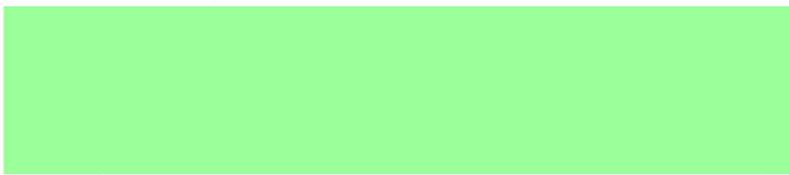


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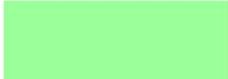
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

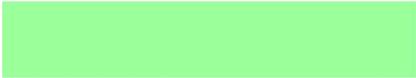


U.S. Citizenship
and Immigration
Services



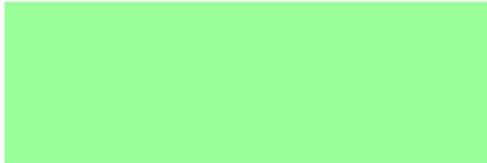
DATE: **MAR 18 2013** OFFICE: NEBRASKA SERVICE CENTER

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

The petitioner is a dry cleaning and tailor shop. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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. 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 6, 2009 and May 29, 2009 decisions, 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.

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).

Here, the ETA Form 9089 was accepted on April 26, 2006. The proffered wage as stated on the ETA Form 9089 is \$8.50 per hour (\$17,680 per year based on 40 hours per week).

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 a C corporation. On the petition, the petitioner claimed to have been established December 23, 2004 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the ETA Form 9089, signed by the beneficiary on July 20, 2007, 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 Sonegawa*, 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 demonstrated that it paid the beneficiary wages as shown in the table below:

- In 2007, the IRS Form W-2 shows wages paid of \$1,700.
- In 2008, the IRS Form W-2 shows wages paid of \$17,680.

The petitioner has established that it paid the beneficiary the proffered wage in 2008. The petitioner paid the beneficiary less than the proffered wage in 2007 and no wages in 2006. Thus, the petitioner must demonstrate that it can pay the full proffered wage in 2006 and the difference between wages actually paid to the beneficiary and the proffered wage in 2007, as represented in the following table:

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).

- In 2006, the proffered wage of \$17,680.
- In 2007, difference of \$15,980.

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 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).²

For 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. The record before the director closed on March 19, 2009 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 2008 federal income tax return was not yet due. However, on appeal the petitioner has provided a copy of its 2008 federal income tax return. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120 stated net income of \$12,631.
- In 2007, the Form 1120 stated net income of \$(699).

Therefore, for the years 2006 to 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage or the difference between the wages paid and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, 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.³ 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 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 2006 and 2007, as shown in the table below.

² The record contains a letter dated March 10, 2009 from [REDACTED] indicating that adding back depreciation and amortization expenses will result in positive cash flow for the petitioner in 2006 and 2007 and that, as a result, the petitioner has established its ability to pay the proffered wage. Amortization is the deduction of expenses of intangible assets over a period of time. Like depreciation, amortization is an actual cost of doing business. It does not represent an amount available to pay a wage. See *River Street Donuts*, 558 F.3d at 116. Therefore, the AAO rejects Mr. [REDACTED]’s assertion that the petitioner’s amortization and depreciation costs should be added back to income.

³ 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.

- In 2006, the Form 1120 stated net current assets of \$(22,210).
- In 2007, the Form 1120 stated net current assets of \$(27,416).

Therefore, for the years 2006 and 2007, the petitioner has not established that it had sufficient net current assets to pay the proffered wage or the difference between the wages paid 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.

The record contains a letter dated May 4, 2009 from the petitioner's accountant, [REDACTED] CPA, indicating that cash flow schedules were created to "reevaluate" the petitioner's financial position. [REDACTED] indicates that "net cash from operating activities" was sufficient to pay the proffered wage based on the cash flow schedules. However, [REDACTED] has not provided any authority or precedent decisions to support the use of "net cash from operating activities" in determining the petitioner's ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record contains copies of the petitioner's account statements from Citizens Bank from December 2005 to January 2008. However, reliance on the balance 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 in 2006 and 2007 somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L considered in determining the petitioner's net current assets.

