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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

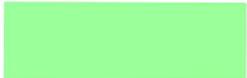


U.S. Citizenship
and Immigration
Services



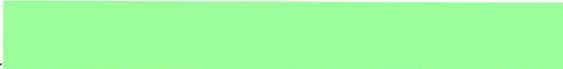
DATE: **MAY 31 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

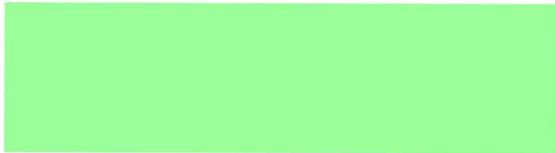
IN RE:

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 with the field office or service center that originally decided your case by filing a 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 general contractor. It seeks to employ the beneficiary permanently in the United States as a finish carpenter. 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 January 16, 2008 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 April 25, 2001. The proffered wage as stated on the ETA Form 9089 is \$18.30 per hour (\$38,064 per year). The ETA Form 9089 states that the position requires two years 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 copies of the petitioner's business checking account statements for December 2002, December 2004, December 2005 and December 2006; and the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for 2006.

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 1995 and currently to employ five 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 February 13, 2007, the beneficiary claimed to have worked for the petitioner from July 1, 1996 until October 10, 2006.

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 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 during each year from 1996 until 2006. The petitioner also provided copies of pay statements which it issued to the beneficiary in 2007. The beneficiary's IRS Form W-2 for 2001, 2002, 2003, 2004, 2005 and 2006 shows compensation received from the petitioner, as shown in the table below.

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).

- In 2001, the Form W-2 stated compensation of \$22,176.00.
- In 2002, the Form W-2 stated compensation of \$27,720.00.
- In 2003, the Form W-2 stated compensation of \$23,418.00.
- In 2004, the Form W-2 stated compensation of \$15,336.00.
- In 2005, the Form W-2 stated compensation of \$8,000.00.
- In 2006, the Form W-2 stated compensation of \$16,290.40.

Additionally, according to the pay statements which the petitioner issued to the beneficiary in 2007, the petitioner paid the beneficiary \$22,000 as of August 27, 2007.

Therefore, in the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. However, the petitioner has demonstrated that it paid the beneficiary a portion of the proffered wage in each year under consideration. Since the petitioner paid the beneficiary a portion of the proffered wage in each year, it must demonstrate the ability to pay the difference between the wages already paid and the full proffered wage, that difference being \$15,888 in 2001, \$10,344 in 2002, \$14,646 in 2003, \$22,728 in 2004, \$30,064 in 2005, \$21,773.60 in 2006 and \$16,064 in 2007.

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

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 September 19, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 should have been the most recent return available. In the response to the director’s August 22, 2007 request for evidence, however, the petitioner stated that its tax return was not yet due. The petitioner provided its 2006 federal income tax return on appeal. The petitioner’s tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005 and 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income² of \$285,922.00.³

² 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 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 18, 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 additional income, deductions and other adjustments shown on its Schedule K for 2001, 2002, 2003, 2004 and 2006, the petitioner’s net income is found on Schedule K of its tax returns.

³ The director erroneously derived the petitioner’s net income from Line 21 of the petitioner’s Form

- In 2002, the Form 1120S stated net income of \$28,332.00.
- In 2003, the Form 1120S stated net income of \$104,876.00.
- In 2004, the Form 1120S stated a net loss of \$3,178.00.
- For 2005, the petitioner did not provide Schedule K.⁴
- In 2006, the Form 1120S stated a net loss of \$69,250.00.

Therefore, for the years 2001, 2002 and 2003, the petitioner demonstrated sufficient net income to pay the beneficiary the difference between wages already paid and the full proffered wage. However, for the years 2004, 2005 and 2006, the petitioner did not demonstrate sufficient net income to pay the beneficiary the difference between wages already paid and the full proffered wage. As of the date upon which the instant appeal was filed, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner could not demonstrate that it had sufficient net income to be able 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.⁵ 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 2004 and 2006, as shown in the table below.

- In 2004, the Form 1120S, Schedule L stated net current liabilities of \$3,178.00.
- For 2005, the petitioner did not provide Schedule L.⁶

1120S for each year. Since the petitioner reported income, credits, deductions and other adjustments from sources other than a trade or business, net income should have been derived from Schedule K.

⁴ The petitioner reported income, credits, deductions or other adjustments from sources other than a trade or business for 2001, 2002, 2003, 2004 and 2006. Therefore, the petitioner's net income was reported on Schedule K for each of these years. For 2005, the petitioner did not provide its complete Schedule K. It only provided that portion of Schedule K which is contained on Page 2 of Form 1120S. That portion of the Schedule K shows income (loss) from sources other than trade or business (e.g. rental real estate income and interest income) and, therefore, the petitioner's income should have been derived from the Schedule K for 2005 also. However, since the petitioner has not provided that document, it has not demonstrated any income for 2005.

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

⁶ In his August 22, 2007 request for evidence, the director specifically requested that the petitioner

- In 2006, the Form 1120S, Schedule L stated net current liabilities of \$69,250.00.

Therefore, for the years 2004, 2005 and 2006, the petitioner did not demonstrate 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 petitioner has the ability to pay the beneficiary the proffered wage in each of the years under consideration if USCIS takes into consideration the balances in the petitioner's bank account. To support her assertions, counsel submits copies of the petitioner's business checking account statements for December 2002, December 2004, December 2005 and December 2006.

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

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

provide Schedule L for 2005 as this document was not included with the petitioner's tax return for that year. In its response, the petitioner failed to supply the requested Schedule L.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its Schedule L for its 2005 tax return. The Schedule L would have demonstrated the amount of net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

(Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *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, 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, the petitioner claims to have been in business for 11 years at the time the instant petition was filed. The petitioner submitted financial documentation for six of those years. From 2001 through 2006, the petitioner's gross sales fluctuated considerably, from a high of \$2.1 million in 2001 to a low of \$342,569 in 2003. As of 2006, the petitioner's gross sales were \$1.1 million or almost half of the gross sales for 2001. From 2001 through 2006, officer compensation decreased from \$100,385 to \$0 and payroll decreased correspondingly from \$106,404 to \$25,446. The petitioner has not, therefore, established the historical growth of its business or the overall number of employees. Further, the petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry. Moreover, the petitioner has provided evidence showing that beneficiary has been working for its company since 1996 and, therefore, has not claimed or demonstrated that he is replacing a former employee or an outsourced service. Thus, assessing the totality of the petitioner's circumstances 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.