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



U.S. Citizenship
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Services

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DATE: **MAY 04 2011** Office: TEXAS SERVICE CENTER

FILE:



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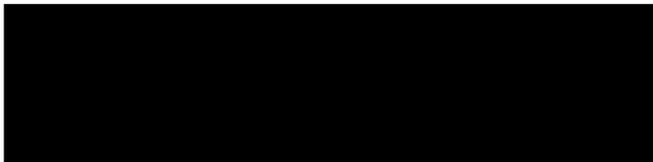
Petitioner:



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:



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, with a fee of \$630. 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a ranch. It seeks to employ the beneficiary permanently in the United States as a heavy equipment operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and 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 June 9, 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)(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 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 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 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 Form ETA 750 was accepted on March 25, 2005. The proffered wage as stated on the Form ETA 750 is \$17.34 per hour (\$36,067.00 per year). The Form ETA 750 states that the position requires two years experience in the job offered or in the related occupation of "assistant machine operator."

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 petitioner's tax records indicate that the petitioner is structured as a limited domestic partnership and files its tax returns on IRS Form 1065. On the petition, the petitioner claimed to have been established on December 1, 1995 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on October 12, 2005, the beneficiary claims to have been employed by the petitioner since October 1990.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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. The proffered wage is \$36,067.20. The record of proceeding contains copies of IRS Forms W-2 that were issued by the petitioner to a person named [REDACTED] as shown in the table below.

- In 2005, the IRS Form W-2 stated total wages of \$17,105.00 (a deficiency of \$18,962.20).
- In 2006, the IRS Form W-2 stated total wages of \$16,850.00 (a deficiency of \$19,217.20).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

- In 2007, the IRS Form W-2 stated total wages of \$17,275.00 (a deficiency of \$18,792.20).

However, the beneficiary in this matter is named [REDACTED], not [REDACTED], and the record is devoid of evidence establishing that these two names pertain to the beneficiary. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592. Accordingly, absent clarification in the record on this matter, the Forms W-2 will not be considered persuasive evidence of the petitioner's ability to pay the proffered wage.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the designated period, then 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*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner showing that it 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*, 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).

The record before the director closed on June 4, 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 due. The petitioner’s 2007 federal income tax return is the most recent return before the director for consideration. The petitioner’s tax returns stated its net income as detailed in the table below.

- In 2005, the petitioner’s Form 1065 stated net income of (\$194,706.00).²
- In 2006, the petitioner’s Form 1065 stated net income of (\$880,218.00).
- In 2007, the petitioner’s Form 1065 stated net income of (\$331,192.00).

Therefore, for the years 2006 and 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

² For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner’s Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed April 27, 2011) (indicating that Schedule K is a summary schedule of all partners’ shares of the partnership’s income, deductions, credits, etc.). In the instant case, the petitioner’s Schedules K have relevant entries and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 2006, the Form 1065 stated net current assets of (\$346,485.00).
- In 2007, the Form 1065 stated net current assets of (\$214,134.00).

Therefore, for the years 2006 and 2007, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 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.

On appeal, counsel asserts that the director's decision is based on an incorrect interpretation of the petitioner's financial records, and that the petitioner has provided evidence sufficient to show that it has the ability to pay the proffered wage. Counsel further asserts that USCIS must consider the totality of the circumstances in its determination of the petitioner's ability to pay the proffered wage pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also asserts that the general partners' assets should be considered in determining the petitioner's ability to pay the proffered wage.

A partnership consists of a general partner(s) and may also have limited partners. A general partner is liable for the partnership's total liabilities. As such, a general partner's assets may be utilized to show the ability to pay the proffered wage. However, a general partner's expenses and liabilities must also be examined in order to make a determination that its assets are truly available to pay the proffered wage. Conversely, a limited partner's liability is limited to his or her initial investment. The petitioner's tax returns indicate at Schedule B part 1 that the petitioner is a domestic limited partnership. As such, the petitioner has not demonstrated that the

³ 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.

limited partner's assets may be utilized to pay the proffered wage. Furthermore, the petitioner has failed to identify any liquefiable assets belonging to the general partners.

