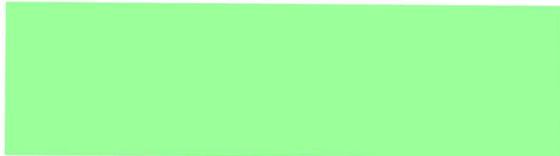


(b)(6)

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



DATE: **FEB 28 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. The petitioner appealed that decision and the director rejected it as untimely filed on April 7, 2009. The Administrative Appeals Office (AAO) subsequently reopened the matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) and allowed the petitioner 30 days to submit a brief and additional evidence. The petitioner responded to this request and on March 29, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and reconsider its March 29, 2013 decision. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). Upon reopening the matter to itself, the AAO 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 AAO also held that the petitioner had not established that the beneficiary was qualified for the instant position. The AAO denied the petition accordingly.

The instant motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The motion to reconsider also qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy. Therefore, the petitioner's motion is properly filed.

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 or motion.

In the AAO's March 29, 2013 decision, it held that the petitioner established its ability to pay the beneficiary's proffered wage in 2009 and 2010. Therefore, the remaining issues in this case are: (1) whether the petitioner has the ability to pay the beneficiary's proffered wage in 2007, 2008, and 2011; and (2) whether the beneficiary meets the experience requirements of the labor certification.

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 October 22, 2007. The proffered wage as stated on the ETA Form 9089 is \$15.50 per hour (\$32,240.00 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered, as a head cook. In its March 29, 2013 decision, the AAO noted that the dates of the beneficiary's claimed employment in the experience letter from [REDACTED] conflicted with the dates of employment claimed on the ETA Form 9089. On motion, the petitioner submitted a new letter that resolved the discrepancies with the initial experience letter. Therefore, the petitioner has established that the beneficiary meets the experience requirements of the labor certification. The AAO's March 29, 2013 decision regarding the beneficiary's experience is withdrawn, and the sole remaining issue is whether the petitioner has established its ability to pay the beneficiary's proffered wage in 2007, 2008, and 2011.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation for the time period pertinent to this case from October 1, 2007, to December 31, 2009. The petitioner was then restructured as an S corporation beginning on January 1, 2010. On the petition, the petitioner claims to have been established in 1987 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year as a C corporation was from October 1, 2007 until September 30, 2008; from October 1, 2008 until September 30, 2009; and from October 1, 2009, until December 31, 2009. The petitioner's tax returns then shifted to the calendar year beginning on January 1, 2010, in conjunction with its being restructured as an S corporation. On the ETA Form 9089, signed by the beneficiary on November 6, 2007, the beneficiary claimed to have worked for the petitioner from February 5, 2007 until October 22, 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'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United

<sup>1</sup> The AAO also found in its March 29, 2013 decision that the petition was not supported by an original certified ETA Form 9089 signed by the attorney. This deficiency has been resolved on motion.

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 labor certification states that the beneficiary did not work for the petitioner from the priority date onward, and nothing in the record demonstrates that the petitioner employed and paid the beneficiary the full proffered wage from the priority date in 2007 onward.

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.

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. For an S corporation, 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. As stated above, the years at issue in this case are 2007, 2008, and 2011. The petitioner’s tax returns demonstrate its net income for these years, as shown in the table below.

- In 2007, the Form 1120 stated net income of \$291.00.
- In 2008, the Form 1120 stated net income of \$(4,449.00).
- In 2011, the Form 1120S stated net income of \$(7,131.00).

Therefore, for the years 2007, 2008, and 2011, the petitioner did not have sufficient net income to pay the proffered wage.

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>2</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.

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<sup>2</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.

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

- In 2007, the Form 1120 stated net current assets of \$(8,142.00).
- In 2008, the Form 1120 stated net current assets of \$(973.00).
- In 2011, the Form 1120S stated net current assets of \$(90,632).

Therefore, for the years 2007, 2008, and 2011, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 motion that the petitioner has maintained retained earnings which are available to pay the beneficiary's proffered wage. The AAO does not agree with this assertion. Retained earnings are a company's accumulated earnings since its inception less dividends. Joel G. Siegel and Jae K. Shim, *Barron's Dictionary of Accounting Terms* 378 (3<sup>rd</sup> ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

The petitioner's president states in a letter, dated April 27, 2013, that the beneficiary's employment will increase the petitioner's financial standing to cover the cost of hiring her. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

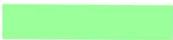
I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Therefore, USCIS will not consider the potential future earnings that might come to the petitioner as a result of the beneficiary's employment.

Counsel also asserts that the petitioner has the ability to pay the beneficiary's proffered wage in the totality of the circumstances under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Under *Sonogawa*, 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. *Id.* Counsel cites the fact that the petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. Counsel submits an inflation calculation from [www.usinflationcalculator.com](http://www.usinflationcalculator.com) to demonstrate that this amount today would be approximately \$696,925.00. Counsel states that the petitioner has demonstrated similar gross income amounts, and therefore, the beneficiary's proposed income would not place a financial burden on the petitioner. However, as stated above, USCIS does not consider gross receipts without also viewing its expenses incurred in evaluating its ability to pay the proffered wage. *See Taco Especial v. Napolitano, supra*, at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The AAO disagrees with counsel's assertion that the instant case is similar to *Sonogawa* and establishes the petitioner's ability to pay the proffered wage in the totality of the circumstances. During the year at issue in *Sonogawa*, the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner in that case incurred large moving costs and was unable to do regular business for a significant period of time. 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 petitioner states on the Form I-140 that it has been in business since 1987 and employs five workers. While reviews of the petitioner's restaurant are generally positive, the petitioner's tax returns reflect low net income for 2007; negative net income for 2008 and 2009; and negative net current assets for 2007, 2008, and 2011. The salaries and wages listed on the petitioner's tax returns are only slightly greater than the proffered wage. In 2007, 2008, and 2011, the petitioner claims it paid salaries of \$36,909.00; \$34,710.00; and \$48,748.00, respectively. To pay the proffered wage of \$32,240.00 in these years, the petitioner would need to nearly double its total salaries and wages. It is unlikely that the petitioner would be able to double its total salaries and wages to hire just one additional employee. The petitioner has not demonstrated the occurrence



of any uncharacteristic business expenses in any of the relevant years. Nothing in the record indicates that the petitioner's tax returns do not paint an accurate 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.

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.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden.

**ORDER:** The motions are granted. The appeal is dismissed. The petition remains denied.