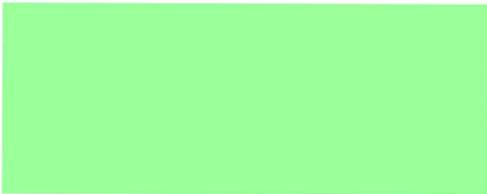




U.S. Citizenship
and Immigration
Services

(b)(6)



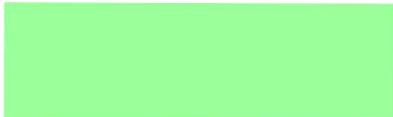
DATE: OFFICE: TEXAS SERVICE CENTER FILE: 

JAN 31 2013

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

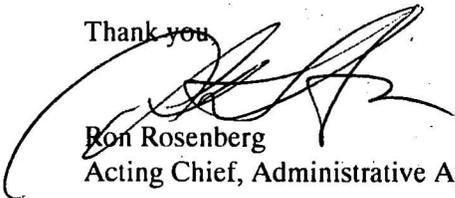


INSTRUCTIONS:

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 Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on October 3, 2011, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The motion will be approved. The appeal remains dismissed and the petition remains denied. The AAO's decision of October 3, 2011 will be affirmed.

The petitioner is a farm. It seeks to employ the beneficiary permanently¹ in the United States first line supervisor-agriculture crop worker. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established the continuing financial ability to pay the proffered wage and denied the petition accordingly.

The petitioner filed an appeal.² The AAO dismissed the appeal on October 3, 2011. Following an examination of the record, the AAO concluded that the petition could not be approved because the petitioner failed to establish its continuing ability to pay the proffered wage of \$33,425.60 per year from the May 23, 2006 priority date onward. The AAO also noted that the petition had not been eligible for approval because it was submitted with an invalid labor certification that had not been signed by the employer, alien or counsel and did not comply with the terms of 20 C.F.R. § 656.17.³

Through counsel, the petitioner submits a motion for reconsideration⁴ accompanied by some additional documentation. Even if properly considered as a motion to reconsider, counsel's filing does not overcome the basis of the AAO's dismissal of the appeal on October 3, 2011, for the reasons set forth below.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

¹ 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.

² The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

³ The AAO notes that the petitioner submitted a copy of a signed page 8 and 9 of an ETA Form 9089, but page 9 contains no certification, or signature of the certifying officer, and no reference to the ETA Form 9089 case number that was submitted with the petition.

⁴ The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision.

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 discussed in the AAO's previous decision, a corporate petitioner's continuing financial ability to pay the proffered wage includes a review of whether the petitioner has employed and paid compensation to the beneficiary, as well as an examination of the petitioner's net income and net current assets. The petitioner submitted a W-2 issued to the beneficiary in 2007. No other payment of compensation has been submitted despite the claim on the ETA Form 9089 that the petitioner has employed the beneficiary since 2000. Following a review of the record, the AAO concluded that the petitioner had not demonstrated a continuing financial ability to pay the proffered wage. The AAO noted that neither the petitioner's declared -\$83,342 in net income nor its declared -\$305,723 in net current assets as shown on its 2006 corporate federal income taxes in the year of the priority date was sufficient to cover the proffered wage during this period.

On motion, counsel asserts that the value of growing crops should be considered, but also states that it is not recorded anywhere. 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). Counsel also contends that line 9 of a balance sheet previously provided, represents \$111,795 in cash surrender value of a life insurance policy that should be considered. With the motion, counsel submits copies of 2006 financial statements of the corporate petitioner and of its president.

As was set forth in the AAO's previous decision, and pursuant to 8 C.F.R. 204.5(g)(2), if, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 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).

Here, the petitioner is a C corporation. USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. As set forth above, the petitioner reported -\$83,342 in fiscal year 2006.

USCIS will also review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁵ A corporation’s year-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 or (net income) can cover the proffered wage or any difference between the actual wages paid and the proffered wage, the petitioner is expected to be able to pay the full proffered wage using those net current assets. Here the petitioner’s current assets as declared on Schedule L of its 2006

⁵According 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.

tax return were \$1,354. Its current liabilities as shown on its 2006 return were \$307,077. The difference between these figures represents the petitioner's net current assets of -\$305,723. It is noted that while counsel refers to line 9 of a previously submitted balance sheet, the only numbered balance sheet contained in this record is the line 9 shown on the corporate petitioner's Schedule L of its federal income tax return. The figure for line 9 on its 2006 return, as set forth above, is not considered a current asset and is not included in the calculation of a petitioner's current assets. However, assets must be balanced against the petitioner's liabilities. Therefore, for the fiscal year 2006, the petitioner did not have sufficient net income or net current assets to pay the proffered wage.

Counsel has submitted copies of two financial statements dated February 22, 2006 set forth on a bank's form. As the petitioner is a corporation, not an individual, only the petitioner's financial statement would be relevant.⁶ It is signed by the petitioner's president. It is noted that 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. There is no indication that this statement has been audited or that it is anything other than the representations of the petitioner itself. Second, counsel emphasizes the petitioner's net worth figure, but as set forth above and as discussed in the AAO's previous decision, USCIS rejects the idea that a petitioner's total assets, such as those included in the petitioner's net worth on this statement, should be considered in the determination of the ability to pay the proffered wage. Total assets include such items as farm equipment and machinery, which are depreciable assets and would not be converted to cash during the ordinary course of business. Rather, a petitioner's net current assets are considered as an alternative method of demonstrating a petitioner's ability to pay the proffered wage. It is noted that even this statement shows that the petitioner's stated current liabilities of \$34,381 exceed its stated current assets of \$6,547 by \$28,334.

The AAO finds that the petitioner has not met its burden in establishing that it has had the continuing financial ability to pay the proffered wage. It is further noted that no new evidence or legal authority has been submitted that would reverse the AAO's previous decision.

The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The prior decision of the AAO on October 3, 2011, dismissing the appeal is affirmed. The petition remains denied.

⁶ 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."