

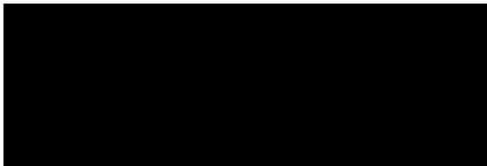
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



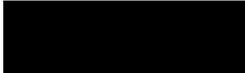
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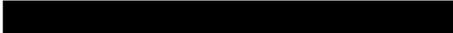
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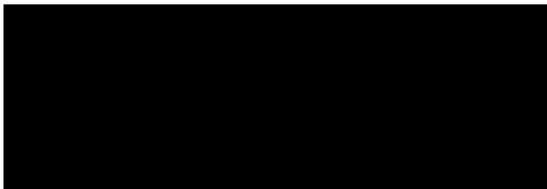
Date: **MAY 21 2012** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

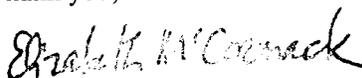


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The 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 indicates in the Form I-140 petition that its type of business is industrial machines.¹ It seeks to employ the beneficiary permanently in the United States as an Industrial Machine Mechanic, SOC/O*Net job code 49-9041.00. 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 denied the petition, finding 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 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 September 19, 2011 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.

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.²

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(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

¹ In its federal tax returns, the petitioner describes its business as a janitorial service company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

² 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).

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 Form ETA 750 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 Form ETA 750 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).

In the instant proceeding, the ETA Form 9089 was electronically filed for processing and accepted by the DOL on October 12, 2006. The proffered wage specified on the ETA Form 9089 is \$12.72 per hour or \$26,457.60 per year. No experience is required for the position offered.

To show that the petitioner has the continuing ability [REDACTED] hour or [REDACTED] per year from October 12, 2006, the petitioner submitted the following evidence:

- Copies of Forms 1120, U.S. Corporation Income Tax Return for an S Corporation, for the years 2006 through 2009;
- Copies of [REDACTED] tax returns (Forms 1040, U.S. Individual Income Tax Return) for the years 2008 through 2010;
- The beneficiary's Form W-2 for 2006;
- A sworn statement dated May 2, 2011 from [REDACTED] stating that the beneficiary has lived on her property located at [REDACTED] since 2001 without payment of rent or utilities and that the estimated monthly rentals and utilities are [REDACTED] per year;
- A list of checks issued to the order of the beneficiary in 2008, 2009, and 2010.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. [REDACTED] are the sole stockholders (owners) of the corporation. On the petition, the petitioner claimed to have been established in 2004 and to currently employ one individual.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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 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. Comm. 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.

Based on the 2006 Form W-2 submitted, the beneficiary was paid less than the proffered . Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay and the full proffered from until the beneficiary receives his lawful permanent residence. The petitioner can demonstrate this ability through either its net income or net current assets.

If the petitioner chooses to use its net income to demonstrate the ability to pay, USCIS will 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). 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 May 4, 2011 with the receipt by the director of the petitioner’s submissions in response to the director’s Request for Evidence (RFE). As of that date, the petitioner’s 2010 federal income tax return was not yet available. Therefore, the petitioner’s income tax return for 2009 is the most recent return available. The petitioner’s tax returns demonstrate its net income (loss) for the years 2006 through 2010, as shown below:

<i>Tax Year</i>	<i>Net Income (Loss)³ – in \$</i>	<i>Remainder of the Annual Proffered Wage – in \$</i>
2006		
2007		
2008		
2009		

³ For an S Corporation, 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 if the S corporation’s income is exclusively from a trade or business. 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 18 of Schedule K (2006-2010). See Instructions for Form 1120S, 2010, at <http://www.irs.gov/pub/irs-prior/i1120s--2010.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In the instant case, the net income in 2006 and 2009 is found on line 18 of schedule K; in 2007 and 2008, the net income is found on line 21 of the Form 1120S.

Therefore, the petitioner did not have sufficient net income to pay the remainder of the beneficiary's proffered wage in 2006 or the full proffered wage from 2007 to 2009.

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.⁴ 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 the years 2006 through 2009, as shown below:

<i>Tax Year</i>	<i>Net Current Assets – in \$</i>	<i>Remainder of the Annual Proffered Wage – in \$</i>
2006		
2007		
2008		
2009		

Therefore, the petitioner did not have sufficient net current assets to pay the remainder of the beneficiary's proffered wage in 2006 or the full proffered wage from 2007 to 2009. Based on the net income and net current asset analysis above, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

The petitioner claimed in the ETA Form 9089 that it had employed the beneficiary since 2001. On appeal, the petitioner submits a sworn statement stating that it has provided the beneficiary with free lodging and utilities since 2001. According to the petitioner, the lodging and the utilities provided to the beneficiary amount to [REDACTED]. Additionally, the petitioner submits a list of checks issued to the beneficiary from 2008 to 2010. The petitioner claims to have paid the following amounts:

- [REDACTED]
- [REDACTED]
- [REDACTED]

⁴ 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.

No evidence, such as the canceled checks, the receipt for rental and utilities, etc., has been submitted to demonstrate the reliability of the petitioner's assertions, however. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The AAO will not accept the petitioner's sworn statement and the list of checks as evidence of the petitioner's ability to pay.

Nevertheless, even were we to accept the petitioner's assertions that the petitioner has paid and provided the beneficiary with free lodging and utilities, and include the amount of the checks and the value of the lodging and the utilities as part of the beneficiary's wages, the petitioner would still be short of paying the beneficiary's proffered wage, as shown below:

<i>Year</i>	<i>Lodging and Utilities plus Payments to the Beneficiary – in \$</i>	<i>Remainder of the Annual Proffered Wage – in \$</i>
<i>2006</i>		
<i>2007</i>		
<i>2008</i>		
<i>2009</i>		
<i>2010</i>		

On appeal, counsel for the petitioner also contends that the petitioner should be allowed to add back the depreciation deduction to boost the company's net income or reduce the net loss. Counsel indicates that accumulated depreciation is a non-monetary loss.

The AAO declines to accept the petitioner's contention as persuasive, as the court in *River Street Donuts* has held that a depreciation expense is a real expense, and for that reason, it should not be added back to boost or reduce the company's net income or loss. As noted above, 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.

On appeal, counsel also submits the stockholders' individual tax returns as evidence of the petitioner's ability to pay.

USCIS (legacy INS), however, has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal

obligation to pay the wage.” For these reasons, the AAO will not consider the individual tax returns of the Stalnakers as evidence of the petitioner’s ability to pay.

Finally, 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. 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. As in *Sonogawa*, 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.

Unlike *Sonogawa*, the petitioner in this case has not provided any evidence reflecting the company’s reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner’s inability to pay the proffered wage particularly from 2006 to 2009.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence.

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.