



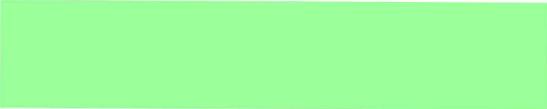
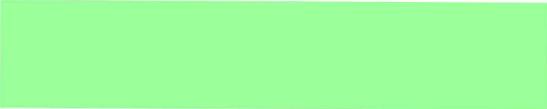
U.S. Citizenship
and Immigration
Services

(b)(6)



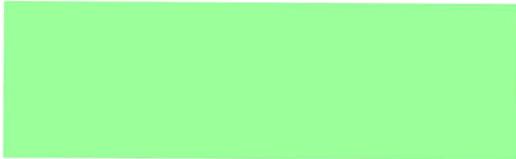
DATE: APR 17 2014

OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

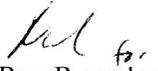


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment 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 December 3, 2008 denial, at 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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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, 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, Application for Permanent Employment Certification, 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 January 22, 2007.¹ The proffered wage as stated on the ETA Form 9089 is \$12.25 per hour (\$25,480 per year for 40 hours of work per week). The ETA Form 9089 states that the position requires two years experience in the proffered position of cook.

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.²

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 1992 and to currently employ 4 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 but not dated, the beneficiary claimed to have worked for the petitioner beginning on March 2, 1999.

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 copies of IRS Forms W-2 to demonstrate that it paid the beneficiary in 2007, 2008, 2009, 2010, and 2011 as shown in the table below.

- In 2007, the Form W-2 states that the petitioner paid the beneficiary \$3,600.

¹ The Department of Labor advised the AAO that it has no record of a request for the earlier priority date of April 30, 2001 as noted by the counsel in the record of proceeding. The AAO will adjudicate the petition based on the January 22, 2007 priority date.

² 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).

- In 2008, the Form W-2 states that the petitioner paid the beneficiary \$16,160.
- In 2009, the Form W-2 states that the petitioner paid the beneficiary \$20,355.
- In 2010, the Form W-2 states that the petitioner paid the beneficiary \$16,087.50.
- In 2011, the Form W-2 states that the petitioner paid the beneficiary \$17,730.

The wages paid by the petitioner to the beneficiary in 2007, 2008, 2009, 2010, and 2011 were less than the proffered wage. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2007, 2008, 2009, 2010, and 2011 as noted below.

- In 2007, the remainder is \$21,880.
- In 2008, the remainder is \$9,320.
- In 2009, the remainder is \$5,125.
- In 2010, the remainder is \$9,392.50.
- In 2011, the remainder is \$7,750.

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, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

On April 25, 2012 the AAO issued a notice of intent to deny and request for evidence. In response to the AAO’s notice, the petitioner submitted tax returns for 2007, 2008, 2009, 2010, and 2011.³ As of that date, the petitioner’s 2012 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2011 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2007, 2008, 2009, 2010, and 2011, as shown in the table below.

- In 2007, the Form 1120S stated net income⁴ of \$(5,039).
- In 2008, the Form 1120S stated net income of \$(2,038).
- In 2009, the Form 1120S stated net income of \$(3,311).
- In 2010, the Form 1120S stated net income of \$(3,901).
- In 2011, the Form 1120S stated net income of \$(9,170).

³ The AAO also noted inconsistencies in the petitioner’s name and address. The petitioner has submitted an explanation and sufficient evidence to resolve these inconsistencies.

⁴ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 3, 2014) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.).

Therefore, for the years 2007, 2008, 2009, 2010, and 2011, the petitioner did not have sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage.

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.⁵ 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2007, 2008, 2009, 2010, and 2011, as shown in the table below.

- In 2007, the Form 1120S stated net current assets of \$(367).
- In 2008, the Form 1120S stated net current assets of \$563.
- In 2009, the Form 1120S stated net current assets of \$7,511.
- In 2010, the Form 1120S stated net current assets of \$9,713.
- In 2011, the Form 1120S stated net current assets of \$(1,682).

Therefore, for the years 2007, 2008, and 2011, the petitioner did not have sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage. The petitioner established that it had sufficient current net assets to pay the difference between the wages paid to the beneficiary and the proffered wage in 2009 and 2010.

