



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF L- K.O., LLC

DATE: SEPT. 25, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a catering services business, seeks to employ the Beneficiary permanently in the United States as a marketing analyst for immigrant classification as an advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

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 9, 2014 denial, the issue in this case is whether or not the Petitioner has the ability to pay the proffered wage as of the priority date and continuing until the Beneficiary obtains lawful permanent residence.

In pertinent part, section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer 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, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on November 20, 2013. The proffered wage as stated on the ETA Form 9089 is \$49,700.00 per year. The ETA Form 9089 requires a Master's degree in Business Administration and states that the position requires 12 months of experience in the job offered.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record of proceeding shows that the Petitioner is structured as a C corporation. On the petition, the Petitioner claimed to have been established in 2011 and to currently employ 13 workers. According to the tax returns in the record, the Petitioner's fiscal year is based on the calendar year. On the ETA Form 9089, signed by the Beneficiary on June 21, 2014, the Beneficiary did not claim to have worked for the Petitioner.

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, 144 (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, 614-15 (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 record reflects that the

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<sup>1</sup> 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).

Petitioner began paying the Beneficiary on November 20, 2014, but states that she was not employed before this date. The record contains the Beneficiary's 2014 Form W-2, stating wages paid of \$4,000.00. The record also contains three paychecks the Petitioner issued to the Beneficiary for pay periods from February 16, 2015 to March 31, 2015.

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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 St. 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The Petitioner’s tax returns demonstrate its net income for 2013 and 2014, as shown in the table below.

- In 2013, the Form 1120 stated net income of \$20,372.00.
- In 2014, the Form 1120 stated net income of \$26,612.00.

Therefore, for 2013 and 2014, 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. The Petitioner’s tax returns demonstrate its end-of-year net current assets for 2013 and 2014, as shown in the table below.

- In 2013, the Form 1120 stated net current assets of \$13,323.00.
- In 2014, the Form 1120 stated net current assets of \$70,121.00.

Therefore, for 2013, the Petitioner did not have sufficient net current assets to pay the proffered wage. The Petitioner did have sufficient net current assets to pay the proffered wage for 2014.

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.

The record contains the Petitioner’s audited financial statement for the six month period ending June 30, 2014. We note that audited financial statements are acceptable forms of evidence under 8 C.F.R. § 204.5(g)(2) relating to the Petitioner’s ability to pay the proffered wage. However, these financial

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<sup>2</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron’s Educ. Series 2000).

statements only cover six months of the period of time in which the Petitioner must demonstrate its ability to pay the proffered wage. As stated above, the priority date of the instant petition is November 20, 2013. The Petitioner has demonstrated its ability to pay the Beneficiary's proffered wage in 2014, but not in 2013.

The Petitioner submitted its bank records from January 1, 2014 through July 31, 2014. The Petitioner's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the Petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the Petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the Petitioner's taxable income (income minus deductions) or the cash specified on Schedule L as noted above in determining the Petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns 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 *Sonegawa*, 12 I&N Dec. at 614-15. 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 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 a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Form I-140 indicates that the Petitioner has been in business since 2011 and that it employs 13 workers. We note that the Petitioner began paying the Beneficiary on November

20, 2014. As shown above, the Petitioner's 2013 tax return does not state sufficient amounts of net income or net current assets to demonstrate its ability to pay the Beneficiary's proffered wage for that year. The Petitioner has not demonstrated that 2013 was an uncharacteristic year or otherwise provided any evidence of unexpected business expenses during that year. The record does not contain evidence of the Petitioner's financial growth since it was established in 2011. The record does not contain any evidence of the Petitioner's reputation in the industry.

The Petitioner states that it employs 13 workers. However, the tax returns for 2013 show total wages paid to all workers in the amount of \$24,524.00 and no amount of officer compensation. For 2014, the tax returns show total wages paid to all workers in the amount of \$29,693.00 and no amount of officer compensation. The Beneficiary's proffered wage alone is \$49,700.00, almost twice the total amount of wages paid to all the Petitioner's workers in both years. 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). We sent the Petitioner a notice of derogatory information and request for evidence in which we requested that the Petitioner submit evidence pursuant to *Matter of Sonogawa*, 12 I&N Dec. at 614-15. The Petitioner did not submit any evidence that establishes its ability to pay the proffered wage based on a totality of the circumstances.

We note that the Petitioner cites an unpublished decision in which we held that a petitioner had established its ability to pay the proffered wage in the totality of the circumstances. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In addition, the decision the Petitioner cites involves a company in which its wages paid and net income demonstrated continued growth over a period of seven years. The Petitioner has not provided evidence that establishes a similar scenario of its financial ability to pay the Beneficiary's proffered wage.

Here, from a two-year comparison of tax returns submitted, the Petitioner's gross receipts slightly declined in 2014 from 2013, and its total wages paid only slightly increased. However, as noted above, the Petitioner's total wages paid of \$29,693 (2014) would not seem to account for its 13 claimed workers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The Petitioner did not submit tax returns for any prior years, which while not required based on the priority date, would have provided a longer tax history from which we could examine the Petitioner's totality of the circumstances. 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, 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 met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of L-K.O., LLC*, ID# 13035 (AAO Sept. 25, 2015)