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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

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 22 2010

IN RE: Petitioner: [redacted]

Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 landscape contractor. It seeks to employ the beneficiary permanently in the United States as a landscape gardener ("foreman"). 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 as the petitioner failed to submit any evidence. 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 August 20, 2008 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.

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

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.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on April 22, 1996 and to currently employ 14 workers. The Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $10.00 per hour which equates to $20,800 per year based on a 40-hour week. The petitioner requires five hours of overtime per week at $15.00 per hour which equates to an additional $3,500 per year. Therefore, the beneficiary's annual salary which includes five hours of mandatory overtime is $24,300.

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 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Further, the job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10).

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 beneficiary claimed on his Form ETA 750 that he was employed 40 hours per week by the petitioner as a foreman from June 2000 to the date that the labor certification was filed, April 30, 2001. The petitioner has not presented any evidence of the beneficiary's employment or evidence of wages paid. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any wages, from the April 27, 2001 priority date and onwards.

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*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I290B, 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).

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*, --- F. Supp. 2d. at *6 (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 116. "[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).

The record before the director closed on August 20, 2008 with the issuance of the director's denial. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. With the appeal, the petitioner provided the company's complete tax returns for 2001 through 2007. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2001, the petitioner's Form 1120S stated net income [2]of $36,971.
- In 2002, the petitioner's Form 1120S stated net income of $56,666.
- In 2003, the petitioner's Form 1120S stated net income of $11,242.
- In 2004, the petitioner's Form 1120S stated net income of $34,974.
- In 2005, the petitioner's Form 1120S stated net income of $31,637.
- In 2006, the petitioner's Form 1120S stated net income of $30,367.
- In 2007, the petitioner's Form 1120S stated net income of $362.

While the petitioner would be able to establish its ability to pay the proffered wage from 2001 through 2002, and again from 2004 through 2006, USCIS records indicate that the petitioner has filed two I-140 petitions, including the instant petition. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the respective priority date until each respective beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not established its ability to pay the proffered wage of $24,300 from its net income in 2003 and 2007. We are unable to determine from the record whether the petitioner could pay the respective wages of both sponsored workers from its net income for any of the above years. Therefore, the evidence does not reflect that the petitioner can pay the proffered wage of all sponsored workers for any of the years from 2001 through 2007.

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. 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 as shown in the table below.

- In 2001, the petitioner's Form 1120S stated net current assets of -$46,833.
- In 2002, the petitioner's Form 1120S stated net current assets of -$29,175.
- In 2003, the petitioner's Form 1120S stated net current assets of -$23,710.

[2] 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 23* (1997-2003) line 17e* (2004-2005) line 18* (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed as of August 2, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, alternative minimum tax items, deductions, other adjustments shown on its Schedule K for all the relevant years, the petitioner's net income is found on Schedule K of its tax return.

- In 2004, the petitioner's Form 1120S stated net current assets of -$17,838.
- In 2005, the petitioner's Form 1120S stated net current assets of -$10,994.
- In 2006, the petitioner's Form 1120S stated net current assets of -$114.
- In 2007, the petitioner's Form 1120S stated net current assets of -$10,141.

The petitioner's net current assets would not demonstrate the petitioner's ability to pay for the instant beneficiary or the second sponsored worker in any of the foregoing years.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the Form ETA 750 and the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage for the instant beneficiary or the second sponsored worker.

On appeal, counsel states that the Notice of Decision (NOD) was not preceded by a request for evidence (RFE) to allow the petitioner the opportunity to submit a rebuttal. However, according to the regulations, the director is not required to issue a RFE before denying a petition.

8 C.F.R. § 103.2(b)(1) states that a petitioner must demonstrate eligibility at time of filing:

> An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

If the application does not demonstrate eligibility, the director is not required to send a request for evidence. *See* 8 C.F.R. § 103.2(b)(8):

> . . .
>
> (ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

As the petitioner failed to submit all the required initial evidence, the director in his discretion denied the petition pursuant to the regulations and was not required to issue an RFE.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). 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 petitioner's tax returns have shown relatively low net income and negative net current assets for each year. The petitioner has not provided evidence of any occurrences that created an uncharacteristic business expenditures or losses. The petitioner must demonstrate that it can pay the proffered wage from the respective priority date until the beneficiary obtains permanent residence. The petitioner has additionally sponsored another worker and the petitioner must demonstrate that it can pay all of its sponsored workers from each respective priority date until each beneficiary obtains permanent residence. The petitioner has not provided its historical growth, its reputation within the landscaping business, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the ability to pay the proffered wage for the instant beneficiary, as well as pay the wage of the second sponsored worker.

Beyond the decision of the director, the petitioner has not established that the beneficiary met the other special requirements of the labor certification at the time of filing, April 30, 2001.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v United States*, 229 F Supp. 2d 1025, 1043 (E.D. Cal 2001), *aff'd*, 345 F.3d 683 (9 Cir. 2003); *see also* Soltane v. DOJ, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified 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 labor certification application was accepted on April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor

certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have "knowledge of some construction and keystone work, blue print reading, [be] responsible, [have] leadership skills, [be] reliable and dependable." It is also noted on Form ETA 750, item 17, that the beneficiary will supervise five employees.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, he represented that he was employed by the petitioner as a foreman from June 2000 to April 19, 2001, the date he signed Part B, Statement of Qualifications of Alien.

The petitioner must submit evidence that the beneficiary obtained the required special requirements stated in the job offered before April 30, 2001. The regulations at 8 C.F.R. § 204.5(g)(1) state in pertinent part that evidence relating to qualifying experience shall be in the form of letter(s) from the current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties. The petitioner has not provided a letter or any other evidence to show the beneficiary had the requisite special requirements at the time of filing the labor certification on April 30, 2001. Therefore, the petitioner did not to establish that the beneficiary had the required special requirements listed on Form ETA 750, item 15, before the priority date.

In conclusion, the petitioner has not established its continuing ability to pay the proffered wage and has not established that the beneficiary met the other special requirements of the labor certification at the time the labor certification was accepted for processing, April 30, 2001. Therefore, the petition may not be approved.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.