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 beneficiary would replace the onsite manager and that the onsite manager's wages should be considered in determining the petitioner's ability to pay the proffered wage since the priority date. The record contains evidence that the petitioner hired [REDACTED] as an onsite manager and that [REDACTED] joined the military and the beneficiary assumed managerial and cash register duties after [REDACTED] left the petitioner's employment. In an affidavit dated June 8, 2012, the petitioner states that the position of "cook" requires managerial duties and that [REDACTED] also worked as a cook when onsite. The job duties listed in the labor certification include "manages operation of restaurant and oversees cash register." The record contains evidence that [REDACTED] was paid \$6,250 in 2007 and \$8,500 in 2008. In general, wages already paid to others are not available to prove the

⁵According 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.

ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, even if the employee's wages were available to pay the beneficiary's proffered wage, the wages paid to the employee were not sufficient to meet the difference between the wages paid to the beneficiary and the proffered wage in 2007 and 2008, and no wages were paid to this employee in 2011.

Counsel also asserts that the petitioner's owner and sole shareholder is willing to reallocate his officer's compensation in order to pay the difference between the wages paid to the beneficiary and the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that the owner, [REDACTED], holds 100 percent of the company's stock and works as a cook and manager in the restaurant. The record contains Forms W-2 for the owner indicating that his compensation in 2007, 2008, 2009, 2010, and 2011 from the petitioner was as listed in the table below.

- In 2007, the owner received compensation in the amount of \$24,000.
- In 2008, the owner received compensation in the amount of \$20,000.
- In 2009, the owner received compensation in the amount of \$25,000.
- In 2010, the owner received compensation in the amount of \$26,600.
- In 2011, the owner received compensation in the amount of \$37,900.

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'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."

In the present case, however, counsel's response to the AAO's notice of intent to deny and request for evidence included the owner's household expenses for the years 2007 to 2011. The owner's average household expenses, as listed in the response, total \$43,285 per year. The household expenses submitted are greater than the amount paid to the owner by the petitioner in the years 2007 to 2011. The tax returns list the owner's income as \$35,636 in 2007, \$24,388 in 2008, \$64,384 in 2009 and \$46,039 in 2010. As noted, above the petitioner established that it had sufficient current net assets to pay the difference between the wages paid to the beneficiary and the proffered wage in 2009 and 2010. For 2007 and 2008, if the difference between the wages paid to the beneficiary and

the proffered wage are subtracted from the petitioner's owner's total income, the petitioner's owner's adjusted gross income (AGI) can be modified as shown in the table below.

	Total Income	Balance of Wages	Reduced Total Income	Recalculated AGI
2007	\$35,636	\$21,880	\$13,756	\$3,015
2008	\$24,388	\$9,320	\$15,068	\$6,085

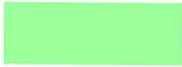
Therefore, the petitioner's owner's recalculated AGI without the portion of the officer's compensation used to pay the balance of the proffered wage in 2007 and 2008 is less than the petitioner's owner's annual household expenses. It is improbable that the petitioner's owner could support himself and his dependents on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage.

The petitioner did not submit the owner's 2011 tax returns as requested by the AAO, and therefore, the AAO is unable to determine if the owner had sufficient income in 2011 to meet his household expenses and pay the difference between the wages paid to the beneficiary and the proffered wage in that year.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). Accordingly, the evidence in the record does not confirm that the job offer is realistic and that the proffered salary of \$25,480 per year can be paid by the petitioner.

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, as noted above, the petitioner did not submit sufficient evidence that the owner's compensation or the wages of a replaced employee were sufficient to pay the proffered wage. The record contains evidence that the petitioner has been in business since 1992 and has a positive reputation within the community. However, the petitioner's tax returns reflect only moderate growth from 2007 to 2010. The petitioner claims to employ three to four workers at any given time. However, the salaries and wages claimed on its 2007 tax return are nearly 40% below the proffered wage to the instant beneficiary. The petitioner would have needed to nearly double its total wages in 2007 to hire one additional worker. The petitioner's tax returns reflect negative net income and low or negative net current assets in all relevant years. Nothing in the record demonstrates that the petitioner's tax returns paint an inaccurate financial picture.

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.

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.