

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



U.S. Citizenship
and Immigration
Services

B6



Date: OCT 10 2012 Office: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

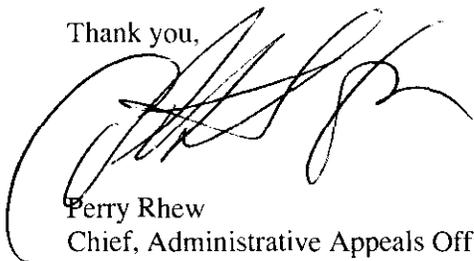


INSTRUCTIONS:

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

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

On appeal, counsel submits additional evidence and maintains that the petitioner has the ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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.

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.

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).

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 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).

Here, the ETA Form 9089 was accepted on February 26, 2009, which establishes the priority date.² The proffered wage as stated on the labor certification is \$21.07 per hour (\$43,825.60 per year). Part H of the ETA Form 9089 states that the position requires that the beneficiary possess an Associate's degree in Dental Technology and 24 months (2 years) of employment experience in the job offered. The employer specifies that an alternate combination of education and experience is acceptable and states that 24 months of training in lieu of an associate's degree plus 2 years of experience in the job offered is the alternative combination.

Part K of the ETA Form 9089, signed by the beneficiary on December 21, 2009, does not indicate that the petitioner has employed the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker (Form I-140), filed on March 30, 2010, it is claimed that the petitioner was established on January 1, 1986,³ reports a gross annual income and currently employs fifty 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 The date is given as 1968, but is subsequently stated on appeal by the majority shareholder to have been "1986."

In support of its continuing ability to pay the proffered wage of \$43,825.60 per year, the petitioner has submitted copies of its Form 1120S, U.S. Income Tax Return for an S Corporation⁴ for 2008 and 2009. They indicate that the petitioner's fiscal year is based on a standard calendar year. The tax returns contain the following information:

Year	2008	2009
Net Income	- \$783,488	-\$ 258,166
Current Assets	\$1,070,640	\$ 893,752
Current Liabilities	\$1,596,054	\$2,374,753
Net Current Assets	- \$ 525,414	-\$1,481,001

It is noted that as the priority day occurred in 2009, the 2009 is considered more relevant in determining the petitioner's ability to pay the proffered wage from the priority date onward.⁵ 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.⁶ 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.⁷

⁴ 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 on the 3008 and 2009 returns.

⁵ The petitioner's 2008 federal tax return will be considered in discussing the petitioner's overall financial circumstances.

⁶ 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.

⁷ 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

The petitioner [REDACTED] has additionally submitted 2008 and 2009 copies of federal income tax returns for a different corporation with a separate federal employer identification number (FEIN) [REDACTED] as well summary 2009 Wage and Tax Statements (W-2s) for both the petitioner and [REDACTED].⁸ The returns show that the majority shareholder of the petitioner, [REDACTED] is the sole shareholder of [REDACTED]. A letter dated November 26, 2007, from [REDACTED] indicates that he is [REDACTED] of both corporations.

The director denied the petition on November 2, 2010. He noted that the petitioner had not established its ability to pay the proffered wage in 2009 and rejected consideration of [REDACTED] tax returns as it is a separate entity.

On appeal, counsel adopts the position contained in a letter submitted on appeal from the majority shareholder of the petitioner, [REDACTED]. The tax returns indicate that [REDACTED] holds 51% of the petitioner and the remaining 49% is split between two other shareholders. The letter advocates that [REDACTED] financial strength should be considered in determining the petitioner's ability to pay the proffered wage because of the relationship between the two corporations. [REDACTED] states that this is illustrated by himself and another employee working at the petitioner while remaining on [REDACTED] payroll. As such, counsel contends that [REDACTED] is incentivized to maintain the petitioner's solvency and [REDACTED] reputation in the industry.

These assertions are not persuasive. It is noted that a person, association, firm, or a corporation that is defined as an "employer" and who is authorized to apply for a labor certification from DOL on behalf of a foreign worker, must possess a valid federal employment identification number (FEIN). 20 C.F.R. § 656.3(1). A FEIN is a unique tax identifier assigned by the IRS to tax return filers. The FEIN of the petitioner given on the ETA Form 9089, the Form I-140, (Immigrant Petition for Alien Worker), and on its tax returns is [REDACTED]. The FEIN of [REDACTED]. Given that the corporate petitioner, not [REDACTED] a separate corporation with a different FEIN, or [REDACTED] individually, petitioned on behalf of the beneficiary, USCIS will look only to the corporate petitioner's financial ability to pay the proffered wage, not to other entities. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court 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."

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.

⁸ The summary 2009 W-2s are apparently intended to illustrate the collective size of the respective corporations' payrolls, not actual forms filed with the Internal Revenue Service (IRS) as those forms are W-3s, Transmittal of Wages.

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 set forth 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, or as appropriate, its net current assets, 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the

AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As shown above, however, in 2009, neither the petitioner's -\$258,166 in net income nor its net current assets of -\$1,481,001 could cover the proffered wage of \$43,825.60. The petitioner has not demonstrated its continuing financial ability to pay the proffered wage. 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, in determining the petitioner's ability to pay the proffered wage, USCIS may consider the overall circumstances of the petitioner's business activities where expectations of increasing business and profits overcome evidence of small profits. 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. Thus, 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 reputation of the petitioner, and the occurrence of any uncharacteristic business expenditures or losses.

Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner, has presented two tax returns (2008 and 2009) showing losses in both net income and net current assets in each year. It cannot

be concluded that this represents a framework of success such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

The clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is February 26, 2009. Accordingly, based on the evidence contained in the record and the foregoing discussion, we cannot conclude that the petitioner has demonstrated its continuing financial ability to pay the proffered from the priority date onward as required by 8 C.F.R. § 204.5(g)(2). The two tax returns submitted for the actual petitioner demonstrate significantly negative net income and net current assets for both years represented. The record does not contain any evidence of pay to this beneficiary, or any prior tax returns to demonstrate historic growth, or that the two years where tax returns were submitted somehow show “uncharacteristically unprofitable” years. The petitioner has not demonstrated that *Sonegawa* should be favorably applied.

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.

Beyond the decision of the director, the petitioner has not established that the beneficiary possessed two years of experience in the job offered as required by the terms of the labor certification, whether coupled with an associate’s degree or as part of the employer’s stated alternative acceptable combination of education and experience.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(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.

In support of the beneficiary two years of employment experience in the job offered as dental ceramist, the petitioner submitted a “Certificate of Career, “ which lists employment of the

beneficiary by a Korean company identified as [REDACTED]. The certificate does not comply with the terms of 8 C.F.R. § 204.5(l)(3)(ii)(A) in that it does not identify the job held or the duties performed by the beneficiary. Further, the employment appears to be a combination of numerous periods of part-time and full-time employment, but fails to define those terms. Finally, the Certificate of Career is not accompanied by a certified English translation,⁹ which is not in accordance with 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.

The petitioner has not established that the beneficiary possessed the required employment experience as of the priority date. 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)).¹⁰

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, 145 (3d Cir. 2004)(AAO's *de novo* authority is well-recognized.)

⁹The translation appears to be offered by the beneficiary.

¹⁰ Additionally, it is noted that the record indicates that the petitioner and [REDACTED] shift employees between the two firms. It is important to note that the petitioner that filed the Form I-140 is deemed to be the actual employer of the foreign worker and that a *bona fide* offer of full-time permanent employment, including payment of the proffered wage remains the obligation of the petitioning firm. The regulation at 20 C.F.R. § 656.3 states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Employment means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

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.