

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

(b)(6)

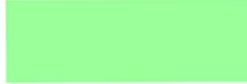


Date:

MAY 02 2013

Office: TEXAS SERVICE CENTER

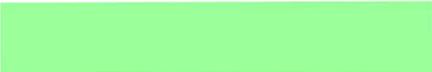
FILE:



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,

Rachel DiToro
FER

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. An untimely appeal to this decision was filed, and the director treated the appeal as a motion without first forwarding it to the Administrative Appeals Office (AAO). On February 6, 2008, the director denied the motion and affirmed his previous decision. The petitioner subsequently filed a second appeal, which the director forwarded to the AAO. On May 14, 2010, the AAO withdrew the director's decision on the untimely appeal, which was treated as a motion, and rejected the appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(1). On June 11, 2010, the petitioner moved to reopen the matter, and the AAO subsequently granted the motion to reopen. On September 27, 2010, the AAO withdrew its previous decision, rejected the untimely appeal, and remanded the matter to the director as a motion to reopen for further consideration of the new evidence submitted on appeal. The director denied the motion, and the matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a company that designs leather products and manufactures buttons. It seeks to employ the beneficiary permanently in the United States as a "Designer-Leather Accessories." As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor. 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 petition. The director denied the petition accordingly.

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 initial denial of the petition, the issue in this case is whether or not the petitioner has the continuing ability to pay the proffered wage to the beneficiary from the priority date of June 4, 2002 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.

(b)(6)

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In the instant case, the DOL accepted the petitioner's ETA Form 9089 on June 4, 2002. The proffered wage as stated on the ETA Form 9089 is \$14.21 per hour or \$29,556.80 per year. The ETA Form 9089 states that the position requires two years of experience in the job offered of "Designer-Leather Accessories." On the ETA Form 9089, the beneficiary made no claim to have worked for the petitioner.

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 in February of 1963 and to currently employ 10 workers. According to the tax returns in the record, the petitioner's fiscal year runs with the calendar year.

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 and on motion.²

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 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. Comm. 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. Comm. 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. As noted above, the beneficiary made no claim to have been employed by the petitioner.

² The submission of additional evidence on appeal or on motion is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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 or on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 petitioner’s Form 1120 tax return lists its net income as shown in the table below.

- In 2002, the Form 1120 stated net income² of \$1,813.00
- In 2003, the Form 1120 stated net income <\$2,136.00>.³
- In 2004, the Form 1120 stated net income of \$14,337.00.
- In 2005, the Form 1120 stated net income of \$62,134.00.
- In 2006, the Form 1120 stated net income of \$19,513.00.
- In 2007, the Form 1120 stated net income of \$3,061.00.
- In 2008, the Form 1120 stated net income of \$1,529.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2002, 2003, 2004, 2006, 2007, and 2008.

As an alternate means of determining the ability of the petitioner to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a corporate entity’s current assets and current liabilities.⁴ 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 corporation is expected to be able to pay the proffered wage using those net current assets. The tax returns of the petitioner demonstrate its end-of-year net current assets as shown in the table below.

- In 2002, the Schedule L of the Form 1120 stated net current assets of \$47,067.00.
- In 2003, the Schedule L of the Form 1120 stated net current assets of <\$63,413.00>.
- In 2004, the Schedule L of the Form 1120 stated net current assets of <\$47,684.00>.
- In 2006, the Schedule L of the Form 1120 stated net current assets of \$348,400.00.
- In 2007, the Schedule L of the Form 1120 stated net current assets of \$314,519.00.
- In 2008, the Schedule L of the Form 1120 stated net current assets of \$227,579.00

The petitioner did not have sufficient net current assets to pay the proffered wage in 2003 and 2004.

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.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁴ 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.

(b)(6)

On appeal from the director's initial denial, counsel asserted that the petitioner did have the ability to pay the proffered wage to the beneficiary if funds contained in the petitioner's [REDACTED] mutual fund account were considered amongst the petitioner's net current assets in both 2003 and 2004. Counsel submitted a letter from the petitioner's accountant and two account statements dated December 31, 2003 and December 31, 2004, respectively, in support of the appeal.

In a letter dated July 26, 2007, the petitioner's accountant, [REDACTED] stated the following in pertinent part:

The amounts shown on Schedule L line 9 "other investments," \$100,944.00 in 2003 and \$105,381.00 in 2004 consist of readily marketable mutual funds which could and probably should have been reflected as "other current assets" on line 6 of Schedule L. These investments were made at my recommendation that free funds should be invested in a way that would provide both growth and income. Care was taken to invest in securities that would always be readily convertible into cash. This treatment would result in positive net current asset balances of \$42,934.00 in 2003 and \$57,697.00 in 2004. These amounts would have been more than sufficient to cover the proposed salary.

The [REDACTED] account statement dated December 31, 2003, listed a balance of \$100,944.46 based upon total cost basis valuation and the [REDACTED] account statement dated December 31, 2004, listed a balance of \$105,381.11 based upon total cost basis valuation.

The petitioner subsequently submitted a photocopy of an "amended" Schedule L for 2003 which now lists \$106,922.00 as "Other current assets" at line 6, and a photocopy of an "amended" Schedule L for 2004 which now lists \$110,929.00 as "Other current assets" at line 6. These photocopies appear to be copies of the petitioner's original Schedule L for 2003 and 2004 with the previous entries whited out at line 6 and line 9 and a new entry written at line 6 of each of the respective Schedule L.

