



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 29 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 Director, Texas Service Center (director), denied the immigrant petition on February 17, 2009, and rejected the subsequent appeal as untimely filed on April 7, 2009. The Administrative Appeals Office (AAO) reopened this matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of correcting the error of the director and entering a new decision. The petitioner was permitted a period of 30 days in which to submit a brief and any additional evidence. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook. 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.

As set forth in the director's denial, the Form I-140 petition in this case was not filed with the required supporting documentation. The Form I-140 was filed electronically on April 24, 2008; no supporting or supplemental documentation was ever received by the director. As stated by the director, the regulation at 8 C.F.R. § 103.2(a)(1) provides that the instructions for filing applications and petitions are "incorporated into the particular section of the regulations in this chapter requiring its submission." The instructions for electronic filing a Form I-140 and the general electronic filing instructions regarding the submission of supporting documentation are available at www.uscis.gov. The instructions for electronic filing provide that if the petitioner does not submit the required initial evidence in the requisite time period,¹ the petitioner "will not establish a basis for eligibility and we may deny your petition or application." The petitioner did not submit the required initial evidence within seven business days from the date of electronic filing. Thus, the petitioner did not establish a basis for eligibility. As such, the director denied the Form I-140 petition on February 17, 2009.

On March 23, 2009, the petitioner's counsel filed an appeal stating that a brief and additional documentation would follow in 30 days. On April 7, 2009, the director erroneously rejected the appeal as untimely filed. Counsel states that he mailed the above mentioned additional documentation the director on April 17, 2009, including the ETA Form 9089 and copies of the petitioner's 2006 and 2007 tax returns. The record does not contain confirmation of when the director received these documents. However, the record does indicate that the United States Citizenship and Immigration Service (USCIS) Los Angeles District Office received this mailing on May 12, 2009. It appears that the documents were forwarded to the USCIS Los Angeles District Office because that is where the beneficiary's file was located at the time. Counsel sent follow-up correspondence to the director on February 22, 2011; in response to which the AAO reopened the matter on its own motion in order to adjudicate the March 23, 2009 appeal. Upon reopening the matter, the AAO afforded the petitioner 30 days in which to submit additional supporting documentation to establish eligibility for the benefit sought. The petitioner was notified that the record did not establish that the petitioner had the ability to pay or that the beneficiary possesses the

¹ Seven business days.

required experience to perform the proffered position. The petitioner's February 13, 2013 response has been incorporated into the record.

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.²

Ability to pay the proffered wage

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 Form ETA 9089 was filed on October 22, 2007. The proffered wage listed on the ETA 9089 is \$15.50 per hour (\$32,240). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

² 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).

On the petition, the petitioner claimed to have been established in 1987 and to currently employ five workers. On the ETA Form 9089, signed by the beneficiary on November 6, 2007, the beneficiary claimed to have begun working for the petitioner on February 5, 2007.

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 established that it employed or paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2007 onwards.³

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.

³ The AAO notes that on the ETA 9089, the beneficiary indicated that he worked for the petitioner from February 5, 2007 to October 22, 2007. However, no proof of employment with the petitioner has been submitted.

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 evidence in the record of proceeding shows that the petitioner was structured as a C corporation at the time of filing the labor certification. The petitioner filed its 2007, 2008 and 2009 taxes as a C corporation. It then filed its 2010 and 2011 taxes as an S corporation.⁴ The table below describes the tax year, reporting dates and corresponding corporate structure:

<u>Tax year</u>	<u>Dates covered</u>	<u>Corporate structure</u>
2007	October 1, 2007 to September 30, 2008	C corporation
2008	October 1, 2008 to September 30, 2009	C corporation
2009	October 1, 2009 to December 31, 2009	C corporation

⁴ The AAO notes that although the petitioner changed its corporate structure in 2010, the petitioner's federal employer identification number (FEIN) remained the same. As such, the AAO will consider the subsequent federal returns.

2010	January 1, 2010 to December 31, 2010	S corporation
2011	January 1, 2011 to December 31, 2011	S corporation

It is evident that due to the change in corporate structure, the company shifted its tax reporting year from the fiscal year to the calendar year. As such, the 2009 return only covers a period of three months of business activity. In order to analyze the petitioner's ability to pay based on its 2009 tax returns, we will prorate the proffered wage and determine if the petitioner had sufficient income or net current assets to cover three months of wages.

<u>Year</u>	<u>Form 1120 stated net income</u>	<u>Proffered Wage</u>
2007	\$291	\$31,824
2008	\$(4,449)	\$31,824
2009	\$13,439	\$7,956 ⁵
2010	\$41,250 ⁶	\$31,824
2011	\$(7,131)	\$31,824

Therefore, for the years 2007, 2008 and 2011 the petitioner did not have sufficient net income to pay 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.⁷ 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 2007, 2008 and 2011, as shown in the table below.

<u>Year</u>	<u>Net current assets</u>
2007	\$(8,142)
2008	\$(973)
2011	\$(90,632)

⁵ In order to calculate the wage burden for the last quarter of 2009 covered by the 2009 tax returns, the annual proffered wage of \$31,824 is multiplied by .25. As a result, the proffered wage for the fourth quarter of 2009 is \$7,956.

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the years 2007, 2008 and 2011, the petitioner did not have sufficient net current assets to pay 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.

On appeal, the petitioner submits its director's personal tax returns, stating that "any expenses of the restaurant under our [REDACTED] will be met and satisfied by the owners." 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." Therefore, the petitioner'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 has been in business for over 20 years; however, the petitioner's director, [REDACTED], writes that the company has "only recently been in operation under our corporation. This means that, and as the tax records reveal, substantial capital has been provided by the stockholders to support and update the business." The business itself has a negative net income in two out of the five years in question. The business does appear to pay officer compensation, but the amount is negligible and there is no indication in the record that the officers are willing or able to forgo compensation in order to pay the beneficiary the proffered wage. Additionally, there are no other factors present in the record such as reputation, uncharacteristic expenditures or losses, or replacement of employees, which would indicate that the financial condition of the petitioner should be given less weight. 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 beginning on the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beneficiary Qualifications

The petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience as a head cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a head cook with [REDACTED] in Japan from July 3, 1989 to April 30, 1996.

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. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). Upon reopening the instant matter, the AAO notified the petitioner that the record did not contain any work experience letters for the beneficiary and therefore the record did not demonstrate that the beneficiary had the required qualifications. In response, the petitioner submitted a work experience letter and translation dated February 2, 2013 from [REDACTED], President of [REDACTED], stating that the company employed the beneficiary as a head cook from July 1996 to April 1989. The dates in the letter are inconsistent with the dates of employment stated on the

ETA Form 9089. The record does not contain any other evidence of the beneficiary's prior experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director, the certified ETA Form 9089 was not signed by the attorney who prepared the form, as required by 20 C.F.R. § 656.17(a)(1). USCIS will not approve a petition unless it is supported by an original certified ETA Form 9089 that has been signed by the employer, beneficiary, attorney and/or agent. *Id.*

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.