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U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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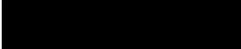


U.S. Citizenship
and Immigration
Services



B6

DATE: JUL 20 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a chef. 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 concluded that the petitioner had failed to establish that the petitioner had the continuing ability to pay the proffered wage.

On appeal, the petitioner, submits additional evidence 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 procedural history in this case is documented by the record and incorporated. 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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, which is the date that the ETA Form 9089 was initially received in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N

¹ The tax returns describe the petitioner's business activity as a convenience store that provides gas and food.

158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on October 3, 2006, which establishes the priority date.² The proffered wage is \$15.64 per hour, which amounts to \$32,531.20 per year.

Part H of the ETA Form 9089 indicates that the offered position of chef requires a high school education and thirty-six months (3 years) of employment experience in the offered position of chef.

The ETA Form 9089 was signed by the beneficiary on January 12, 2006 and does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), it is claimed that the petitioner was established on February 15, 2004, employs four workers and reports gross annual income of \$656,156.

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, 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. Comm. 1967).

Ability to Pay the Proffered Wage

In support of its ability to pay the proffered wage of \$32,531.20 per year, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return(s) for 2004, 2005,³ 2006 and 2007. The petitioner's returns reflect that its fiscal year is a standard calendar year. The tax returns also contain the following information:

² 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.

³ As the 2004 and 2005 returns pre-date the priority date of October 3, 2006 and are less relevant to the petitioner's ability to pay the proffered wage from the priority date onward, they will be considered only generally.

Year	2004	2005	2006
Net Income ⁴	-\$16,974	\$14,713	-\$ 471
Current Assets	-\$ 263	\$19,221	\$ 27,163
Current Liabilities	\$55,428	\$57,337	\$ 57,336
Net Current Assets	-\$55,691	-\$38,116	-\$ 30,173

Year	2007
Net Income	-\$ 22,499
Current Assets	\$ 51,594
Current Liabilities	\$143,528
Net Current Assets	-\$ 91,934

As indicated 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.⁵ 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 corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets

⁴The petitioner is structured as a C corporation. On the tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). For C corporations, USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

⁵ According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁶

The director denied the petition on February 24, 2009. He noted the level of the petitioner's net income and net current assets in the 2006 and 2007 tax returns failed to establish that it had the ability to pay the instant beneficiary from the priority date onward.

On appeal, counsel offers appraisals of three of the principal shareholder's real properties in support of the petitioner's ability to pay the proffered wage of \$32,531.20 per year. Counsel cites *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that the petitioner should be able to rely upon the principal shareholder's individual family assets. Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, in which the petitioner is a corporation.

With regard to the individual assets belonging to the principal shareholder of a corporate petitioner or the assets of another corporation, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders or other corporations. Consequently, assets of its shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, only the corporate petitioner's assets and liabilities will be considered. It is also noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [United States Citizenship and Immigration Services (USCIS)] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is noted that USCIS does not generally consider real estate as probative of a petitioner's ability to pay the proffered wage because it would not be part of a current asset review that would only include items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Total assets would include such items

⁶ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

as depreciable assets that the petitioner uses in its business. It is noted herein that two of the properties appear to be properties upon which the petitioner operates. Another includes what appears to be a personal residence. As stated above, they would not be part of this consideration of the ability to pay the proffered wage as real estate is generally considered as a long term asset and would not be converted to cash during the ordinary course of business. It would not, therefore, become funds available to pay the proffered wage.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date of October 3, 2006. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel additionally contends that depreciation, cash-on-hand and added taxable income should be considered in determining the petitioner's ability to pay the proffered wage.

Counsel's assertions are not persuasive. 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, 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, 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 period, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this matter, the record contains no evidence that the petitioner has employed the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure or net current assets reflected on the petitioner's federal income tax return or audited financial statements without consideration of depreciation or other expenses as counsel asserts in this case. *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 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).

It is additionally noted that cash-on-hand is reflected on Line 1 of Schedule L of the corporate petitioner’s tax returns. It was stated as \$1,382 in 2006 and \$8,337 in 2007. Both figures are already included as part of the calculation of the petitioner’s current assets in each year, which are in turn balanced against current liabilities to arrive at the petitioner’s net current assets as explained above. The USCIS does not consider such assets in isolation, but will be part of the review of the petitioner’s net current assets as an alternative source of funds to cover the proffered wage.

In this case, in 2006, neither the petitioner's taxable income of -\$471 nor its -\$30,173 in net current assets could cover the proffered wage of \$32,531.20 or establish its financial ability to pay in this year.

Similarly, in 2007, neither the petitioner's net income of -\$22,499 nor its -\$91,934 in net current assets could cover the proffered wage or demonstrate its continuing financial ability to pay the proffered wage to the beneficiary from the priority date onward.

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, as noted above, unlike the *Sonogawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonogawa* are present in this matter. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage. It is noted that from 2004 through 2007, the petitioner's net current assets have yielded losses, with the largest loss in 2007. With the exception of 2005, each year from 2004 through 2007, the petitioner has reported net income losses. Additionally, the 2006 and 2007 tax returns reflect less total wages paid to all employees than the amount of the proffered wage. The petitioner paid total wages of \$18,525 to all workers in each year, which is \$14,006.20 less than the proffered wage, as well as low officer compensation, which was only \$1,600 in 2006 and \$-0- in 2007. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

Beneficiary's Qualifying Education

Beyond the decision of the director, and as noted above, the ETA Form 9089 requires that the beneficiary have a high school education. On part J of the ETA Form 9089, the beneficiary claims that he completed relevant education in 1988, but does not identify the name and location of the institution. The regulation at 8 C.F.R. § 204.5(l)(3) further provides in pertinent

part:

(ii) *Other documentation*—

(B) *Skilled Workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The record in this proceeding is devoid of any diploma or grade transcript. Therefore the petitioner has not established that the beneficiary possesses the relevant education required by the terms of the labor certification.⁷

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also See Soltane v. DOJ*, 381 F.3d 143 at 145.

For the reasons explained above, the petition may not be approved. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to

⁷ The AAO also notes that employment verification letter from “Harb & Jomaah Trade Company” appeared to be signed by the beneficiary’s father as a “partner.” In any further proceedings, the nature of the beneficiary’s relationship to this entity, if any, other than as a kitchen chef, should be addressed by the petitioner. Further, additional corroboration, such as payment records of compensation as would be kept by an official governmental source should be provided. Additionally, none of the Arabic documents in the record are accompanied by an *English translation that complies with the terms of 8 C.F.R. § 103.2(b)(3)*:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.

demonstrate that the petitioner has had the continuing ability to pay the proffered wage. Further, the petitioner has not established that the beneficiary possessed the requisite education as of the priority date as established by the ETA Form 9089.

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.