The record contains an undated letter signed by [REDACTED] Senior Tax Manager for [REDACTED] Certified Public Accountants and Consultants, in [REDACTED] New York, as well as letter dated November 17, 2010 signed by [REDACTED] Certified Public Accountant in [REDACTED] New York.

In her letter, Ms. [REDACTED] stated in pertinent part:

In response to your question as to filing amended returns for [REDACTED] as prepared by your accountant, [REDACTED] CPA, I would agree with his opinion as there was no need to file an amended return for the tax years 2003 and 2004.

Based on the information provided by you and your accountant, the only change to the return was to correct the proper presentation of current assets. The reclassification of readily marketable securities from "Other Investments" to "Other Current Assets" on the balance sheet would be correct.

However, the filing of an amended return is not necessary as it is only a reclassification of an asset within the balance sheet and does not affect the tax return income or tax liability of the company. It is not uncommon to correct a balance sheet for presentation purposes so that it is correct going forward. When there is no change to the total assets or total liabilities, there would be no reason to file an amended return.

In her letter, Ms. [REDACTED] stated in pertinent part:

I have reviewed the information provided by [REDACTED] regarding the incorrect classification of marketable mutual funds as "Other Investments" on the Company's 2003 and 2004 tax return (Schedule L). As these investments are short term assets, the balance should have been shown as "Other Current Assets." Based on my discussion with [REDACTED] from the Company and in reviewing the information, in my opinion, filing an amended return for 2003 and 2004 to move the balance to the "Other Current Assets" line on Schedule L of the tax return is unnecessary.

I have also discussed the facts with an IRS representative, who confirmed that the filing of the amendment is not necessary. Based on my discussion with the representative, since this specific change does not change the tax liability of the Company's return nor does it result in a refund, this change does not require the filing of an amended return.

In addition, beginning in 2005 and onward, the Company correctly shows the balance of these marketable mutual funds as "Other Current Assets."

The assertion that funds invested in the petitioner's [REDACTED] mutual fund account were readily available for conversion to pay the proffered wage to the beneficiary in 2003 and 2004 is not persuasive. As noted above, the petitioner's accountant, [REDACTED] specifically stated that "...[t]hese investments were made at my recommendation that free funds should be invested in a way that would provide both growth and income." An investment account devoted to providing funds to the petitioner's growth and income cannot be considered to be a liquid source of funds readily available to pay the proffered wage and, therefore, it is improbable that the petitioner would have liquidated this asset to pay the proffered wage. Further, the petitioner has failed to disclose whether the funds in these accounts would have been subject to penalties and taxes if such funds had been withdrawn from this investment account. It is noted that the petitioner did not submit either annual

reports or audited financial statements which would have given a complete and accurate picture of the petitioner's financial abilities and the relevance of the claimed assets.

As the J.P. MorganChase mutual fund account was an investment devoted to the petitioner's growth and income, the listing of these funds at line 9 "Other investments" of the petitioner's Schedule L for 2003 and 2004 cannot be considered to be incorrect. Neither Ms. [REDACTED] nor Ms. [REDACTED] provide any explanation or rationale as to why the original listing at line 9 of the Schedule L is incorrect, and merely conclude that the funds in the account are correctly listed at line 6 of the Schedule L as short term assets readily available for conversion. The petitioner's accountant contemporaneously prepared the original Schedule L for 2003 and 2004, fully aware of the petitioner's intent to commit the funds as an investment in the [REDACTED] mutual fund account, rather than treating the account as a source of cash from which wages could be paid. The original Schedule L for 2003 and 2004 listing the petitioner's [REDACTED] mutual fund account at line 9 "Other Investments" were the documents included with the filing of the petitioner's Form 1120 tax return for 2003 and 2004 with the IRS. In addition, Ms. [REDACTED]'s contention that beginning in 2005, the petitioner showed the balance of these marketable mutual funds at line 6 of the Schedule L as "Other current assets" is erroneous. The petitioner listed minimal amounts at line 6 of the Schedule L for 2005 with \$5,148.00 for the beginning of year and \$4,320.00 for the end of year, but continued to make entries at line 9 of the Schedule L with \$105,381.00 being listed for the beginning of year and \$126,598.00 for the end of year. These entries reflect that the petitioner continued to maintain the investment in the [REDACTED] mutual fund account through the end of 2005 as well, rather than treating the account as a short term readily convertible current asset.

Finally, the record is devoid of a credible explanation addressing why, exactly, these funds are being recharacterized, and why this evidence was not previously available to the Texas Service Center during its initial adjudication of the petition. It appears that the recharacterization of the funds in the [REDACTED] mutual fund account is an attempt to change the classification of these funds on the petitioner's original Schedule L for 2003 and 2004 after such documents had been filed with the IRS and submitted as evidence to USCIS merely to overcome the basis of ineligibility relied upon by the director to deny the petition. It is emphasized that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements, after the fact. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). 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 petitioner has failed to demonstrate the ability to pay the proffered wage of \$29,556.80 through an examination of both its net income and net current assets in 2003 and 2004. Consequently, the petitioner has not established the continuing ability to pay the proffered wage since the priority date of June 4, 2002.

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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 failed to demonstrate its ability to pay the proffered wage based on its net income or net current assets in 2003 or 2004. No evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonogawa*. Nor has the petitioner included any evidence or detailed explanation of its milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's officers are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage.

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.

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.