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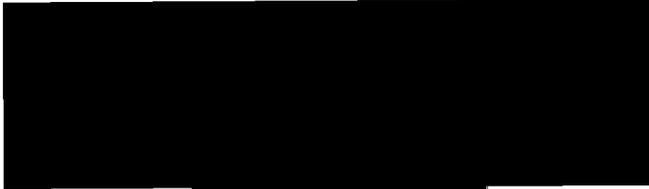
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



MAY 28 2010

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

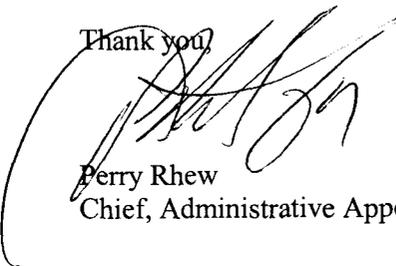
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a food processing company.¹ It seeks to employ the beneficiary permanently in the United States as a warehouse manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 April 14, 2009 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien Employment Certification, as certified

¹ The petitioner's correct corporate name is [REDACTED], but it does business under the name of [REDACTED]. The petitioner appropriately filed with the State of California a fictitious business name certificate for the name [REDACTED] is an active corporation according to the records of the California Secretary of State.

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$27.41 per hour, and \$41.11 per hour for overtime. The Form ETA 750 indicates that the beneficiary will work 40 hours per week, plus five hours of overtime which would yield an annual wage of \$57,012.80 without overtime,² and \$67,701.40 with overtime. The Form ETA 750 states that the position does not require any experience, training or education.

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 a C corporation. On the petition, the petitioner claimed to have been established in 1980, to have a gross annual income of \$4,705,400 and to currently employ 47 workers. According to the tax returns in the record, the petitioner's fiscal year operates on a calendar year. On the Form ETA 750B, signed by the beneficiary initially on December 18, 2003, and in amendments to the Form ETA 750 signed by the beneficiary on February 12, 2004, the beneficiary did not claim to have worked for the petitioner. The record contains, however, copies of W-2 Forms for the beneficiary which indicate that the beneficiary was employed by the petitioner in 2002, 2003, 2004, 2005, 2006 and 2007 and was paid the following wages:

- 2001 - No wages reported
- 2002 - \$19,236.79
- 2003 - \$18,204.41
- 2004 - \$19,436.39
- 2005 - \$19,307.48
- 2006 - \$19,114.42
- 2007 - \$18,811.41
- 2008 - \$21,105.94⁴

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later

² The director stated the wage as \$57,012 without calculation of the overtime wages.

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).

⁴ The petitioner issued W-2s to the beneficiary from 2002 to 2006 with an employer name of [REDACTED]. The 2007 and 2008 W-2s show the employer's name as [REDACTED]. The W-2s all show the same tax identification number and the petitioner submitted evidence on appeal that [REDACTED] does business as [REDACTED], so that the W-2 statements will be accepted.

based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the 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. Comm. 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner did, however, pay the beneficiary partial wages as noted above. The petitioner must establish the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage of \$67,701.40. The difference between the wages paid to the beneficiary and the proffered wage (\$67,701.40) is listed below for all relevant years.

- 2001 - \$67,701.40
- 2002 - \$48,464.61
- 2003 - \$49,496.99
- 2004 - \$48,265.01
- 2005 - \$48,393.92
- 2006 - \$48,586.98
- 2007 - \$48,889.99

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). 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.

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 [REDACTED] “[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.” [REDACTED] at [REDACTED] (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. The record before the director closed on October 11, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. The petitioner’s tax returns demonstrate its net income for all relevant years, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$1,155.00.
- In 2002, the Form 1120 stated net income of \$496.00.
- In 2003, the Form 1120 stated net income of (\$50,244.00).
- In 2004, the Form 1120 stated net income of \$4,245.00.
- In 2005, the Form 1120 stated net income of \$9,981.00.
- In 2006, the Form 1120 stated net income of \$8,302.00.
- In 2007, the Form 1120 stated net income of (\$122,277.00).
- In 2008, the Form 1120 stated net income of \$97,863.00.⁵

⁵ The petitioner submitted its 2008 Form 1120 on appeal.

Therefore, for the years 2001 through 2007, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner's 2008 net income would be sufficient 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 assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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 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 2001 through 2007 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$697,491.00.
- In 2002, the Form 1120 stated net current assets of \$710,055.00.
- In 2003, the Form 1120 stated net current assets of \$661,412.00.
- In 2004, the Form 1120 stated net current assets of \$669,214.00.
- In 2005, the Form 1120 stated net current assets of \$685,207.00.
- In 2006, the Form 1120 stated net current assets of \$671,954.00.
- In 2007, the Form 1120 stated net current assets of \$523,530.00.
- In 2008, the Form 1120 stated net current assets of \$621,472.00.

Therefore, for the years 2001 through 2008, the petitioner did have sufficient net current assets to pay the proffered wage.⁷ The petition must, accordingly, be approved.

⁶According 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.

⁷ The petitioner submitted unaudited financial statements in response to the director's request for evidence. As the statements were not audited in accordance with 8 C.F.R. § 204.5(g)(2), the director denied the petition. The tax returns submitted on appeal meet the regulatory requirements and thus overcome the deficiency.

The evidence submitted establishes 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.