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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

B6



Date: **JUL 12 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 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant/inn. It seeks to employ the beneficiary permanently in the United States as an Italian style chef. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

Counsel submits additional evidence on appeal and asserts that the petitioner established its ability to pay the proffered wage.

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. For the reasons set forth below, the AAO does not accept all of the evidence submitted on appeal.

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 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 March 17, 2008, which establishes the priority date. The proffered wage as stated on the ETA Form 9089 is \$14.77 per hour, which amounts to \$30,721.60

per year. The ETA Form 9089 states that the position requires only 24 months (two years) of work experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have originally been established in 1754, to have a gross annual income of \$1,474,983, a net annual income of \$983,681 and to currently employ 35 workers. According to the tax return in the record, the petitioner's fiscal year runs from October 1<sup>st</sup> to September 30<sup>th</sup> of the following year. On the ETA Form 9089, signed by the beneficiary on August 13, 2008, the beneficiary did not claim to have worked for the petitioner.

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 overall 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).

It is noted that the petition was filed on August 14, 2008. It was accompanied by a copy of the petitioner's 2006 Form 1120, U.S. Corporation Income Tax Return. As indicated above, the petitioner's fiscal year on this tax return runs from October 1, 2006 to September 30, 2007. 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.

Line 28 of this tax return shows the petitioner net income for 2006 as \$10,447.<sup>1</sup> Therefore, for this period, the petitioner did not have sufficient net income to pay the proffered wage of \$30,721.60.

Besides net income USCIS will alternatively examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 are equal to or greater than the proffered wage, the

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<sup>1</sup>This tax return is for the time period before the March 17, 2008 priority date, but will be considered generally.

<sup>2</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.

petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2006 tax return reflects that its current assets were \$32,228 and its current liabilities were \$77,612, yielding net current assets of -\$45,384. This sum does not cover payment of the proffered wage during this fiscal year. Further, this fiscal year financial information did not cover the priority date of March 17, 2008 or establish that the petitioner could pay the proffered wage from the priority date of March 17, 2008 onward as required by 8 C.F.R. § 204.5(g)(2).

On October 8, 2008, the director issued a notice of intent to deny, informing the petitioner of the deficiencies of the evidence, quoting the regulation at 8 C.F.R. § 204.5(g)(2) and affording the petitioner thirty (30) days to respond. The director stated in relevant part:

The petitioner is required to provide evidence to prove the ability to pay the proffered wage from the time the priority date was established until the beneficiary becomes a permanent resident. If the beneficiary was an employee of the petitioner during the years mentioned, please provide the W2's as proof of wages paid. The burden of proof is on you to prove that you had and still have the ability to pay.

In response counsel submitted a letter dated October 21, 2008. She refers to the enclosed CPA letter stating that the 2007 tax return had not been filed as the fiscal year closed on September 30, 2008. Counsel indicated in the October 2008 letter that the 2007 tax return would be filed in the next three (months). She additionally requested an extension of twelve (12) more weeks to provide the requested financial information. Other than the accountant's attached letter, no other documentation was provided.

The director denied the petition on March 26, 2009, noting that "at the discretion of the officer, the petitioner was given additional time to respond. As of today, USCIS has not received any evidence from the petitioner to show ability to pay or an explanation as to why the evidence was not provided." The director proceeded to review the financial information that had been provided and concluded that the petitioner had failed to demonstrate the continuing financial ability to pay the proffered wage of \$30,721.60 from the priority date onward.

