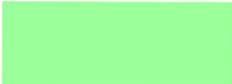


(b)(6)

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**



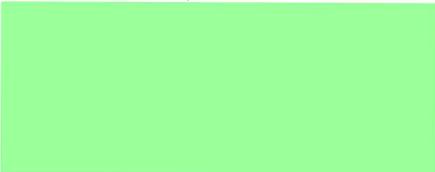
Date: Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: **FEB 01 2013**  
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 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a rental real estate company. It seeks to employ the beneficiary permanently in the United States as a carpenter pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL). The director determined that the petitioner did not demonstrate its ability to pay the proffered wage from the priority date onwards. The director denied the petition accordingly.

On August 8, 2011, the AAO dismissed the subsequent appeal, affirming the director's denial. The petitioner then filed a motion to reopen and reconsider the AAO decision. The record shows that the motions are properly filed and timely and include the petitioner's 2010 Internal Revenue Service Form 1065. The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, we will accept the motion to reopen and reconsider the matter based on the new information submitted. Thus, the instant motions are granted.

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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

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.

As noted in the AAO's prior decision, 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). Here, the ETA Form 9089 was accepted on December 29, 2005. The proffered wage as stated on the ETA Form 750 is \$19.95 per hour (\$41,496 per year).

In the AAO's August 8, 2011 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary (\$25,563.35 in 2006 and \$17,450.00 in 2007 as nonemployee compensation). We noted the petitioner's net income (the 2005 Form 1065 stated net income of -\$9,055<sup>1</sup> and the 2006 Form 1065 stated net income of -\$24,705). We also noted the petitioner's net current assets (in 2005, the Form 1065 stated net current assets of -\$31,659, and in 2006, the Form 1065 stated net current assets of -\$42,630).<sup>2</sup> The AAO decision stated that the petitioner did not establish the ability to pay in any year from the priority date onwards.

Despite the AAO decision stating that the 2007 Form 1065 had not been submitted, the petitioner did not submit this tax return with the motion. The petitioner also did not submit the 2008 or 2009 Form 1065. On motion, the petitioner submitted its 2010 Form 1065, which reflects net income of \$0 and net current assets of -\$169,411.

Counsel disputes the AAO's calculation of the petitioner's net current assets, stating that "the decision ... arbitrarily and capriciously ignores depreciation." Counsel argues that "Depreciation by definition [is] not considered a loss" and that depreciation amounts should be considered in determining the ability to pay the proffered wage.

As stated in the AAO's previous decision,

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

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<sup>1</sup> For an LLC, where an LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K (page 5 for 2008-2009). In this matter, the petitioner's Schedule K reflected the same amount as Line 22, so the petitioner's net income is taken from Line 22.

<sup>2</sup> On motion, counsel states that "the Immigration Service stated it examined only the net income reflected on the tax returns . . ." Both the Director and the AAO decisions included the petitioner's net current assets as a basis of considering whether the petitioner demonstrated its ability to pay the proffered wage.

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*, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The AAO specifically responded to the petitioner’s argument concerning the consideration of depreciation:

In response to the director’s RFE and on appeal, counsel argues that the depreciation deducted on the tax returns should be added back in because, “Depreciation is an annual income tax deduction that allows the recovery of the cost or other basis of certain property over the time the property is used . . . [and] is money available for use in the business.” As stated by the court in *River Street Donuts*, “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, . . . even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.” *River Street Donuts*, 558 F.3d at 116.

On motion, counsel reiterates the above argument, citing *Full Gospel Portland Church v. Thornburg*, 730 F.Supp. 441, 449 (D.D.C. 1988) and *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the proposition that “normal accounting practices,” “source of income pledge,” and “individual assets” should be considered in determining the petitioner’s ability to pay the proffered wage. Neither the facts or holdings in *Full Gospel* or *Ranchito Coletero* apply to the case at hand. The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church’s ability to pay the wages of its employee. The petitioner here did not allege any sort of unique sources of income to liken itself to the church in *Full*

*Gospel. Ranchito Coletero* involved a sole proprietorship, a company form that requires the consideration of the personal assets of its owner. The petitioner here is a limited liability company with multiple owners,<sup>3</sup> which is considered to be a partnership under federal tax laws. As a result, the assets of its owners may not be considered like those owners of a sole proprietorship such as the situation presented in *Ranchito Coletero*.