On appeal, the petitioner submits a letter from More Bank dated July 7, 2009 indicating that the petitioner would have qualified for a credit line in 2007 in the amount of \$40,000. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the line of credit was available at the time of filing the petition. The petitioner did not actually have the line of credit in 2007 and, even if we accepted that the funds would have been available in 2007, the petitioner's ability to pay the proffered wage in 2006 would still need to be established. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

On appeal, counsel advised that the petitioner paid \$2,002.00 for alteration services in 2006 and had business arrangements with two other dry cleaners for its alteration needs in 2006. Counsel states that the amounts paid to those two cleaners was \$18,411.00. Therefore, counsel states that the petitioner paid \$20,413.00 to third-party alteration services, and that the petitioner would replace the third-party services with the beneficiary. The record contains a receipt showing payments made by the petitioner to [REDACTED] in 2006 in the amount of \$7,592.00. The record also contains a receipt showing payments made by the petitioner to [REDACTED] in 2006 in the amount of \$4,606.00.⁴ The petitioner's 2006 tax return shows that the petitioner paid \$2,002.00 for alteration services that year, but it is unclear if the \$2,002.00 includes monies paid to [REDACTED]. Therefore, the petitioner has established that it paid \$12,198.00 to [REDACTED] in 2006 for alteration services and that it would replace those services with the beneficiary's services. However, this amount is insufficient to establish the petitioner's ability to pay the proffered wage in 2006.

In 2007, the petitioner's president states in a letter dated July 22, 2009 that the beneficiary replaced two part-time employees, [REDACTED] as well as work performed by the owner and president's wife, [REDACTED]. They were paid \$3,375.00, \$5,400.00 and \$5,400.00, respectively, by the petitioner in 2007. The record contains the names of the workers, their 2007 IRS Forms W-2, and a letter from the petitioner stating that they were employed part-time as alteration tailors and that [REDACTED] no longer work for the petitioner.⁵ However, the payment to [REDACTED] is reflected on the petitioner's federal tax return as officer compensation. It is unclear what office she holds with the petitioner and whether a portion of the \$5,400.00 represented payment for services other than alteration tailor services. If she performed other kinds of work, then the beneficiary could not have replaced her. The petitioner's president

⁴ A third receipt in the amount of \$6,213.00 does not indicate who the payments were made to, or what they were made for, in 2006. Therefore, the receipt does not establish that the petitioner paid \$6,213.00 to another cleaner for alteration services in 2006.

⁵ [REDACTED] is still working for the petitioner.

also advised that the petitioner paid \$3,547.00 for alteration services provided by a third-party in 2007. While the petitioner's 2007 tax return shows that the petitioner paid \$3,547.00 for alteration services that year, the petitioner provided no receipts or invoices to establish who the payments were made to in 2007. The record does not contain the name of the service provider. Therefore, the petitioner has established that it paid \$8,775.00 in 2007 to [REDACTED] to perform alteration services and that it would replace those services with the beneficiary's services. However, this amount is insufficient to establish the petitioner's ability to pay difference between the wages paid and the proffered wage in 2007.

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.

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, the petitioner was incorporated on December 23, 2004 and has four employees. [REDACTED] CPA noted in a letter dated May 4, 2009 that the petitioner's salaries increased from 2006 to 2007. However, the petitioner had minimal gross income that declined in each relevant year and minimal wages paid to all employees in each relevant year. No evidence was provided to explain any temporary or uncharacteristic expenses⁶ or disruption in its business activities during

⁶ The petitioner's accountant, [REDACTED] CPA, notes in a letter on appeal that the petitioner decreased its long-term debt from 2006 to 2007. However, these debt payments do not appear to have been uncharacteristic for the business. Going on record without supporting documentary

2006 or 2007. No evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. No evidence was provided to establish the historical growth of the business since its incorporation in 2004. 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 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.