

(b)(6)

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,
Josh K
For

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 is a “Manufacturing/Engineering” business. It seeks to employ the beneficiary permanently in the United States as a “Sr. CIJ [Continuous Ink Jet] Engineer.” 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 October 5, 2010 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 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 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 April 16, 2008. The proffered wage as stated on the ETA Form 9089 is \$100,402.00 per year. The ETA Form 9089 states that the position requires 120

months of experience in the job offered, or alternately, 120 months of experience as a “Systems Integration Engineer, Manufacturing Engineer.”

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2003 and to currently employ seven workers. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on July 19, 2010, the beneficiary claimed to have worked for the petitioner since May 18, 2003.

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 submitted W-2 Forms showing it paid the beneficiary wages as follows:

- 2008 - \$69,000.00
- 2009 - \$72,000.00
- 2010 - \$72,000.00
- 2011 - \$92,400.00
- 2012 - \$112,800.00

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The wages paid in 2012 exceed the beneficiary's proffered wage. Thus, for 2008 through 2011 the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those amounts are:

- 2008 - \$31,402.00
- 2009 - \$28,402.00
- 2010 - \$28,402.00
- 2011 - \$8,002.00

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 record contains IRS tax transcripts for 2008, 2009, 2010, and 2011, which demonstrate its net income for these years, as shown in the table below.²

- In 2008, the tax transcript stated net income of (\$51,344.00).
- In 2009, the tax transcript stated net income of (\$6,341.00).
- In 2010, the tax transcript stated net income of (\$8,516.00).
- In 2011, the tax transcript stated net income of (\$2,716.00).

Therefore, for the years 2008, 2009, 2010, and 2011, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages paid to the beneficiary.

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.³ 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 record also contains the petitioner’s tax returns for 2008, 2009, and 2011, which demonstrate its end-of-year net current assets for these years, as shown in the table below.

- In 2008, the Form 1120S stated net current assets of (\$235,160.00).
- In 2009, the Form 1120S stated net current assets of \$41,750.00.

² As shown above, the beneficiary’s W-2 Form for 2012 demonstrates that he was paid an amount higher than the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage for 2012.

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

- In 2010, the Form 1120S, Schedule L, was not provided.
- In 2011, the Form 1120S stated net current assets of \$112,632.00.

Thus, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary for 2008 and without the petitioner's Form 1120S, Schedule L, for 2010, the petitioner has not established its ability to pay for 2010. The petitioner did have sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary for 2009 and 2011.

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 amounts in wages paid to independent contractors for 2008 and 2009 are discretionary funds that are available to pay the beneficiary's proffered wage. The record contains a letter from the petitioner's president which states that if the business does not support paying both the independent contractors and the beneficiary's proffered wage, the beneficiary will have the priority to be paid the proffered wage at the expense of the contractors. The record contains Forms 1099 for three independent contractors for 2008 and 2009. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Additionally, the record does not verify the full-time employment of these contractors or provide evidence as to how their wages will be decreased, if necessary, in order to pay the beneficiary's proffered wage. The petitioner has also not documented the position, duty, and/or termination of any of these workers to demonstrate how the petitioner would offset their wages to pay the beneficiary the proffered wage.⁴ In addition, the petitioner did not document that these payments were discretionary, rather than being fixed by contract or otherwise obligated. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Without such evidence, the AAO does not find the petitioner's claim persuasive.

Counsel also references the statement by the petitioner's president that he would be willing to take his salary or any distributions only after the beneficiary had received the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the

⁴ The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

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." The AAO notes that the tax returns in the record do not list any officer compensation, and the beneficiary's wages represent the majority of the wages paid documented on the returns. From the record, it is unclear what, if any, compensation the president would forego, assuming he were otherwise able to do so. Further, the petitioner failed to submit evidence to show that the president's compensation payments were not fixed by contract or otherwise. Without such evidence, the AAO does not find such claims persuasive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Without such evidence, the AAO does not find the petitioner's claim persuasive.

Additionally, the record contains a letter from the owner of the petitioner in which he states that he withdrew \$80,000 in paid capital in 2008 and \$57,000 in paid capital in 2009 and that he would be willing to forego the shortfall in the beneficiary's proffered wage. Any claim that the capital stock value and the paid-in capital value, Schedule L, lines 22 and 23, are evidence of the ability to pay the proffered wage is unavailing. Capital stock and paid-in capital are not current asset items but are part of the equity of the corporation and are unavailable to pay the proffered wage. Further, the Schedules K-1 accompanying the 2008 tax return indicate only two shareholders for the petitioner with the petitioner's president holding 5% of the petitioner's shares. Schedule K-1 does not indicate any amount as "affecting shareholder basis," "other information," or in any other category that would support the president's claim. The capital amounts listed on Schedule L do not comport with the figures stated by the petitioner's president.

Counsel also submitted eight distributor agreements the petitioner entered into in 2010 and asserts that these demonstrate that the petitioner has a reasonable expectation of increased profits. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The record contains a letter from the president of the petitioner which lists its projections for gross sales, gross margins, and net income through 2013, stating that it just signed a new contract with a very large company that will increase its sales by more than five times in 2014.⁵ The record does not contain any evidence that provides the name of this business or that otherwise substantiates this claim. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently

⁵ The AAO notes that the petitioner projected its gross receipts for 2010 to be \$760,000.00. The record demonstrates above that its gross receipts ended up being \$701,835.00, which tends to diminish the petitioner's claims regarding its projections for 2013.

become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Therefore, any expectation of increased profits will not be considered.

The record contains the petitioner's bank statements from May through October 2010. Counsel's 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 returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above 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 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 Form I-140 states that the petitioner has been in business since 2003 and that it employs seven workers. The petitioner's letter, dated January 7, 2013, submitted in response to the AAO's RFE states that the petitioner currently employs eight workers. However, the petitioner's tax returns indicate that the wages paid to the beneficiary in each year since 2008 account for the majority of the salaries paid, casting doubt on whether the other workers are full-time or contracted workers. From 2008 onward, the petitioner has paid relatively low wage amounts annually, given the number of workers claimed. The petitioner states that its first five years were spent mostly in research and development, but the record contains no evidence to substantiate this. The evidence in the record does not establish that the petitioner had the ability to pay the proffered wage for 2008 and 2010. The record includes the petitioner's tax return information from 2004 through 2010.

That information demonstrates that the petitioner did not have a consistent pattern of growth in its gross receipts from 2004 through 2010, but that each year alternated between a lower and higher figure. Furthermore, a petitioner's gross receipts are not the best indicator to determine its ability to pay the beneficiary's proffered wage. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881. The petitioner has not demonstrated any uncharacteristic losses or expenses that were incurred in 2008 and 2010.⁶ The petitioner has not provided any evidence of 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 denied.

⁶ The petitioner claims that the recession impacted its ability to pay the proffered wage in 2008 and 2009, but there is no direct evidence in the record linking the petitioner's claimed hardship to the economy. The AAO notes that the record contains a graph showing the petitioner's gross receipts from 2004 to 2010 as compared to the Dow Jones Industrial Average Index from 2005 to 2010. However, there is nothing in the record demonstrating that the economy was the fundamental reason for the petitioner's hardship. A mere broad statement by counsel that the petitioner's business was impacted adversely by the struggling economy, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the economy.