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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington DC 20529-2090

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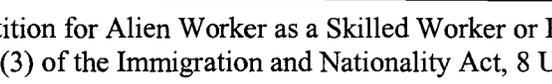


U.S. Citizenship
and Immigration
Services



Bb

DATE: MAY 11 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:

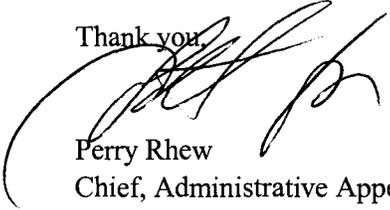


INSTRUCTIONS:

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 Director, Nebraska Service Center (director), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 it had the continuing ability to pay the beneficiary the proffered wage as of the priority date and denied the petition accordingly.

On appeal, counsel contends that the petitioner has demonstrated its continuing 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 if properly submitted upon appeal. 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 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 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted on September 5, 2006, which establishes the priority date.¹ The proffered wage as stated on the ETA Form 9089 is \$21.02 per hour, which amounts to \$43,721.60 per year. The petitioner does not claim to have employed the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on October 29, 2007, it is claimed that the petitioner was established in 1995, reports a gross annual income of \$786,551, a net annual income of -\$97,337 and currently employs eight workers.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In support of its continuing ability to pay the proffered wage of \$43,721.60 per year, the petitioner has submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation² for 2006, 2007 and 2008. They indicate that the petitioner's fiscal year is based on a calendar year. The tax returns contain the following information:

¹ 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.

² Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 (2003), line 17e (2004, 2005) and on line 18 (2006, 2007) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 18 of Schedule K in 2006, 2007 and 2008.

Year	2006	2007	2008
Net Income	-\$97,337	\$46,165	-\$5,552
Current Assets	\$5,072	\$70,592	-0-
Current Liabilities	\$1,115	\$ 1,891	-0-
Net Current Assets	\$3,957	\$68,701	-0-

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.³ 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 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.⁴

The petitioner has also provided copies of bank statements from [REDACTED] for October through December 2006 and January and February 2008; from [REDACTED] for February through December 2008; and from [REDACTED] for October through December 2006 and from April through August 2008. The petitioner's reliance on these statements is misplaced. 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. Bank statements do not reflect a petitioner's complete financial profile. Further, 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 corresponding tax return(s) that were provided, such as the petitioner's Schedule K income (income minus deductions) or the cash specified on Schedule L of the corresponding tax return that is already considered in determining the petitioner's net current assets.

³ 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.

⁴ 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 would not, therefore, become funds available to pay the proffered wage.

The director denied the petition on July 27, 2009. He noted that the petitioner had established its ability to pay the proffered wage in 2007 but that it had not established its ability to pay the proffered wage in 2006 or 2008.

On appeal, in support of the petitioner's ability to pay the proffered salary, counsel asserts that the *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) supports the petitioner's ability to pay the proffered wage. In that memo, the adjudicators were advised of three methods by which the ability to pay should be evaluated. With respect to the Yates Memorandum, it is noted that by its own terms, this document 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.⁵

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage from the priority date onward. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is September 5, 2006, as established by the labor certification. Demonstrating that the petitioner is paying or could pay (the petitioner here has not paid any wages) 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.

Counsel also refers to a petitioner's prospect of additional income if it hires the beneficiary. It is noted that *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), discussed the theory of a beneficiary's ability to generate income in the determination of the petitioner's ability to pay the proffered wage. However, although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, other than counsel's brief mention of anticipated hiring of the beneficiary no detail or documentation has been provided to explain how the beneficiary's employment as an administrative assistant will significantly increase profits for a construction firm.⁶ This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

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

⁶The quarterly tax returns submitted show that the petitioner only has one employee, listed as the sole shareholder. The beneficiary's proffered wage would represent more than twice the paid officer compensation for the years where tax returns were submitted. 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. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

A petitioner must establish the elements for the approval of the petition at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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, as discussed above, the record does not indicate that the petitioner has employed the beneficiary or paid the beneficiary any wages.

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, as advocated here by counsel on appeal, 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).

An additional factor is present in this case, as well. Current USCIS records indicate that the petitioner has sponsored and received approval for at least one other worker on a Form I-140. It was filed on November 14, 2006 and had a priority date of September 23, 2006. It was approved on October 16, 2007.⁷ There is no record that this beneficiary has obtained permanent resident status. Here, the petitioner’s ability to pay the instant beneficiary must be considered within the context of the petitioner’s sponsorship of this other beneficiary. The petitioner has submitted no information relevant to payment of wages, or employment status of the other sponsored beneficiary. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA Form 9089 job offer to the beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In this case, the petitioner’s ability to pay this beneficiary has not been established in any year as the tax returns reflect negative net income and insufficient net current assets in two out of the three relevant years and no information has been provided relevant to the other beneficiary to determine whether the petitioner can pay both sponsored workers in 2007.

Although in 2007, the petitioner had sufficient net income or net current assets to pay the instant beneficiary her proffered wage of \$43,721.60, the insufficiency of the evidence related to the petitioner’s continuing ability to pay both beneficiaries’ their combined respective proffered wages precludes a favorable finding with regard to its ability to pay the instant beneficiary, as of her September 5, 2006, priority date in any year.

⁷ This beneficiary’s case was

Moreover, in 2006, as shown above, neither the petitioner's -\$97,337 in net income nor its \$3,957 in net current assets could cover the proffered wage or establish its ability to pay in this year.

Similarly, in 2008, neither the petitioner's -\$5,532 in net income, nor its \$-0- in net current assets provided sufficient funds to pay the proffered wage or establish its ability to pay in this year. The petitioner has not established its continuing financial ability to pay the proffered wage of \$43,721.60 from the priority date onward. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In some cases, as counsel indicates 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. Comm. 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. 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, and the occurrence of any uncharacteristic business expenditures or losses.

In this case, it is noted that two out of the relevant three corporate tax returns failed to demonstrate an ability to pay the proffered wage out of net income or net current assets. The petitioner's gross receipts have declined more than half from 2006 to 2008. The petitioner's tax returns for 2006, 2007 and 2008 list no salaries in 2006, \$2,777 in salaries in 2007, and \$16,198 in 2008;⁸ all substantially less than the proposed salary for the beneficiary. Similarly, officer compensation has never exceeded \$20,000 in 2007. It is noted that counsel has asserted on appeal that the petitioner anticipates an increase in income upon the completion of a condominium project. Counsel's undocumented hypothesis does not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988);

⁸ Although the petitioner claimed eight employees on its Form I-140 filed in 2007, the record indicates that it employs mostly subcontractors (filing Form 1099s) and filed Wage and Tax Statements (W-2s) for one person in 2006 and 2007 and for two individuals in 2008.

Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has submitted no particularly analogous unique or unusual evidence comparable to that which prevailed in *Sonegawa*, from which to make a positive finding. Thus, assessing the overall circumstances, 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* financial ability to pay the proffered wage beginning on the priority date pursuant to 8 C.F.R. § 204.5(g)(2).

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.