



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 06 2013**

Office: TEXAS SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

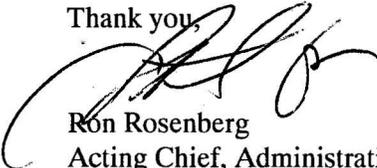
ON BEHALF OF PETITIONER:

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

(b)(6)

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 is a dental office. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(1)(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1) as a dental assistant. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner failed to demonstrate a continuing ability to pay the proffered wage beginning on the priority date.

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 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.

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 750, was accepted for processing by any office within the employment system of 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 Form ETA 9089, as certified by

¹ The submission of additional evidence on appeal 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. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on May 11, 2009, which establishes the priority date. The proffered wage as stated on the ETA Form 9089 is \$19.04 per hour, which amounts to \$39,603.20. The Form I-140, Immigrant Petition for Alien Worker was filed by the petitioner on July 2, 2010. On Part 5 of the Form I-140, the petitioner states that it was formed on January 1, 2002, has four workers and claims a gross annual income of \$366,731.

The petitioner is organized as a single-member professional limited liability company (LLC).² On the ETA Form 9089, signed by the beneficiary on June 15, 2010, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United

² A limited liability company is an entity formed under state law by filing articles of organization. A limited liability company may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes. A single member LLC is treated as a sole proprietorship only as a mechanism for tax filing purposes and does not change the fact that the business is legally a limited liability company. If the only member of the LLC is an individual, the LLC income and expenses are reported on Form 1040, Schedule C, E, or F. *See* IRS Publication 3402 (Rev. 7-2000) Catalog Number 249400 "Tax Issues for Limited Liability Companies." Members are like shareholders of a corporation and own an interest in the LLC but they are not the LLC. Property interests may be acquired by the LLC and the title acquired vests in the LLC. *See HB Management, LLC v. Brooks*, 2005 WL 225993 (D.C. Super. Ct.); *see also McKinney's Limited Liability Company Law* § 609(a) (members and managers of limited liability companies are generally expressly exempt from personal responsibility for a company's obligations). Further, USCIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).

At the outset, the AAO notes that on March 14, 2013, it issued a Notice of Derogatory Information and Notice of Intent to Deny (NDI/NOID) pursuant to 8 C.F.R. § 103.2(b)(2).³ The AAO informed the petitioner that according to the state of Virginia online business records, the petitioner has a status of "purged" and is not in good standing. The AAO further noted:

This raises a question as to your company's position to conduct business in the state of Virginia or anywhere else. If the petitioning business is no longer a legally authorized business, the petition and its appeal to this office have become moot. In which case, the appeal shall be dismissed as moot.

Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof 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 such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Id.*

Further, it is noted that related to the petitioner, "[REDACTED]" the federal employment identification number (FEIN) claimed on the ETA Form 9089, labor certification and on the Form I-140, Immigrant Petition for Alien Worker is [REDACTED] with an address of [REDACTED] Virginia [REDACTED]

In this case, the FEIN associated with the business claimed on the petitioner's 2010 individual tax return submitted in support of its ability to pay the proffered wage is [REDACTED] Moreover, the business is does not bear the same name and is not claimed

(i) ³*Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [U.S. Citizenship and Immigration Services (USCIS)] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

to be at the same location as the petitioner's address given on the ETA Form 9089 and the Form I-140. As the record currently stands, none of the 2010 financial information submitted to the record reliably supports the I-140 petitioner's (with the FEIN of [REDACTED] ability to pay the proffered wage.⁴

If a new entity is claiming that it is a successor-in-interest to the employer identified on the labor certification, in order to use that labor certification, it must submit evidence sufficient to establish that it is a successor-in-interest.

A valid successor relationship may be established if the job opportunity is the same as *originally offered on the labor certification; if the purported successor establishes eligibility* in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*"). The petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects, including establishing its continuing ability to pay the proffered wage from the date of transfer forward.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. In this case, the petitioner has provided no evidence of a valid successor-in-interest relationship.

The AAO additionally requested certain documentation related to the petitioner's existence in the state of Virginia and its continuing ability to pay the proffered wage of \$39,603.20. The AAO specifically requested copies of the petitioner's federal income tax returns from 2009 through the present, with the FEIN specified on the ETA Form 9089 and Form I-140. If the federal income tax returns for these years were not provided, the petitioner was advised to provide audited financial statements or annual reports.

