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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

[Redacted]

DATE: **MAY 22 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)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

[Redacted]

**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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a manufacturer. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 January 4, 2011 denial, the 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 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 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on March 18, 2008. The proffered wage as stated on the ETA Form 9089 is \$14.69 per hour (\$30,555.20 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

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.<sup>1</sup>

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 1979 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is from April 1st to March 31st. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onward.

The petitioner did, however, submit W-2 Forms for the beneficiary as follows:

- 2008 - \$16,704.00<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> This W-2 Form lists the same Federal Employer Identification Number (FEIN) as is listed for the employer on the labor certification and the instant petition. However, the employer's name indicated on this statement is an individual's name doing business as [REDACTED]. Therefore, it is unclear if this W-2 represents wages paid by the petitioner, or another entity. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by

- 2009 - \$17,321.00<sup>3</sup>
- 2010 - \$16,456.00<sup>4</sup>

Thus, if the petitioner is able to establish that these wages were paid by the petitioner, then for those years the petitioner must establish the ability to pay the difference between the proffered wage, \$30,555.20, and wages paid to the beneficiary. Those amounts would be:

- 2008 - \$13,851.20
- 2009 - \$13,234.20
- 2010 - \$14,099.20

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 (1<sup>st</sup> 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.

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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. *Id.* In any further filings, the petitioner must provide evidence to clarify the relationship between the Form W-2 employer and the petitioner.

<sup>3</sup> The record contains two Forms W-2 issued to the beneficiary in 2009, one from a company with the same name as the petitioner, but with a different FEIN than is listed on the labor certification and Form I-140, Immigrant Petition for Alien Worker. The second Form W-2 is again in the name of an individual, the petitioner's president, and having the same FEIN as the petitioner. Before the AAO can accept these Forms W-2 as demonstrating wages paid by the petitioner to the beneficiary, the petitioner must establish that it was the entity listed on both Forms W-2. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-592 (BIA 1988). 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. *Id.*

<sup>4</sup> This Form W-2 lists the same company name as the petitioner, but a different FEIN. In any further filings, the petitioner must provide evidence to explain this discrepancy.

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).

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 November 15, 2010 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 fiscal years 2010 federal income tax return was not yet due. Therefore, the petitioner's income tax return for fiscal year 2009 is the most recent return available. The petitioner's tax returns demonstrate its net income for its fiscal years, as shown in the table below.

- In fiscal year 2007, the petitioner did not submit its Form 1120.<sup>5</sup>

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<sup>5</sup> In any further filings, the petitioner should submit its corporate income tax returns for each relevant year in which it must demonstrate its ability to pay the proffered wage from the priority date onward which would include its 2007 and 2008 fiscal year tax returns. The petitioner did submit its owner's

- In fiscal year 2008, the petitioner did not submit its Form 1120.
- In fiscal year 2009, the Form 1120 stated net income of \$12,405.00.

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2008 Schedule C for Form 1040. As it is unclear whether this income directly reflects the petitioner's net income, the AAO will not consider this toward the petitioner's ability to pay the proffered wage. Although the director stated that the petitioner was structured as a sole proprietorship in 2008, the petitioner's tax returns state that it was incorporated in 2002. This demonstrates that the petitioner was a C corporation in 2008 and should have filed a Form 1120 for that year. Furthermore, even if the AAO accepted the Form 1040 Schedule C as evidence of the petitioner's ability to pay the proffered, which it does not, this amount of net income is also insufficient to pay the difference between the wages paid to the beneficiary and the proffered wage for 2008. These conflicting tax returns cast doubt on whether the petitioner is the same entity as the labor certification employer, as the provision of a personal income tax return for 2008 and the provision of a corporate income tax return for 2009, for a corporation incorporated in 2002, suggests that the two separate entities existed simultaneously. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.*

Further, the labor certification employer is identified as [REDACTED] with an FEIN beginning with "13," and 1979 is listed as the year the labor certification employer began its business. The petitioner on the Form I-140 is identified as [REDACTED] also with an FEIN beginning with "13," and also commencing business in 1979. The 2008 personal income tax return lists the sole proprietor's business name as the petitioner's president's name, with an FEIN beginning with "13." However, the 2009 corporate tax return lists a corporation name of [REDACTED] with an FEIN beginning with "02" and an incorporation date of April 23, 2002. It is unclear whether the petitioner is the same entity as the labor certification employer, or a successor-in-interest of the same. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Id.* In any further filings, the petitioner must overcome these inconsistencies with independent, objective evidence. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.*

Therefore, for the petitioner's fiscal years 2007, 2008, and 2009, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages paid to the beneficiary.

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.<sup>6</sup> 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 2008 and 2009, as shown in the table below.

- In fiscal year 2007, the petitioner did not submit its Form 1120.<sup>7</sup>
- In fiscal year 2008, the petitioner did not submit its Form 1120.
- In fiscal year 2009, the Form 1120 stated net current assets of \$25,221.00.

Therefore, for 2009, if the petitioner is able to establish that it is the same entity, or a successor-in-interest to the labor certification employer and the Form W-2 employer, the petitioner would have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary. The petitioner did not demonstrate its ability to pay the difference between the proffered wage and the wages paid to the beneficiary for 2008.

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.

Counsel asserts on appeal that the petitioner's total combined income for 2008 and 2009, which counsel states is \$80,835.00, is sufficient to pay the proffered wage. It is unclear from the record how this number was determined. As stated above, the court *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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

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<sup>6</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>7</sup> As stated above, the Form 1040 Schedule C has not been attributed to the petitioner for the purposes of establishing its ability to pay the proffered wage. In any further filings, the petitioner should submit its Form 1120, including Schedule L, for 2008.

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). The record does not contain the petitioner's Form 1120 for fiscal year 2007 or 2008 to determine its net income for these years and its net income for 2009 was only \$12,405.00. This amount is insufficient to pay the difference between the proffered wage and the wages paid to the beneficiary.<sup>8</sup>

The record contains the petitioner's bank statements for 2008. Any reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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

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<sup>8</sup> Even if the AAO accepted the Form 1040, Schedule C, from the petitioner's owner for 2008, this lists a net income of \$11,521.00 which is insufficient to pay the difference between the proffered wage and the wages paid to the beneficiary.

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 states on Form I-140 that it has been in business since 1979 and employs seven workers. However, the petitioner's tax returns indicate it was incorporated in 2002, and doubt exists as to whether the labor certification employer and the petitioner are the same entity, or if a successor-in-interest relationship exists, or if the labor certification employer has ceased to exist. Further, the single corporate tax return in the record indicates relatively low wages paid, in light of the petitioner's claim to employ seven workers, suggesting these workers are part-time or contractual workers. The petitioner has not demonstrated its ability to pay the difference between the proffered wage and wages paid to the beneficiary. The record contains no evidence of the petitioner's historic growth. The record does not demonstrate that the petitioner experienced any uncharacteristic losses or expenses. The petitioner has not demonstrated its reputation in the industry. 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.