



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 27 2013

OFFICE: TEXAS SERVICE CENTER

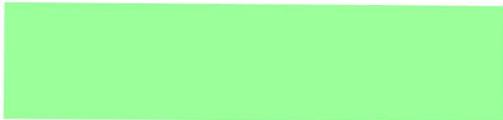
FILE: 

IN RE: Petitioner:
Beneficiary:



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

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a construction company. It seeks to employ the beneficiary permanently in the United States as a concrete mason. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor 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 had also failed to demonstrate that the beneficiary had the experience requirements of the position offered as set forth on the labor certification. 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 February 5, 2013 denial, the issues in this case are: (1) 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, and (2) whether the petitioner can establish that the beneficiary has the requisite experience for the position offered.

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 October 6, 2008. The proffered wage as stated on the ETA Form 9089 is \$22.02 per hour (\$45,801.60 per year). The ETA Form 9089 states that the position requires 24 months (two years) of experience in the offered position.

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

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 1992 and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on October 1, 2008, 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. The record contains the beneficiary's IRS Wage and Tax Statement (W-2) Forms for 2008 through 2011. The record also contains the beneficiary's personal tax returns for those same years. The beneficiary's tax identification number indicated on his tax returns (9XX-XX-X289) is different from the employee social security number, beginning "14X-," set forth on the W-2 Forms provided. Based on this discrepancy, the W-2 Forms in the record are insufficient in demonstrating that the petitioner paid the beneficiary the wages set forth therein. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile

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).

such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See id.* However, although the petitioner has not established that the wages indicated on the W-2 Forms were paid to the beneficiary, for purposes of this decision, the AAO will consider the purported wages in analyzing the petitioner's ability to pay the beneficiary the proffered wage. Accordingly, for the years 2008 through 2011, the W-2 Forms in the record indicate the petitioner paid the following wages, as shown in the table below.

<u>Tax Year</u>	<u>Wages Paid</u>	<u>Remainder To Be Paid (Proffered Wage (\$45,801.60) Minus Wages Paid)</u>
2008	\$33,082	\$12,719.60
2009	\$32,912	\$12,889.60
2010	\$31,212	\$14,589.60
2011	\$31,025	\$14,776.60

Therefore, in the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2008 or subsequently. Even if the petitioner can resolve the tax identification/social security number issue indicated above and establish that it paid the beneficiary the wages indicated above, it must still demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in each year from 2008 onward.

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, 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 record before the director closed on August 15, 2012 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2008 through 2011, as shown in the table below.

- In 2008, the Form 1120S stated net income² (loss) of (\$260,396).

² 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 June 24, 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, credits, deductions, other adjustments, shown on its Schedule K, the petitioner's net income is found on Schedule K of its tax returns.

- In 2009, the Form 1065 stated net income (loss) of (\$14,174).
- In 2010, the Form 1065 stated net income (loss) of (\$19,661).
- In 2011, the Form 1065 stated net income (loss) of (\$91,484).

Therefore, for the years 2008 through 2011, the petitioner did not have sufficient net income to pay the proffered wage or the difference between the claimed paid wages and the proffered wage.

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.³ 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 2008 through 2011, as shown in the table below.

- In 2008, the Form 1120S stated net current assets (liabilities) of (\$6,268).
- In 2009, the Form 1120S stated net current assets (liabilities) of (\$1,910).
- In 2010, the Form 1120S stated net current assets (liabilities) of (\$3,049).
- In 2011, the Form 1120S stated net current assets (liabilities) of (\$114).

Therefore, for the years 2008 through 2011, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between the claimed paid wages and the proffered wage.

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, or its net income or net current assets.

In addition, USCIS records indicate that the petitioner has filed multiple I-140 petitions since 2006. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). However, the evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

³According 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.

Counsel does not contest the director's finding that the petitioner has not established its ability to pay the beneficiary the proffered wage out of the petitioner's net income and net current assets. Rather, counsel asserts on appeal that the petitioner established its ability to pay under a "totality of the circumstances" analysis.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

As noted by counsel, 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.

In the instant case, counsel contends that the petitioner has demonstrated its ability to pay the beneficiary the proffered wage under *Sonogawa*. The petitioner has been in existence since 1992 and contends that it has shown a sustained ability to maintain a yearly payroll in excess of a quarter million dollars, which it asserts is a strong indicator of its ability to pay the beneficiary the relatively small difference between the proffered wage and the wages already paid to the beneficiary from 2008 through 2011. This assertion fails to take into account, however, that the petitioner has not demonstrated that it paid the beneficiary any wages, given the different tax identification and social security numbers indicated for the beneficiary on the latter's tax returns and on the W-2 Forms in the record. It also fails to take into account that the petitioner must also demonstrate its ability to pay the full proffered wage to all the beneficiaries it has sponsored from the priority date onward in each case. The record before the AAO does not address at all whether the other beneficiaries sponsored by the petitioner are already paid any wages, the full proffered wages, or whether the petitioner would still have to establish its ability to pay the proffered wage to all the sponsored beneficiaries, including the beneficiary here.

Counsel also submitted the petitioner's bank statements for its business checking account from January 2008 through December 2011 in order to demonstrate that it "has maintained consistent liquidity" during those years. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered above in determining the petitioner's net current assets

Moreover, in examining the totality of the circumstances in this case, the AAO observes that the record lacks evidence of the petitioner's reputation in the industry or in its service area. Additionally, the tax returns in the record show negative net income and net current assets for every year beginning in the priority date year of 2008. There is no explanation provided in the record for these negative figures, including any unexpected business losses, particularly in 2008 and 2011. Also, the tax returns in the record actually show that the petitioner's gross receipts have decreased from its high in 2008. The AAO also notes again that the record failed to demonstrate that the petitioner had the ability to pay the full proffered wage in any year since the 2008 priority date. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director also noted that the petitioner had failed to establish that the beneficiary satisfied the minimum experience requirements of the offered position as of the priority date as required. *See Matter of Wing's Tea House, supra*. Specifically, the director found that the letter from the beneficiary's prior employer did not satisfy the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), which provide that the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. The labor certification in this case requires a minimum of two years experience in the offered position of concrete mason. The letter from the prior employer, [REDACTED], in the record did not set forth in any detail a description of the beneficiary's qualifying experience. On appeal, an updated letter from the former employer, dated February 25, 2013, was submitted, which corroborates that the beneficiary was employed for the company as a concrete mason from July 1, 2003 to August 5, 2005 in a full-time capacity and sets forth a description of the job duties that was found lacking in the original letter. Upon careful review of the record, the AAO concludes that the petitioner has met its burden to demonstrate that the beneficiary had the requisite qualifying experience in the offered position by the priority date. However, the instant appeal must still be dismissed as the petitioner has not demonstrated its continuing ability to pay the beneficiary the proffered wage as of the priority date.

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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.