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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: **SEP 28 2012**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a "Cook, Japanese." 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.

The record shows that the appeal is properly filed and 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 October 10, 2007 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 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 October 26, 2006. The proffered wage as stated on the ETA Form 9089 is \$14.14 per hour, which equals \$29,411 per year based on 40 hours per week.

The ETA Form 9089 states that the position requires 24 months of experience as a “Cook, Japanese” or 24 months of experience as a “Chef, Cook.”

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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2004 and to currently employ five workers. On the ETA Form 9089, signed by the beneficiary on December 11, 2006, the beneficiary did not claim to work for the petitioner.

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’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 has not established that it employed and paid the beneficiary in 2006. As is discussed below, counsel supplemented the record with the beneficiary’s Forms W-2 for 2007 and 2008, and these documents do not establish that the petitioner paid the beneficiary the full proffered wage.

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 (1<sup>st</sup> 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

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<sup>1</sup> 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).



Counsel states in his brief that the director erroneously compared the total amount of the sole proprietor's 2007 monthly expenses against his 2006 adjusted gross income and erroneously concluded that the proffered wage exceeds the sole proprietor's adjusted gross income. Although counsel implies that the monthly expenses submitted in response to the RFE reflect only 2007 expenses, and that the sole proprietor's 2006 monthly expenses were different, counsel did not provide a list of monthly expenses for 2006. 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)).

Copies of numerous bank statements were submitted on appeal. The bank statements are from the sole proprietor's personal checking, savings, and credit card accounts with [REDACTED] and from the business checking account of [REDACTED]. The statements from the sole proprietor's personal accounts cover most of 2006 and three weeks in 2007.<sup>2</sup> Only three of the statements from the sole proprietor's personal account are for periods after the October 26, 2006 priority date. The three statements are summarized below:

<u>Statement Period</u>	<u>Checking</u>	<u>Savings</u>	<u>Credit Card</u>	
			<u>Credit Line</u>	<u>Amount Owed</u>
Oct. 10 –Nov. 7, 2006	\$453.74	\$833.45	\$21,500	\$6,305.94
Nov. 8 –Dec. 7, 2006	\$3,577.43	\$1,834.96	\$21,500	\$5,833.02
Jan. 9 – Jan.31, 2007	\$6,193.61	\$135.92	Not stated	\$8,233.44

In each of the statements listed above, the amount of credit card debt is greater than the amount of saving and checking combined. This does not support a conclusion that the sole proprietor could pay the difference between his adjusted gross income for 2006 and his household expenses, as well as pay the proffered wage, without incurring additional debt.

The business checking account statements of [REDACTED] are from July 2007 and September 2007. Statements for only three months in a year do not provide sufficient information to determine whether the account averaged sufficient funds throughout the year to pay the proffered wage.

Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), stating that USCIS must consider other sources of income pledged to the petitioner. He states that the sole owner of the petitioner has pledged his personal assets to paying the proffered wage. The decision in *Full Gospel Portland Church* is not binding in this case. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the decision. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case.

<sup>2</sup> Counsel's brief and Table of Exhibits indicate that the sole proprietor's personal bank statements from December 2006 to October 2007 were submitted; however the actual statements in the record cover most of the period from January 10, 2006 through January 31, 2007.

The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners, along with other evidence, in determining a church's ability to pay the wages of a music director. Here, counsel's assertion is that USCIS should treat the pledge of the sole proprietor as sufficient evidence of his ability to pay. In *Full Gospel*, a group of individuals were viewed by the court as a credible source of funds. In this case, one individual, with no record of paying the proffered wage, is the only source of funds. When there are multiple pledgers, as in the case of a church congregation, even if one or two individuals fail to fulfill their pledges, others may still fulfill the obligation. That type of safety net does not exist when there is only one person pledging funds. Regardless of any type of pledge made by the sole proprietor, USCIS considers the personal assets of a sole proprietor when determining whether the sole proprietor has the ability to pay the proffered wage. The sole proprietor must demonstrate the existence of sufficient assets, however, and merely pledging to pay wages is not an acceptable substitute when sufficient assets are not demonstrated.

Counsel also provided several financial statements comparing the petitioner's gross receipts, gross profits, net income, owner's equity and total wages paid during the years 2004, 2005, 2006 and 2007. The financial statements appear to have been prepared by an accountant, but do not indicate that they are audited financial statements. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Further, the priority date is October 26, 2006. The information from the years 2004 and 2005 predates the priority date.

Counsel also submitted information regarding the sole proprietor's equity in his home. A home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel also asserts in his brief that hiring the beneficiary would increase the petitioner's net income. However, this assertion is not persuasive. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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Finally, counsel explains that the beneficiary began working for the petitioner when his employment authorization card was issued by USCIS in October of 2007. Two of the beneficiary's pay check stubs were submitted on appeal. The two pay stubs indicate the following:

<u>Pay Period</u>	<u>Total Earnings</u>
• October 1, 2007 - October 15, 2007	\$1,440.00
• October 16, 2007 - October 31, 2007	\$1,320.00

USCIS received an additional correspondence from counsel regarding the instant appeal containing the beneficiary's Forms W-2 issued by the petitioner for the years 2007 and 2008. The beneficiary's 2007 Form W-2 shows wages of \$6,360 and the beneficiary's 2008 Form W-2 shows wages of \$27,457.50. Although counsel states that "Please note that the Beneficiary was paid more than the prevailing wage" for these years, it is the proffered wage that is relevant to this determination, and the petitioner was paid less than the proffered wage in 2007 and 2008. The proffered wage of \$14.14 per hour equals \$29,411 annually, and the wages paid in 2007 and 2008 are both less than this amount.

Further, the record does not contain copies of the petitioner's 2007 and 2008 tax returns to demonstrate that the petitioner had sufficient funds to pay the difference between the proffered wage and the beneficiary's actual wages. The regulation at 8 C.F.R. § 204.5(g)(2) requires that evidence of a petitioner's ability to pay the proffered wage be in the form of annual reports, federal tax returns, or audited financial statements. Forms W-2 issued to the beneficiary are not sufficient, by themselves, to establish ability to pay.

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'l Comm'r 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. 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



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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 had only been in business for two years at the time of the priority date. There is no evidence in the record of uncharacteristic expenditures or losses, nor is there evidence in the record of the business' reputation. Although it appears that the beneficiary was earning close to the proffered wage when he began working for the petitioner in October 2007 and throughout 2008, the petitioner must demonstrate its continuing ability to pay beginning on the priority date. There is not sufficient evidence in the record to support such a conclusion. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.