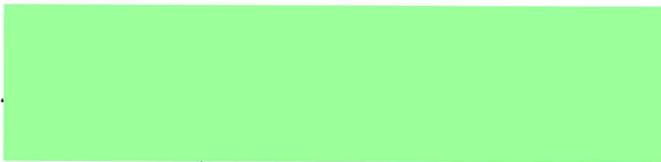


(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



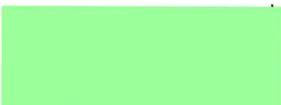
U.S. Citizenship
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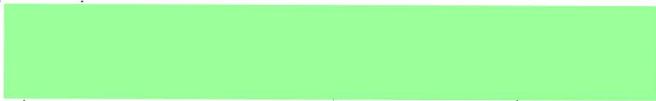
Office: TEXAS SERVICE CENTER FILE:



IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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 \$585. 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Administrative Appeals Office (AAO) rejected the appeal of the denial of the preference visa petition on July 16, 2010. The petitioner has filed a motion to reconsider the AAO's decision. The motion is granted, and the appeal is reconsidered. Upon reconsideration, the appeal will be dismissed.

The petitioner is a [REDACTED] franchisee. It intends to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by 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 and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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

As set forth in the director's April 30, 2008 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 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 ETA Form 9089 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 approved ETA Form 9089 accompanying the petition was originally filed not for the current beneficiary but for another beneficiary named [REDACTED]. Along with the Form I-140 petition, [REDACTED] the franchise owner, submitted a letter, requesting that Mr. [REDACTED] the named beneficiary on the approved ETA Form 9089, be replaced by [REDACTED] or the current beneficiary in this instant case. The reason for this substitution, according to [REDACTED] was because [REDACTED] no longer wanted to pursue the labor certification process with the petitioner.³ The AAO notes that the ETA Form 9089 was accepted for processing by the DOL on July 7, 2006. The proffered wage stated on that form is \$8.91 per hour or \$18,532.80 per year. The ETA Form 9089 also states that the position requires a minimum of 24 months of work experience in the job offered.

The record includes copies of the following evidence of ability to pay:

- The petitioner's Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2005 and 2006;
- The federal tax returns of [REDACTED], filed on IRS Forms 1120S for 2006;
- The petitioner's 2006 and 2007 bank statements labeled "corporate checking account" and "cash management account;"
- The petitioner's corporate checking account for the months of January, March, and April 2008;
- The beneficiary's IRS Forms W-2 for 2006 and 2007; and
- Various documents downloaded/printed from the New Hampshire and the Virginia Department of State, Corporation Division, showing [REDACTED] as the registered agent for eight different corporations.

² A search of the USCIS internal database system reveals that another petitioner identified as [REDACTED] has filed a Form I-140 petition on behalf of [REDACTED] and that petition has been approved as of July 28, 2008 (SRC 07 108 52026).

³ The record shows that the request to substitute the beneficiary on the approved ETA Form 9089 was made on July 16, 2007. The regulation at 20 C.F.R. § 656.11(a) specifically prohibits any request to change the identity of an alien beneficiary on any application for permanent labor certification submitted after July 16, 2007. Since the request for substitution of the beneficiary was made on July 16, 2007, the substitution will be allowed for the present petition.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation, with one shareholder: [REDACTED]. On the petition, the petitioner claimed to have been in business since 2001⁴ and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a tax year beginning January 1 and ending December 31. On the ETA Form 9089, signed by the current beneficiary on July 3, 2007, the beneficiary indicated that he had worked for the petitioner since November 2005.

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. In the instant case, the petitioner appears to have never hired either the initial or the substituted beneficiary.

In the instant case, although the petitioner has established that it employed the beneficiary in 2006 and 2007, it has not established that it paid the beneficiary the full proffered wage of \$8.91 per hour or \$18,532.80 per year during any relevant time frame including the period from the priority date in 2006 or subsequently. Instead the W-2 forms submitted show that the beneficiary received the following wages from the petitioner:

- \$2,356.66 in 2006 (\$16,176.14 less than the proffered wage).
- \$12,359.04 in 2007 (\$6,173.76 less than the proffered wage).

