

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

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**



B6

Date:

**JAN 04 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:

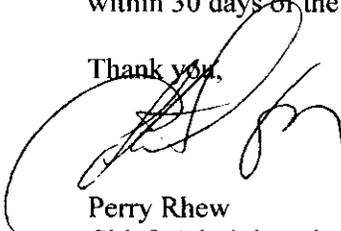


INSTRUCTIONS:

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 employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an inn. It seeks to employ the beneficiary permanently in the United States as a janitor. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director also determined that the petitioner had failed to submit the initial evidence to establish that it had the ability to pay the proffered wage and failed to submit evidence to establish that the beneficiary possessed the requisite work experience, and denied the petition, accordingly.

On appeal, the petitioner submits additional evidence relating to the petitioner's ability to pay the proffered wage and the beneficiary's employment experience and contends that the petition merits approval.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

Section 203(b)(3)(A)(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(l) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on January 3, 2008, indicates that the petitioner was established in 1967,<sup>1</sup> reports a gross annual income of \$250,000, a net annual income of \$50,000 and currently employs six workers. The petitioner sought visa classification (Part 2, paragraph e of I-140) of the beneficiary as a skilled worker (requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act. Section H, 4, 6, and 10 of the ETA Form 9089, do not require the applicant to have any formal education or training and require six months of work experience in the job offered of janitor or six months of experience as a maintenance worker.<sup>2</sup>

Relying on 8 C.F.R. § 204.5(l)(2), and as mentioned above, the director observed that the minimum requirements of the certified position described on the ETA Form 9089 required less than two years training or experience. As the visa classification sought on the Form I-140 petition designated the skilled worker (or professional) category (paragraph e), the Form I-140 petition was not approvable because it was not supported by the appropriate ETA Form 9089. In order to be classified as a skilled worker, the ETA Form 9089 must require a minimum of two years of training or experience as set forth in Section 203(b)(3)(A)(i) of the Act. The director denied the petition on this basis because the petitioner did not demonstrate that the position required at least two years of training or experience, therefore the labor certification does not support the visa classification sought. The director also denied the petition because the petitioner submitted no evidence of its ability to pay the proffered wage and lack of evidence that the beneficiary possessed the requisite work experience.

On appeal, with regard to the designation of the wrong visa category, counsel asserts that it was a scrivener's error and that the director could have issued a request for evidence for the missing evidence. It is noted that the regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It further noted that neither the law nor the regulations compel the director to consider other classifications if the petition is not approvable under the classification requested or require the director to issue a request for evidence where evidence of ineligibility is present. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

---

<sup>1</sup>It is unclear that the current owners have operated the business since this date. State records reflect that the petitioner was organized on March 18, 2003. *See* the records at the Massachusetts Corporations Division online website at <http://corp.sec.state.ma.us/corp/corpsearch/CorpSearchSummary.asp?ReadFromDB=True...> (accessed December 15, 2011).

<sup>2</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. As evidence of ineligibility was present, we cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner.

Additionally, as cited by director, it is noted that a petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage as of the priority date.<sup>3</sup> It must also demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on December 27, 2005, which establishes the priority date. The proffered wage as set forth on the ETA Form 9089 is \$11.28 per hour, which amounts to \$23,462 per year. On the ETA Form 9089, which was signed by the beneficiary on August 6, 2006, it is claimed that he worked for the petitioner from July 1, 2005 to December 15, 2005.<sup>4</sup>

With respect to the petitioner's ability to pay the proffered wage, it is noted that 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

---

<sup>3</sup> The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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 overall 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).

<sup>4</sup> The petitioner submitted a letter with the I-140 petition that stated it employed the beneficiary from April 13, 2006 onward. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 [United States Citizenship and Immigration Services (USCIS)].

In support of its ability to pay the proffered wage, the petitioner has submitted copies of its 2005, 2006, and 2007, Form 1065, U.S. Return of Partnership Income. They indicate that the petitioner files its returns on a standard calendar year basis and is structured as a domestic limited liability company.<sup>5</sup> The returns contain the following information:

Year	2005	2006	2007
Net Income	-\$19,771	-\$17,098	-\$27,776
Current Assets	\$19,913	\$16,044	\$10,183
Current Liabilities	\$ -0-	\$-0-	\$-0-
Net Current Assets	\$ 19,913	\$16,044	\$10,183

---

<sup>5</sup> A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

For an LLC taxed as a partnership (as in this case), where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) page 5 (2008-2010) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedule K for 2005, 2006, and 2007 and has relevant entries for additional income, credits, deductions, or other adjustments, and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its 2005, 2006, and 2007 tax returns.

