality of the petitioner's financial circumstances, counsel asserts that the director should have considered the personal income of [REDACTED], as reflected in the U.S Individual Income Tax Returns (Form 1040) for 2006 and 2007. According to Schedule K-1 which accompanies the petitioner's U.S. Income Tax Returns for an S Corporation, [REDACTED] owns 60% of petitioner's shares and is the majority shareholder. Counsel asserts that the language of the regulation at 8 C.F.R. § 204.5(g)(2) permits such evidence since it states, "In appropriate cases" certain types of evidence may be requested and may be supplied. Counsel also asserts that a May 4, 2004 memorandum issued by William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials permits officers to consider certain types of discretionary evidence.

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

⁴According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

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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. 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.

(emphasis added).

The regulation is clear in the types of evidence which are required for a demonstration of the ability to pay, those being 1) annual reports, 2) federal tax returns or 3) audited financial statements. 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. Further, even though this regulation allows the submission of additional material "in appropriate cases," it specifically identifies those types of additional evidence which may be submitted and evidence of the personal income of the petitioner's shareholders is not among them.

In fact, the personal income of the petitioner's majority shareholder is the only type of additional evidence which counsel asserts that USCIS should consider because counsel provided no other pieces of evidence either in response to the director's RFE or on appeal.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

So, while counsel asserts that the shareholders of the petitioning entity have a vested interest in the success of the organization and accordingly desire the best personnel in the pursuit of that goal, the individual shareholders are not personally liable for the debts of the corporation, such as wages due to employees. Therefore, their personal income cannot be considered for paying those debts or liabilities.

With respect to the May 4, 2004 memorandum issued by William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors, this document does not give any indication of the types

of evidence which might be requested by USCIS officers. In his memorandum, Mr. Yates states, with respect to the issuance of requests for evidence:

Under 8 C.F.R. 103.2(b)(8), the CIS is only required to issue an RFE in one circumstance – when initial evidence is missing. Initial evidence is evidence specified in the regulations and on the application or petition and accompanying instructions. In all other instances, such as when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of an RFE is discretionary.

(emphasis in the original).

As explained elsewhere in the memorandum, if the petitioner has supplied the required initial evidence and that evidence does not establish eligibility, USCIS may deny the petition without the issuance of an RFE. In the instant situation, with its initial petition submission, as evidence of the petitioner's ability to pay the beneficiary the proffered wage, the petitioner supplied only its U.S. Income Tax Return for an S Corporation for 2006. By the time of adjudication, the petitioner's federal income tax return for 2007 would have already been filed with the Internal Revenue Service and available for consideration. Further, the director noted that the petitioner's federal income tax return for 2006 did not demonstrate the ability to pay, either through consideration of the petitioner's net income or its net current assets. Therefore, the director issued an RFE, affording the petitioner an opportunity to provide its 2007 federal income tax return, an audited financial statement or an annual report for the same year and evidence of any wages which the petitioner might have paid to the beneficiary since the filing of the labor certification. Neither the director, in his RFE, nor Mr. Yates, in his memorandum intimate that it would be acceptable to provide evidence of the personal income of the petitioner's shareholders as evidence of the petitioner's ability to pay.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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.

In the instant case, at the time the petitioner filed Form I-140, it had only been conducting business for four years. The petitioner provided financial documentation for only two of those years. For the two years under consideration, the petitioner's sales were comparable. Likewise, officer compensation and payroll were modest and comparable. The evidence does not demonstrate the 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 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.

The evidence submitted does not establish that the petitioner 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.