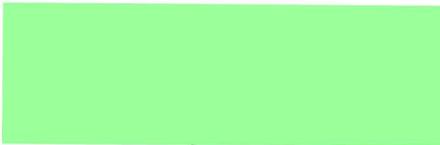
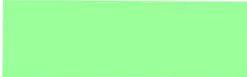


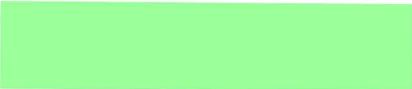
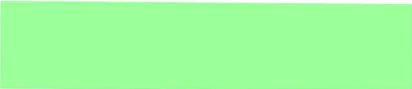


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 06 2013 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 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 employment-based preference visa petition was denied by the Director, Texas Service Center (the director). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development business. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 and other beneficiaries for whom it had filed preference visa petitions the respective proffered wages beginning on the priority date of the visa petition. The director 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 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 April 24, 2012 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wages of all beneficiaries for whom it had filed preference visa petitions as of the priority date and continuing until the beneficiaries obtain lawful permanent residence or the petitions were withdrawn or revoked.

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.

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 July 7, 2010. The proffered wage as stated on the ETA Form 9089 is \$31,43 per hour or \$65,374.40 per year. The ETA Form 9089 states that the position requires a bachelor's degree in computer science, engineering, science, or MIS or the foreign equivalent.

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

On appeal, counsel submits a brief; copies of the petitioner's 2009, 2010, and 2012 Form(s) 1120S, U.S. Income Tax Return for an S Corporation, and the petitioner's business checking statements from February 2012 through May 2012.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ 130 workers. On the ETA Form 9089, signed by the beneficiary on November 3, 2010, the beneficiary did not claim to have worked for the petitioner.

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'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 provided the beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, nor evidence that the petitioner has paid the beneficiary the

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).

proffered wage in from 2010 to 2012.² Therefore, for the years 2010, to 2012, the petitioner has not established that it employed and paid the beneficiary the full proffered wage.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, USCIS electronic records show that the petitioner filed several other I-140 petitions which have been pending or approved during the time period relevant to the instant petition. Where, as here, a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, on January 4, 2012, the director issued a request for evidence (RFE) noting that the record did not contain any evidence to establish the petitioner's ability to pay. Further, in the RFE, the director advised the petitioner that USCIS records indicate that the petitioner has filed multiple petitions for multiple beneficiaries and the petitioner must establish that it has the ability to pay all beneficiaries until they have obtained permanent residence.

In response to the RFE issued by the director, the petitioner submitted a new and expanded list of individuals with pending or approved Form I-140 petitions. As requested, the petitioner listed the priority date and proffered wage for 53 other beneficiaries. For 2011, the petitioner provided copies of the IRS Forms W-2 issued to 19 individuals. The petitioner did not include the beneficiary in the list; and, the petitioner did not provide the required information for all the approved or pending I-140 petitions. USCIS records reflect that the petitioner had pending or approved Form I-140 petitions and I-129 petitions on behalf of at least sixty (60) other beneficiaries not listed by the petitioner. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

On appeal, counsel contends that the director failed to estimate the total proffered wage amount on a prorate basis for all petitions filed on behalf of other beneficiaries by the petitioner; however, as discussed below, the petitioner failed to provide the director with the required information to enable such an analysis. In response to the RFE issued by the director, the petitioner submitted a list of individuals with approved or pending Form I-140 petitions. The petitioner listed most of the dates on which the petitions were filed, as well as the respective receipt numbers; however, the petitioner

² The beneficiary stated on the Form 9089 that he had been employed by the petitioner since February 1, 2007.

failed to provide the proffered wage for each individual, as well as copies of the Forms W-2 issued to each individual for all relevant years.³ The petitioner failed to provide dates and evidence to establish that all those petitions it claimed were withdrawn due to a beneficiary's termination of employment with the petitioner were withdrawn or revoked. The petitioner failed to provide dates and evidence to establish that all those beneficiaries it claims adjusted status, became lawful permanent residents. The petitioner, therefore, prevented the director from determining the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 or ETA 9089 labor certifications.