As set forth in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the LLC petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 15 through 17. If the end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>7</sup>

On appeal, it is noted that counsel submitted copies of Wage and Tax Statements (W-2s) issued by the petitioner to the beneficiary<sup>8</sup> showing the following wages paid:

Year	Wages Paid	Comparison to Proffered Wage of \$23,462
2005	\$5,460.20	\$18,001.80 less
2006	\$7,299.12	\$16,162.88 less
2007	\$12,610.75	\$10,851.25 less

It is noted that if a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the beneficiary less than the proffered wage during a given period,

---

<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>7</sup>We reject, however, counsel's assertions on appeal that would utilize the petitioner's total assets in calculating a petitioner's ability to pay the proffered wage rather than using the difference between current assets and current liabilities as shown on Schedule L and discussed above. A petitioner's total assets include depreciable assets that the petitioner uses in its business. 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. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

<sup>8</sup>The W-2 statements list the beneficiary's address abroad, which calls into question the validity of the W-2 forms. The job offer is in Massachusetts. The petitioner must address this issue in any further filings. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.<sup>9</sup>

---

<sup>9</sup> If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. 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

In this case, as noted above, the petitioner's 2005 net current assets covered the shortfall between the proffered wage and the wages paid to the beneficiary. While the difference between the petitioner's net current assets and the respective shortfalls between the wages paid, and the proffered wage would be small in 2006 and 2007, upon resolution of the issue related to the W-2 statements, the record does not establish the petitioner's ability to pay the proffered wage in these years based on the evidence before us.

*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, the petitioner's gross receipts or sales have declined from approximately \$128,000 in 2005 to \$114,000 in 2007. Its net income losses have increased from -\$19,771 in 2005 to -\$27,776 in 2007. No other reputational factors or evidence of a framework of successful or profitable years was presented that would be sufficient to justify an approval based on *Sonogawa* factors. Although, the difference in wages paid and the proffered wage is not a large amount in 2006 and 2007, the petitioner must both resolve the issue related to the W-2 statements set forth above, and the petitioner would also need to establish that the totality of the circumstances in this matter would warrant approval. From the record before us, the evidence does not establish this.

However, the amount of wages paid to the beneficiary in each of these years raises a question whether the petitioner intends to employ the beneficiary in a full-time, permanent position. It is noted that the regulation at 20 C.F.R. § 656.3 requires permanent, full-time employment and the employer must be prepared to document the permanent and full-time nature of the employment.

The director also denied the petition because the petitioner had failed to submit evidence that the beneficiary possessed the requisite six months employment experience required by the terms of the ETA Form 9089. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

---

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).

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The ETA Form 9089 requires the petitioner to list all jobs that the beneficiary has held in the past three years. It also requires that any other work experience must be listed that qualifies the alien for the job for which certification is sought. Two jobs are listed. The first position listed is as a janitor with the petitioner, as mentioned above, from July 1, 2005 to December 15, 2005. The other position was as a janitor with the [REDACTED] where the beneficiary states that he worked full-time from December 4, 2000 to May 4, 2002.

On appeal, however, counsel submits an employment verification letter from a third employer that was not listed on the ETA Form 9089. It is from [REDACTED]. He states that the beneficiary was employed as a sanitation employee for about two years during the period from February 1989 to October 1995 and ended his employment as "Head Butcher." As this letter does not represent a qualifying employer as claimed on the ETA Form 9089, signed under penalty of perjury by the beneficiary, without more corroboration, it is not probative to establish his qualifying six months of employment as a janitor or maintenance worker. *See also Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.) It is also noted that it is not clear that [REDACTED] an accountant for this company, should be considered as either a "trainer" or "employer" who can corroborate the beneficiary's employment and describe with more specificity the training received or the experience acquired by the beneficiary.

Based on a review of the underlying record and the evidence submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for a skilled worker visa classification initially sought by the petitioner. Clarification is required before the petitioner can establish its ability to pay the proffered wage, or that the job offer is permanent and full-time. Additionally, there was insufficient evidence to establish that the petitioner has demonstrated that the beneficiary has the requisite qualifying employment experience as set forth on the ETA Form 9089. Therefore, the appeal will be dismissed.

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.