The petitioner submits as evidence a copy of the petitioner's unaudited balance sheets and profit and loss statements for 2005, 2006, and 2007. The petitioner also submitted a letter dated June 3, 2008 from [REDACTED] who stated that since 2005 he has used the above noted financial statements in connection with preparing the petitioner's federal income tax returns. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. As the financial statements are not audited, they are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Regardless, even if USCIS were to consider the unaudited financial statements, the statements are consistent with the tax returns in that they show negative net income and negative net current assets in 2006 and 2007.

Counsel asserts that the director erred in not taking into consideration the financial solvency of a general partner [REDACTED] in the limited partnership. Counsel submits as evidence on appeal unaudited profit and loss statements for [REDACTED] which lists its rental income and expenses and net income. Again, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. As noted above, the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Regardless, these unaudited statements only show net income through March 2007.

Counsel asserts that the petitioner is not obligated to show that it has paid the prevailing wage to the beneficiary, and is not required, prior to approval of the I-140 petition, to employ the beneficiary. Although the petitioner may not be obligated to demonstrate that it has paid the prevailing wage, it may establish that through the beneficiary's wages, and/or the petitioner's net income or its net current assets, it has the ability to pay the proffered wage since the priority date. It has not done so in this matter. Counsel also argues that the petitioner's total assets should be considered in evaluating its ability to pay the proffered wage. However, USCIS will not consider total assets that the petitioner uses in its business in evaluating its ability to pay the wage. Rather, as noted above, USCIS will consider current assets, balanced against current liabilities, in evaluating a petitioner's ability to pay the proffered wage.

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 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 Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* 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 *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.

Although inferred by counsel, reliance on the petitioner's gross receipts and/or wage expenses is misplaced. Showing that the petitioner's gross receipts or wages paid exceeded the proffered wage is insufficient. As noted above, USCIS relies on the petitioner's net income figure, as stated on the petitioner's tax returns, rather than the gross income. Similarly, the petitioner showing that it paid wages in excess of the proffered wage is insufficient.

Assessing the totality of the circumstances, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonogawa*. Counsel asserts that the petitioner has been in business since 1995, has experienced past growth, and has a reasonable expectation of future growth. Contrary to counsel's claim, the evidence shows negative net income and net current assets for 2006 (\$880,218.00 and \$346,485.00) and 2007 (\$331,192.00 and \$214,134.00). Further, counsel's claim is too speculative and the petitioner cannot rely upon uncertain future cash flows to establish its current ability to pay the proffered wage. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 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.

The petitioner has not established that the relevant years were uncharacteristically unprofitable or a difficult period for the petitioner's business. Although counsel claims that the petitioner's business suffered a loss in 2006, this has not been substantiated, does not explain the losses in 2007, and is not coupled with evidence establishing a return to profitability. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner has not established its reputation within the industry.

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

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary is qualified for the proffered position with two years of experience in the job offered or in a related occupation. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a heavy equipment operator. The petitioner submitted two employment letters from the petitioner in which [REDACTED] stated that the ranch employed the beneficiary from October 2000 to December 2002 as an assistant heavy machine operator; and from January 2003 to July 2007 (the date Mr. [REDACTED] signed the letter) the beneficiary was employed as a heavy machine operator. In contrast, the beneficiary, signed under penalty of perjury, the Form ETA 750 in which he indicated that he was employed by the petitioner from October 1990 to December 1992 as an assistant heavy machine operator; and from January 1993 to 2005, the date the beneficiary signed the Form ETA 750, he was employed as a heavy machine operator. Such evidence is self serving and insufficient to establish that the beneficiary possessed the necessary qualifications as of the priority date. There has been no independent documentation submitted to substantiate the petitioner's claims. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). Regardless, there has been no explanation given for the inconsistencies that exist between the petitioner's letters and the beneficiary's sworn statement. There is also no explanation for the inconsistency between the beneficiary's name and the name on the Forms W-2 purportedly representing wages paid to the beneficiary for past employment. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Accordingly, the petition will be denied for this additional reason.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 25, 2005. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

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 (9th 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 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 therefore dismissed.