On appeal, filed on April 22, 2009, counsel submits a copy of a 2008 W-2 issued by the petitioner to the beneficiary indicating wages paid of \$29,680, copies of the petitioner's bank statements from October 31, 2007 through December 31, 2008, a copy of a different accountant's letter dated April 17, 2009, a copy of a *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), which counsel asserts supports the approval of the petition, and a copy of an Internal Revenue Service (IRS) Application for Six Month Extension of Time to file the 2007 federal income tax return. There is no date indicating when the extension request was filed, however an accompanying state application for an extension of time reflects that it was signed on December 8, 2008.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, however, the director issued a request for evidence (RFE), instructing the petitioner to specifically submit, *inter alia*, ". . . W2's as proof of wages paid." (Emphasis in original). The denial, dated March 26, 2009 noted that additional time had been allotted to the petitioner but the director noted that the petitioner had not provided the requested evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).<sup>3</sup>

It is additionally noted that the beneficiary's employment with the petitioner was omitted from the ETA Form 9089, which was signed under penalty of perjury by the petitioner on July 14, 2008 and by the beneficiary under penalty of perjury on August 13, 2008. ETA Form 9089 instructions in Part K related to the beneficiary work experience, state, "list all jobs the alien has held during the past 3 years." It raises a question as to when the beneficiary commenced employment with the petitioner and how accurate the W-2 is in claiming to represent payment of approximately 97% of the proffered wage beginning sometime after August 13, 2008 for the remaining part of 2008. It is further noted that Part 3 of the Form I-140, states "None" for the box containing the beneficiary's social security number, while the W-2 contains a social security number.<sup>4</sup> 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). As the record currently stands and under the circumstances, the AAO need not, and does not, consider the sufficiency of the W-2 submitted on appeal.

With regard to the bank statements, it is noted that the majority of those could have been provided to the director as well. The AAO notes, however, that 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, except through its own delay, or otherwise paints an inaccurate financial picture of the petitioner. Additionally, 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 a corresponding audited financial statement had it elected to provide this alternative form of evidence if it could not provide the corresponding tax return.

It is additionally noted that the accountants' letter, dated April 17, 2009 and submitted on appeal, states that they have been recently retained and are awaiting information from outside bookkeepers. Counsel did not request any additional time to submit documents on appeal, or even request an additional thirty days at the time of filing the appeal.

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<sup>3</sup> *See also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>4</sup> In any further filings, the petitioner should clarify these discrepancies and provide additional documentation of the beneficiary's employment and payment of compensation.

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, (or audited financial statement if provided) 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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).

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).

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not submitted any of the required evidence pursuant to 8 C.F.R. § 204.5(g)(2) such as a federal tax return or audited financial statement that establishes its 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 in her brief accompanying the appeal that USCIS should determine the petitioner’s continuing ability to pay the proffered wage from the priority date based on the beneficiary’s 2008 W-2, the petitioner’s bank records and the accountant’s letter. She cites the Yates Memorandum in this regard. It is noted that by its own terms, the Yates Memorandum is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.<sup>5</sup> It does not supersede the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity’s ability to pay if, in the context of the beneficiary’s employment, “[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage.” The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, the regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is March 17, 2008 as established by the labor certification. Demonstrating that the petitioner is paying the proffered wage in a specific year or time period may suffice to show the petitioner’s ability to pay for that year or period of time, but the petitioner must still demonstrate its ability to pay for the remainder of the pertinent period of time. As noted above, the payment of wages by the petitioner to the beneficiary has not been credibly established yet by the current record, and the W-2 form submitted does not demonstrate payment of the entire proffered wage.

Counsel’s assertions on appeal cannot be concluded to outweigh the lack of evidence of a federal income tax return or audited financial statement that demonstrates that the petitioner could pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL. The AAO concludes that the petitioner failed to establish its continuing financial ability to pay the proffered wage from the priority date of March 17, 2008, onward.

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

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<sup>5</sup>See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

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, or the occurrence of any uncharacteristic business expenditures or losses.

In the instant case, while the petitioner has been in existence for a long time, the record contains only one tax return, in which neither the net income nor the net current assets are sufficient to cover the proffered wage. One tax return is insufficient to establish any evidence of historic growth or consistent earnings. No unique or uncharacteristic circumstances analogous to *Sonegawa* have been presented. Thus, assessing the overall 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.