In response, the petitioner, through counsel, provided copies of the individual federal income tax returns filed by the petitioner's owner, [REDACTED] for 2009, 2010 and 2011, but failed to provide either a federal income tax return or audited financial statement for 2012. Additionally, only the 2009 income tax returns contained financial information pertinent to the petitioner with the FEIN of [REDACTED]. The 2010 and 2011 contained data only for the other limited liability company owned by [REDACTED] with a FEIN of [REDACTED]. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Moreover, according to the copies of the quarterly state reports provided for the state of Virginia for the fourth quarter of 2009, as well as copies of the petitioner's Form 941, Employer's Federal Tax Return for the fourth quarter of 2009, the petitioner reported no income and paid no wages. According to counsel, the petitioner's business in Virginia was closed and the property was sold. She asserts that the petitioner's office in [REDACTED] should be considered the successor-in-interest, but submits no persuasive evidence of a purchase agreement or transfer of ownership to another business with a different FEIN. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981). Counsel admits that both entities have been operating at the same time and that "there is no evidence of transfer to Dr. [REDACTED] as successor-in-interest in the strict sense as interpreted in *Matter of Dial Auto Repair Shop, Inc.*" Counsel also maintains that the petitioner's intent to employ the beneficiary at the [REDACTED] location of the other business was manifested on the Form I-140. The AAO notes that this is an accurate observation, but also notes that the petitioner's intent to employ the beneficiary was given differently as the petitioner's address in [REDACTED] Virginia on Part H.1 of the ETA Form 9089, which asks the employer to list the beneficiary's primary worksite. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

It must be emphasized that the FEIN of an employer is a unique identifier that the Internal Revenue Service (IRS) assigns to tax filers. The DOL recognizes this in requiring that any U.S. employer proposing to sponsor a foreign worker for permanent employment on immigrant visa applications must possess a valid FEIN. Similarly, the United States Citizenship and Immigration Services (USCIS) does not recognize affiliated or co-employers with different FEINS for the purpose of sponsorship of a beneficiary on a Form I-140. Therefore, as the petitioning business's operation was terminated on or about the third quarter of 2009, the petition will be dismissed as moot because the petitioner with a FEIN of [REDACTED] and an address of [REDACTED] Virginia [REDACTED] no longer existed.

Even if not otherwise dismissed as moot, the petitioner has not established its continued financial ability to pay the proffered wage of \$39,603.20.

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 set forth above, there is no evidence that the petitioner has employed the beneficiary, and the petitioner has not submitted any evidence of any wages paid to the beneficiary.

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 as herein advocated by counsel. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 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 116. "[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).

With respect to the federal income tax returns submitted to the record:

- In 2009, the petitioner stated net income⁵ of \$113,688.

No further income tax returns contained evidence of the petitioner’s net income due to its termination.

- In 2010, the business with a different FEIN stated net income as -\$45,708.
- In 2011, the business with a different FEIN stated net income as \$139,226.

Therefore, for the years 2010, 2011, and 2012, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$39,603.20. Even if considering the business with a different FEIN, which the petitioner has not established any successorship, its stated net income was not shown to be sufficient to cover the proffered wage in 2010 and 2012.

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 assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁶ Since the petitioner did not submit audited financial statements or annual reports according to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the Schedules C (Form 1040) submitted by the petitioner, net current assets cannot be ascertained for any year. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Thus, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets from the priority date onward.

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. 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

⁵ Net income is reported on its member’s IRS Form 1040, Schedule C at line 31 for 2009, 2010, and 2011.

⁶ 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.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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, or the petitioner's reputation within its industry.

As stated above, the Form I-140 petitioner ceased operations in 2009 and the petition is, therefore, moot.⁷ Nothing establishes that the tax returns for the other entities submitted is the valid successor-in-interest to the original petitioner and entity that filed the labor certification. Therefore, after that year, there is no information in the record concerning its business organization and finances. Even if considering the other business, its net income was insufficient to cover the proffered wage in 2010. Thus, assessing the circumstances in this individual case, it is concluded that the petition does not merit approval under the principles set forth in *Matter of Sonegawa*.

Based upon the evidence submitted, the petitioner did not establish that it had the continuing ability to pay the proffered wage. As set forth above, the petition is also dismissed as moot. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). (noting that the AAO reviews appeals on a *de novo* basis).

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.

⁷ Where there is no legally active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.