[REDACTED] the franchise owner, states on appeal that the beneficiary currently works exclusively for the petitioner, earning \$10.00 per hour. The record contains pay stubs issued to the beneficiary for wages of \$10.00 per hour from the period ending January 5, 2008 to the period ending May 17, 2008.

⁴ A search of New Hampshire Department of State's website reveals that the petitioning corporation or [REDACTED] was incorporated on February 20, 2001.

Concerning the paystubs submitted as evidence of the petitioner's ability to pay, the AAO observes that none of these paystubs bears a name, employer identification number, label or logo of the payor, casting doubt on their credibility. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Moreover, even if we accepted the paystubs submitted above as evidence of the petitioner's ability to pay, they amount to \$10,878.75 (year-to-date gross earnings as of May 17, 2008) and would not establish the ability to pay in 2008.

On appeal, counsel for the petitioner additionally contends that the Forms W-2 from [redacted] should be considered as evidence of the petitioner's ability to pay because the franchise owner, [redacted], owns a controlling interest in both corporations – [redacted] Inc. and [redacted] or the petitioner. Referring to Box H-14 of the Form ETA 9089, where the petitioner wrote, "The candidate (the beneficiary) may be assigned to other locations under [the] same ownership in [redacted] counsel states that the petitioner regularly hired job applicants such as the beneficiary and later assigned them to work at other franchise locations owned by [redacted]. For these reasons, counsel concludes that the petitioner should be allowed to include the beneficiary's Forms W-2 from [redacted]. Had the director included the Forms W-2 from [redacted], the beneficiary would have earned \$21,718.64 in 2006 and \$29,790.28 in 2007, well in excess of the beneficiary's proffered wage of \$18,532.80 per year in both 2006 and 2007, according to counsel.

Counsel's contention that the petitioner should be allowed to include the beneficiary's wages from [redacted] to establish the ability to pay in the present case is not persuasive. The AAO notes that [redacted] and [redacted], or the petitioner, in this case are two distinct legal entities.⁵ The AAO cannot allow the petitioner to pierce its corporate veil and to look into assets and income of other business ventures owned by [redacted]. Because a corporation such as the one in this case is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises 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 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

⁵ A search of the New Hampshire Department of State's website reveals that [redacted] Inc. was incorporated on January 16, 2001, while the petitioner, as previously stated, was incorporated on February 20, 2001. Based on the evidence submitted, the employer identification number (EIN) of [redacted] while the petitioner's EIN is [redacted]. According to [redacted] 2006 tax return, [redacted] owns 40% of [redacted] share, while the other 60% is owned by [redacted] wife and children: [redacted] (40%), [redacted] (5%), [redacted] (5%), [redacted] (5%), and [redacted] (5%). With 40% ownership, Mr. Motta does not own a majority or controlling interest in [redacted].

or entities who have no legal obligation to pay the wage.” Therefore, The AAO declines to accept the W-2s from [REDACTED] as evidence of the petitioner’s ability to pay.

When the petitioner fails to 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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff’d*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner’s gross receipts and wage expense is misplaced. Showing that the petitioner’s gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner’s choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

The record before the director closed on April 17, 2008 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 2007 federal income tax return should have been due, but the petitioner stated that it had not yet filed its 2007 tax return. Evidence was submitted showing that the petitioner had filed an extension request for its 2007 tax return with the IRS. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner’s tax returns demonstrate its net income⁶ for 2005 and 2006, as follows:

- In 2005, the Form 1120S stated net income (loss) of (\$49,513.00) (line 17e of Form 1120S); and
- In 2006, the Form 1120S stated net income (loss) of (\$144,885.00) (line 18 of Form 1120S).

