



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 19 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



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 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 home improvement company. It seeks to employ the beneficiary permanently in the United States as a roofing supervisor. 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 May 29, 2009 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, 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 21, 2005. The proffered wage as stated on the Form ETA 750 is \$875.00 per week (\$45,500 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 C corporation. On the petition, the petitioner claimed to have been established in 2003, to have a gross annual income of \$726,939, and to currently employ “10 – 12” workers. According to the tax returns in the record, the petitioner’s fiscal year runs from October 1st to September 30th. On the Form ETA 750B, signed by the beneficiary on January 20, 2005, 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 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’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 (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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner did not submit any documentation to show wages paid to the beneficiary in 2005, 2006 or 2007.² The petitioner submitted a copy of a W-2 Form showing wages paid by it to the beneficiary

¹ 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).

² On appeal, and in response to a Notice of Derogatory Information (NDI) issued by the AAO, the petitioner submitted tax transcripts and tax returns in an attempt to establish that the beneficiary had earned money while employed by the petitioner. The documentation submitted, however, shows only business income earned by the beneficiary, but does not establish who paid the beneficiary.

in 2008 of \$60,002.02. That sum, if accepted as accurate, would state sufficient wages to pay the beneficiary's proffered wage. This issue will be addressed later in the decision.

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*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed 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 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. 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

Nothing establishes the petitioner paid the beneficiary any of these amounts. The tax returns/tax transcripts submitted by the beneficiary are, therefore, of little evidentiary value.

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).

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 April 14, 2009 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. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for years 2005 through 2007, as shown in the table below.

- In 2005, the Form 1120 stated net income of (\$1,644).
- In 2006, the Form 1120 stated net income of (\$66,440).
- In 2007, the Form 1120 stated net income of (\$21,285).

Therefore, for the years 2005, 2006 and 2007, the petitioner’s tax return did not state sufficient net income to pay the proffered wage.

On April 23, 2009, USCIS received a second response to the director’s March 20, 2009 RFE. That response was submitted by counsel for the petitioner and included tax returns in the petitioner’s name for years 2005, 2006 and 2007. A W-2 Form for 2008 was also provided which showed wages paid to the beneficiary by the petitioner of \$60,000.02. The second set of tax returns submitted in response to the RFE show net income as set forth in the table below:

- In 2005, the Form 1120 stated net income of \$118,536.
- In 2006, the Form 1120 stated net income of \$92,560.
- In 2007, the Form 1120 stated net income of \$83,738.

As can be seen, the tax returns provided by counsel in response to the director’s RFE provide substantially different net income figures than those provided by the petitioner. As a result, a NDI was issued by the AAO on appeal. In the NDI, counsel was informed of the discrepancies and asked, in part, to provide certified copies of the petitioner’s tax returns from the IRS or certified IRS tax transcripts. Counsel responded to the NDI but did not provide the requested information stating that the information was unavailable. Counsel was asked to resolve the inconsistencies between the two sets of tax returns provided, but he offered no explanation. As such, neither set of tax returns will be considered by the AAO in determining the petitioner’s ability to pay the proffered wage of the beneficiary. 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 (BIA 1988). The petitioner has failed to submit credible financial documentation to establish its ability to pay the proffered wage. For this reason, the petition shall be denied.

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.³ 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, provided by the petitioner in response to the director's RFE and received by the director on April 14, 2009, demonstrate its end-of-year net current assets for years 2005, 2006 and 2007 as shown in the table below.

- In 2005, the Form 1120 stated net current assets of \$7,747.
- In 2006, the Form 1120 stated net current assets of (\$49,849).
- In 2007, the Form 1120 stated net current assets of (\$331).

Therefore, for the years 2005, 2006 and 2007, the tax returns supplied by the petitioner in response to the director's RFE would not state sufficient net current assets to pay the proffered wage.

Again, as stated above, on April 23, 2009, USCIS received a second response to the director's March 20, 2009 RFE. That response was submitted by counsel for the petitioner and included tax returns in the petitioner's name for years 2005, 2006 and 2007. The second set of tax returns submitted showed net current assets as set forth in the table below:

- In 2005, the Form 1120 stated net current assets of \$103,269.
- In 2006, the Form 1120 stated net current assets of \$167,736.
- In 2007, the Form 1120 stated net current assets of \$94,810.

The tax returns provided by counsel in response to the director's RFE provide substantially different net current asset figures than those provided by the petitioner. For the reasons set forth above, as

³According 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.

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the petitioner failed to resolve the inconsistencies in the evidence, neither set of tax returns will be considered by the AAO in determining the petitioner's ability to pay the proffered wage of the beneficiary. The petitioner has failed to submit credible financial documentation to establish its ability 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 erred in considering documentation submitted in support of the Form I-140 petition and that the petitioner has established its ability to pay the proffered wage from the priority date onward.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner 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.

The petitioner submitted a letter from its accountant dated August 13, 2007 which states simply that the accountant believes that the petitioner has the ability to pay the proffered wage based on the accountant's familiarity with the petitioner's business and the accountant's 23 years of experience. The accountant, however, failed to state the basis of these conclusions or provide any documentation in support of the conclusions. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner provided, as noted above, a copy of a W-2 Form for 2008 showing wages paid to the beneficiary by the petitioner in the amount of \$60,000.02. The petitioner was asked in the AAO's NDI to provide IRS verified copies of any W-2 Forms. The petitioner did not provide such verification. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Based upon the material inconsistencies in the record concerning the petitioner's tax returns, and the petitioner's failure to provide verified W-2 Forms or any of its verified taxes from the IRS, the 2008 W-2 Form submitted will not be considered in determining the petitioner's ability to pay the proffered wage. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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

(Reg'l Comm'r 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 has failed to provide credible documentation in support of its ability to pay the proffered wage of the beneficiary. Counsel has provided copies of tax returns which are materially different from tax returns provided by the petitioner and, despite a request by the AAO to explain those inconsistencies, failed to offer any explanation. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). As the evidence is in question, and the petitioner has failed to resolve these inconsistencies, the AAO cannot determine that the petitioner can pay the proffered wage, or that *Sonegawa* should be positively applied. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward. 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.

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.