(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: MAY 0 2 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professionals Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner[1] imports and distributes wine. It seeks to employ the beneficiary permanently in the United States as a controller. 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 its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. On November 26, 2012, the director denied the petition accordingly.

The record shows that the appeal is properly filed, timely[2] 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 denial, the single 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.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent, whose services are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[1] The legal name of the petitioner, which was incorporated on August 6, 1998, is , according to the New York Department of State, Division of Corporations. *See* http://appext20.dos.ny.gov/corp_public/CORPSEARCH.SELECT_ENTITY (accessed April 17, 2013).

[2] The petitioner must appeal an unfavorable decision within 30 days of service. 8 C.F.R. § 103.3(a)(2)(i). If the unfavorable decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.8(b). The filing date is the actual date of receipt at the location designated for filing. 8 C.F.R. § 103.2(a)(7)(i). USCIS records indicate that the petitioner filed the appeal on January 3, 2013, or 39 days after service of the decision. Online information of the U.S. Postal Service, however, shows that the Texas Service Center received the appeal on December 31, 2012. *See* https://tools.usps.com/go/TrackConfirmAction.action (accessed April 17, 2013). As the 33rd day of the deadline to appeal the director's mailed decision fell on Saturday, December 29, 2012, the appeal was due on the next business day, Monday, December 31, 2012. 8 C.F.R. § 1.2 (stating in definition of "day" that "when the last day of the period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or a legal holiday"). The AAO therefore finds that the petitioner timely filed the appeal on December 31, 2012.

> *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 DOL accepted the labor certification for processing. *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 DOL accepted the ETA Form 9089 on September 8, 2011. The proffered wage, as stated on the form, is $195,499 per year. The form states that the offered position of controller requires a bachelor's degree or a foreign equivalent degree in accounting, and 60 months (five years) of experience in the job offered. The petitioner indicated that it would accept a Master's degree and three years of experience as an alternate combination of education and experience.

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.[3]

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 1998 and to employ six workers. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, which the beneficiary signed on March 30, 2012, the beneficiary claimed to have worked for the petitioner in the position of office manager from March 1, 2005 to March 1, 2011.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, 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

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[3] 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).

resources sufficient to pay the beneficiary's proffered wage. USCIS will also consider the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration. *See Matter of Sonegawa*, 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 a copy of a handwritten, 2011 Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement, showing that it paid the beneficiary total wages of $22,620 in 2011. Because the total wage amount on the W-2 form does not equal or exceed the annual proffered wage of $195,499, the petitioner has not established that it paid the beneficiary the full proffered wage from the September 8, 2011 priority date onward. Thus, the petitioner must demonstrate that it can pay the $172,879 difference between the wages actually paid to the beneficiary in 2011 and the annual proffered wage.

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. *See 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). If the net income figure equals or exceeds the difference between the wages actually paid to the beneficiary in a given year and the annual proffered wage, the petitioner will be deemed to have demonstrated its ability to pay the proffered wage for that year.

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. *See 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 expenses 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.*, 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. 623 F. Supp. at 1084. 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.
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> 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).

The record before the director closed on September 24, 2012, with his receipt of the petitioner's submissions in response to his request for evidence. 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 stated net income[4] for 2011 is $(43,778).[5] Therefore, for 2011, the petitioner has not established sufficient net income to pay the $172,879 difference between the wages it actually paid the beneficiary that year and the annual proffered wage.

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[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 of the 2011 Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed April 17, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not adjust its income on its Schedule K for 2011, the petitioner's net income is found on line 21 of its Form 1120S.

[5] Numbers in parentheses indicate negative amounts.

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.[6] 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 of Schedule L. If the total of a corporation's year-end net current assets and the wages paid to the beneficiary 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.

Here, the petitioner's 2011 tax return shows year-end net current assets of $(299,257). Therefore, for 2011, the petitioner has not demonstrated sufficient net current assets to pay the $172,879 difference between the wages it paid the beneficiary and the annual proffered wage.

Thus, from the date the DOL accepted the ETA Form 9089 for processing, the petitioner has not established its continuing ability to pay the beneficiary the proffered wage based on examinations of the wages it actually paid the beneficiary, its net income, and its net current assets.

As of the date of this decision, the AAO has not received a brief and/or additional evidence that counsel stated the petitioner would submit within 30 days of the appeal's filing. On the Form I-290B, Notice of Appeal or Motion, however, counsel asserts that the director erred in finding that the beneficiary's 2011 W-2 form did not demonstrate the petitioner's ability to pay the proffered wage. Counsel asserts that the W-2 form reflected the beneficiary's salary while he was working for the petitioner in H-1B nonimmigrant work visa status and that, after the beneficiary's H-1B status expired in 2011, the beneficiary no longer remained on the petitioner's payroll.