Thus, the petitioner did not have sufficient net income to pay the proffered wage of \$8.91 per hour or \$18,532.80 per year beginning from the priority date in July 2006.

When the net income the petitioner demonstrates it had available during that period added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁷ A corporation’s year-

⁶ Where an S corporation’s income is exclusively from a trade or business, 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. 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 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2009, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (last accessed on June 23, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2005 and 2006, the petitioner’s net income is found on line 17e (2005) and 18 (2006) of Schedule K.

⁷ 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

end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. Based on the evidence submitted, the petitioner's net current assets (liabilities) are:

- (\$176,053.00) in 2005; and
- (\$23,659.00) in 2006.

Thus, the petitioner did not have sufficient net current assets to pay the proffered wage of \$8.91 per hour or \$18,532.80 per year.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income, or net current assets.

In response to the director's request for evidence (RFE), counsel for the petitioner submitted copies of the petitioner's bank statements for 2006 and 2007, asserting that the funds in the checking account and the cash management account were available to pay the beneficiary's proffered wage. Counsel further drew a chart listing the end balance of each month in 2006 and 2007 for both accounts: the corporate checking account had an average balance of \$5,000.00 in both years; the cash management account had an average balance of \$152,872.12 in 2006 and \$130,912.69 in 2007.

The director declined to accept the bank statements as evidence of the petitioner's ability to pay and stated:

Counsel's reliance on bank statements is misplaced. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. In addition, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L.

On appeal, [redacted] explains that he regularly maintains \$5,000.00 balance in his corporate checking account, which is available, if needed, to pay the beneficiary's wage. Further, counsel states on appeal that the petitioner also maintained a cash management account, with an average balance of \$152,872.12 in 2006 and \$130,912.69 in 2007, which should be more than sufficient to pay for the beneficiary's wage.

(such as taxes and salaries). *Id.* at 118.

The AAO is not persuaded by the assertions of counsel and [REDACTED]. In addition to what the director has stated earlier, bank statements are also not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. As stated above, the funds in the corporate checking account and cash management account should have already been included in the petitioner's tax returns. No evidence has been offered to explain why the funds reported on either the corporate checking account or cash management account reflect additional available funds.

On appeal, [REDACTED] claims that he employs about 206 workers at his [REDACTED] franchise locations in New Hampshire. He also states that he runs and manages eight [REDACTED] franchises in 17 different locations as either the president or managing member. Citing 8 C.F.R. § 204.5(g)(2), counsel states that [REDACTED] as the president of a company that employs over 100 workers may assert in a statement that his company has the ability to pay the proffered wage to the beneficiary.

As stated above, the AAO will not pierce the corporate veil. [REDACTED] other companies are not relevant to the determination of whether the petitioner in this case has the ability to pay the proffered wage. Accordingly, the number of individuals employed by entities other than the petitioner is not relevant. The Form I-140 petition states that the petitioner, at the time of filing, had 25 workers. Thus, the petitioner does not employ more than 100 workers, and [REDACTED] statement is not acceptable evidence of the petitioner's ability to pay the proffered wage.

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 Sonégawa*, 12 I&N Dec. 612 (Reg. Comm.1967). The petitioning entity in *Sonégawa* 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 *Sonégawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonégawa*, 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, no evidence, however, has been presented to show that the petitioning corporation has as sound and outstanding reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner in this case has not shown any evidence reflecting the company's reputation or historical growth since its inception in 2001. Nor does it include any evidence or detailed explanation of its milestone achievements. The sole owner, [REDACTED] does not appear to have received any compensation from his business in either 2005 or 2006. Additionally, the record is devoid of evidence regarding uncharacteristic business expenditure or loss that would explain why the corporation has been unable to pay the proffered wage as of the filing date and continuing through the present.

Looking at the totality of the evidence submitted and under the circumstances as described above, the AAO finds that the petitioner has not demonstrated by a preponderance of the evidence that it has the continuing ability to pay the proffered wage beginning on the priority date. 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.