Counsel states that the petitioner's property ownership "was ignored by USCIS" and should be considered in determining the ability to pay the proffered wage as "the petitioner could easily have obtained an equity loan to pay the salary." From the AAO's prior decision:

Real estate holdings are not a readily liquefiable asset for use to pay the proffered wage. The assets available to pay the proffered wage are considered in the analysis of the petitioner's net current assets, above. The value of the petitioner's real estate holdings would not be considered in the analysis of its ability to pay the proffered wage.

In addition, on appeal, the petitioner submitted a letter from [REDACTED] the petitioner's owner's real estate attorney, stating that a property "was purchased by him through [the petitioner] for approximately \$7.5 million." The petitioner submitted the corresponding closing statement and other sale documents. The letter from [REDACTED] the petitioner's accountant, notes that a mortgage of \$4 million was taken out on the property "leav[ing] substantial equity in the property." The value of the petitioner's real estate holdings would not be considered in the analysis of its ability to pay the proffered wage.

Furthermore, the previous AAO decision stated:

The date of sale was February 5, 2008. An equity line would not be considered in determining the petitioner's ability to pay the proffered wage. Additionally, as the date of sale was February 5, 2008, even if we considered this equity line, which we would not accept, the sale was after the priority date and would not represent funds from the priority date onwards. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net

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<sup>3</sup> The 2005 Form 1065 stated that the petitioner had four members; the 2006 tax return states that the petitioner had three members. Counsel states in the motion that the petitioner currently has one member. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Even if the petitioner had one member, it has elected to be treated as a limited liability company and not a sole proprietorship. 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'r 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."

current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See Barron's Dictionary of Finance and Investment Terms, 45 (1998).

Since a line of credit is a "commitment to loan" and not an existent loan, the petitioner cannot establish that any unused funds from the line of credit are available at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, any petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

As stated in the previous AAO decision, real property assets are not assets readily available for daily expenses such as payroll and the availability of a line of credit must be established as well as a detailed business plan and audited cash flow statements statement detailing how such a loan would fit into the overall debt structure of the petitioner. With the current motions, the petitioner does not submit any new evidence to address these concerns.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, counsel asserts on motion that the petitioner's "gross income had been increasing each year since its incorporation" and that the "tax returns, together with other financial evidence submitted, reflect enough income to cover the proffered wage and also show a framework of profitability, which parallel the circumstances prevailing in *Sonegawa*." The tax returns in the record state gross income of \$0 in 2005, 2006, and 2010. In addition, the petitioner's net income and net current assets in 2005, 2006, and 2010 were all negative. Unlike the situation in *Sonegawa* where that petitioner's net income was routinely over \$100,000 except for discreet years for which the petitioner provided evidence of extenuating circumstances, the petitioner here reported no gross income in any year for which tax returns were submitted.

The petitioner here has not presented any evidence of extenuating circumstances to demonstrate how one year experienced different net income than that usually earned. Instead, the gross income was constant at \$0 and the net income was negative in 2005 and 2006 and \$0 in 2010. We also note that the petitioner has not submitted its 2007, 2008, or 2009 tax return. As stated in the AAO's previous decision, "neither [the 2005 or 2006 tax returns] indicate that the petitioner paid any salary or wage amounts. The record only contains two tax returns from which we are unable to extrapolate any historical growth. The petitioner did not submit any earlier or later tax returns to establish any patterns of increase." With the current motion, the addition of only the 2010 tax return does not lead to any different conclusion as the net income and net current assets are similar to the previously submitted returns and the petitioner did not submit the tax returns for the three years in between. In addition, the petitioner in *Sonegawa* submitted evidence concerning its reputation and standing within the community. The petitioner here presented no evidence of its reputation or standing in the community to demonstrate that the business is well established and likely to continue its business in the future. 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 from the priority date onwards.

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 motions to reopen and reconsider are granted and the decision of the AAO dated August 8, 2011 is affirmed. The petition remains denied.