



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 3 1 2013**

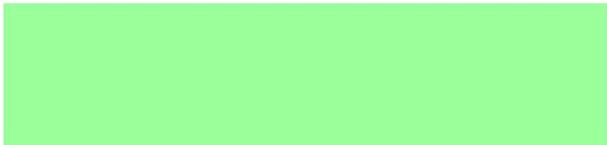
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
 Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker 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 with the field office or service center that originally decided your case by filing a 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 Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal is dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.

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 if properly submitted upon appeal.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by 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 March 27, 2008, which establishes the priority date. The proffered wage as stated on the ETA Form 9089 is \$26.01 per hour, which amounts to \$54,100.80.

The labor certification also states that the position of chef requires 2 years of work experience in the job offered of chef.

The Immigrant Petition for Alien Worker (Form I-140 was filed on December 4, 2008. Part 1 of the Form I-140 states that the federal employer identification number (FEIN) of the petitioner is [REDACTED]. A FEIN is a unique identification number assigned by the Internal Revenue Service (IRS). The regulation at 20 C.F.R. § 656.3 provides that every U.S. employer that sponsors a foreign worker on a labor certification must have a FEIN. Part 5 of the Form I-140 indicates that the petitioner was established in 1998, employs 35 workers, declares a gross annual income of \$153,800 in 2007, and a net annual income of \$3,682 in 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 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, it is noted that the petitioner submitted a copy of its 2007 federal income tax return¹ with the petition. Although this return was filed by the petitioner identified with the FEIN as stated on the Form I-140, it did not cover the priority date of March 27, 2008 and failed to show that the net income of \$3,682 stated on the tax return was sufficient to cover the proffered wage of \$54,100.60.² Also, net current assets are not shown on Schedule L of the tax return. Therefore, the

¹ The copy of the return submitted is extremely light and barely legible.

²The record reflects that the petitioner is a limited liability company. It is noted that a limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC 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 for tax purposes 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, as indicated by the record, the I-140 petitioner, an LLC formed under the laws of New Jersey is considered as a partnership for tax reporting purposes. In this case, it reports additional income or additional deductions and credits on

director denied the petition on February 23, 2009.

USCIS reviews the ability to pay the proffered wage through an examination of wages paid to the beneficiary, the petitioner's net income or the petitioner's net current assets. There is no evidence in this case that the petitioner has employed the beneficiary. If a 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 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). 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.

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

Schedule K. Its net income is reflected as a combined total of its ordinary business income as shown on line 22 of the Form 1065 and income, credits and deductions reflected on Schedule K. Here, the petitioner's net income is found on line 1 of Analysis of Net Income on page 4 of Form 1065. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

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).

As an alternative method of reviewing a petitioner’s ability to pay a proposed wage, USCIS will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities. Current assets would generally be shown on line(s) 1 through 6 of Schedule L of a partnership tax return. Current liabilities would be shown on line(s) 15 through 17 of Schedule L. Net current assets represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. If a limited liability company’s end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. In some cases, as in this matter, if the company does not produce total receipts of at least \$250,000, it is not required to complete Schedule L of the partnership tax return.

An appeal was filed by counsel for the petitioner. On Part 3 of the Form I-290, Notice of Appeal or Motion, for the first time, counsel describes the petitioner as having a fictional business name of [REDACTED]. Counsel attaches the following documentation in support of the petitioner’s ability to pay the proffered wage:

- 1) A copy of an un-negotiated check payable to the beneficiary from [REDACTED]
- 2) A letter from [REDACTED] stating that the beneficiary is employed “by our company” and that the FEIN is [REDACTED]. The letter also states that Mr. [REDACTED] is the president of [REDACTED] that is also part of [REDACTED]
- 3) Copies of [REDACTED] 2007 and the 2008 Form 941, Employer’s Quarterly Federal Tax Return.
- 4) A copy of the December 2008 banking statement of [REDACTED]

As stated above, each U.S. employer that sponsors a foreign worker must have a valid FEIN. The petitioner’s FEIN is different from that of [REDACTED]. The regulations do not permit multiple companies to sponsor beneficiaries. Moreover, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other

enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court 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."

Additionally, there is no first-hand evidence in the record that [REDACTED] is the petitioner's fictional business name. There is no evidence in the record that [REDACTED] claims that it is a successor-in-interest to the petitioner. 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 evidence of the ability to pay the proffered wage. 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 482.³

As the record does not indicate that a successorship relationship is claimed, AAO cannot conclude that [REDACTED] has established that it is a successor-in-interest to the petitioner. Further, [REDACTED] possesses a different FEIN and is a separate entity from the petitioner. 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, at 145 (recognizing that the AAO reviews appeals on a *de novo* basis). Therefore, none of the financial

³ 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.

information submitted to the record related to [REDACTED] may be considered in establishing the petitioner's continuing ability to pay the proffered wage.

It is noted that in *Matter of Sonogawa*, the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

Unlike the *Sonogawa* petitioner, this petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonogawa* are applicable. Additionally, as the priority date is 2008, the record lacks evidence of the petitioning entity's ability to pay the proffered wage for 2008 pursuant to 8 C.F.R. § 204.5(g)(2). The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

The petitioner has not established its continuing financial ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

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.