Moreover, for both 2010 and 2011, the total proffered wages cannot be determined from the information provided. It is noted that the petitioner indicated an hourly rate for some of the beneficiaries for whom petitions are pending or have been approved and who have not adjusted status to become lawful permanent residents. Based on the evidence provided, the difference between the proffered wage for the beneficiaries and the wages paid to them in 2011 is approximately \$3,931,374.⁴ The difference between the proffered wages and wages actually paid for 2010 cannot be determined from the record as the petitioner did not provide the requested information.⁵ Therefore, the total wages paid to the beneficiaries in 2010 by the petitioner cannot be determined.⁶ Similarly, the difference between the proffered wages and wages actually paid cannot be determined for 2010.⁷ The petitioner must establish its ability to pay the difference between the proffered wages and wages actually paid in 2010 and 2011.

³ On appeal, the petitioner only submitted 2011 Forms W-2 for 19 beneficiaries whose petitions were still pending and are currently employed by the petitioner. The petitioner failed to provide all Forms W-2 for all beneficiaries of pending and/or approved petitions who had not become lawful residents or had their petition withdrawn or revoked during 2010 through 2011.

⁴ This figure is the sum of the proffered wages listed by the petitioner for beneficiaries whose petitions it claimed were approved or pending in 2010 and 2011. It is noted that the petitioner seeks to prorate the proffered wage for the portion of the year that occurred after the priority date. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

⁵ For purposes of this calculation, where the wages actually paid to a beneficiary exceeded the proffered wage, the difference between the proffered wage and the wages actually paid to the beneficiary were considered to be zero. That is, the excess of the wages actually paid over the proffered wage was not considered in the final calculation. This is because wages already paid to others are not considered to be available to prove the ability to pay the wage proffered to other beneficiaries. These calculations include any deficit for the instant beneficiary.

⁶ This figure would be the sum of wages listed on the 2011 Forms W-2 for the listed beneficiaries, including the instant beneficiary.

⁷ See footnote 6, *supra*.

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 (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 March 29, 2012 with the receipt by the director of the petitioner’s submissions in response to the director’s RFE. As of that date, the petitioner’s 2012 federal income tax return was not yet due.⁸ Therefore, the petitioner’s income tax returns for 2011 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2010 and 2011, as:

- In 2010, the Form 1120S stated net income⁹ of \$155,320.00
- In 2011, the Form 1120S stated net income of \$242,359.00

Therefore, for the years 2010 and 2011, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiaries and the proffered wages of each. Additionally, as discussed above the petitioner failed to provide all of the relevant documentation which would enable the AAO to determine the petitioner’s ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹⁰ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. 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. The petitioner’s tax returns demonstrate its end-of-year net current assets for 2010 as \$2,520,105 and \$3,049,862 in 2011. For the years 2010 and 2011, the petitioner did not have sufficient net current assets to pay the difference between the wages paid

⁸ The petitioner submitted tax returns for its business for 2009 through 2011.

⁹ 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 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 16, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income deductions and other adjustments shown on its Schedule K for 2006 through 2009, the petitioner’s net income is found on Schedule K of its tax return and tax return transcripts.

¹⁰ 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.

and the proffered wages. Because the petitioner did not provide the requested information, the AAO is precluded from determining whether its 2010 and 2011 current assets are sufficient to cover the wages for all beneficiaries.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has failed to establish that it had the continuing ability to pay the beneficiaries the difference between the wages paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, its net income or net current assets.

The petitioner does not dispute that it has failed to establish that it had the continuing ability to pay the beneficiaries the difference between the wages paid and the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, its net income or net current assets. However, the petition, through counsel, contends on appeal that the totality of the circumstances establishes its 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 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.

On appeal, counsel contends that the petitioner's net income only approximates \$200,000 in recent years, however it has met its ability to pay due to annual wages paid in excess of \$14 million in 2009, \$9.6 million in 2010, and \$8.1 million in 2011. The petitioner submits its checking account statements in support. However, in the instant case, the petitioner failed to submit required evidence pertaining to multiple other petitions filed on behalf of multiple beneficiaries, precluding the AAO from making a full determination as to whether it has the ability to pay all of the proffered wages since the priority date. In addition, the gross receipts of the business reflect a recent downward trend

despite stable salary payments and there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the proprietor's reputation within its industry. 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.