Counsel appears to misunderstand the petitioner's obligations. The petitioner need not actually pay the beneficiary the proffered wage until he obtains lawful permanent resident status based on the permanent job opportunity. 20 C.F.R. § 656.10(c)(4). Until then, the petitioner is only obligated to pay the beneficiary the wage rate indicated in its approved H-1B visa petition while the beneficiary remains in that status. Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A) (an H-1B employer must pay the prevailing wage rate, or the actual wage rate it pays employees in the same position with similar qualifications, whichever is higher). The petition and the labor certification state - and USCIS records confirm - that the beneficiary's H-1B visa status expired in March 2011. Therefore, the wages on the beneficiary's 2011 W-2 form may reflect only his wages while in H-1B status through March of that year, as counsel asserts.

Even though the petitioner need not actually pay the beneficiary the proffered wage until he obtains lawful permanent resident status, the petitioner must demonstrate its ability to pay the proffered wage from the petition's priority date onward. *See* 8 C.F.R. § 204.5(g)(2). As discussed above, had

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[6]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.

the petitioner actually paid the beneficiary the proffered wage in 2011 (even though it was not required to do so), it would have demonstrated its ability to pay the proffered wage for that year. Because the record shows that the petitioner paid the beneficiary less than the proffered wage in 2011, however, the AAO finds that the director correctly determined that the petitioner failed to demonstrate it ability to pay the proffered wage in 2011 based on the wages it actually paid the beneficiary. Also as discussed above, for purposes of determining its ability to pay the proffered wage, USCIS credits the petitioner for the amount it actually paid the beneficiary in 2011. Thus, the petitioner need only demonstrate its ability to pay the difference between the wages it actually paid the beneficiary in 2011 and the annual proffered wage. However, the evidence in the record of proceedings does not demonstrate the petitioner's ability to pay that difference.

Counsel also asserts that the director's failure to consider the income of one of the petitioner's shareholders in determining the petitioner's ability to pay the proffered wage "was arbitrary, and capricious – given too, that the petitioner is an S corporation." The record contains a copy of the 2011 personal, joint income tax return of the petitioner's two principal shareholders,[7] showing an adjusted gross income amount of $344,473.

Contrary to counsel's assertion, USCIS generally cannot consider the assets of a petitioning corporation's shareholders in determining its ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners and shareholders, who are not personally responsible for the corporation's debts and liabilities. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); *see also Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) ("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").

While S corporations are treated like partnerships for U.S. federal tax purposes, shareholders of S corporations, absent express personal guarantees, are not responsible for the corporation's debts and liabilities. *See* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations (accessed April 17, 2013). The AAO therefore finds that the director's disregard of the personal incomes of shareholders in determining the petitioner's ability to pay the proffered wage was not arbitrary and capricious, but rather, in accordance with long-standing immigration and corporate case law.

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[7] Based on the shareholder information provided in Schedule K of the petitioner's 2011 tax return, the petitioner has three shareholders. The shareholders appear to be related, as they each have the same last name, and two have the same first name, one being described as "Jr." The two principal shareholders appear to be the parents of the petitioner's president/remaining shareholder, who signed the petition and the labor certification. (The family name of the shareholders is spelled differently, however, on the tax returns of the shareholders and the petitioner, as compared to on the petition. The labor certification and the Forms G-28, Entries of Appearance, state the president's last name with both spellings.)

Finally, counsel asserts that the director, in determining the petitioner's ability to pay the proffered wage, failed to consider the totality of the circumstances in accordance with *Matter of Sonegawa*, 12 I&N Dec. at 612.

Counsel's final assertion is well-taken. As discussed above, 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 Sonegawa*, at 612. The petitioning entity in *Sonegawa* 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, however, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its 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.

Like the petitioner in *Sonegawa*, the petitioner in the instant case appears to have been doing business for more than 10 years, as the record shows it was incorporated in 1998. Unlike in *Sonegawa*, however, the petitioner has not established the historical growth of its business. The record contains only one annual tax return of the petitioner and little other financial information, preventing any meaningful, historical comparisons of its finances.

In the petition, which was filed on May 14, 2012, the petitioner stated that it employed six workers. In response to the director's request for evidence, however, it submitted copies of handwritten, 2011 W-2 forms of only five employees. It also submitted a copy of a handwritten IRS Form W-3 Transmittal of Wage and Tax Statements, which stated that it submitted only three W-2 forms to the IRS in 2011. The conflicting information in the petition, the W-2 forms and the W-3 form cast doubt on the true number of the petitioner's employees and the validity of the W-2 forms in the record. The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may also lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

Similarly, the petitioner's 2011 tax return shows total wages paid of $138,221, while the 2011 W-3 form reports total wages of $122,408.45. The differing wage amounts on the tax return and the W-3 form cast doubt on the true amount of wages the petitioner paid in 2011. *See Matter of Ho*, 19 I&N at 591-592. Moreover, the wage amounts on both the tax return and the W-3 form are less than the difference between the wages the petitioner paid the beneficiary in 2011 and the annual proffered wage, raising additional doubts about the petitioner's ability to pay the proffered wage. In addition, the petitioner has not identified any uncharacteristic losses or expenditures that prevented it from demonstrating its ability to pay the proffered wage, nor has it established an outstanding reputation in its industry. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has failed to demonstrate its continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.