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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

PUBLIC COPY



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FILE:



Office: TEXAS SERVICE CENTER Date:

MAY 25 2010

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, with a fee of \$585. 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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA 9089), approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to establish ability to pay the proffered wages to the beneficiaries of the approved and pending petitions including the instant beneficiary as of the priority date and to the present.

The record shows that the appeal is properly and timely filed, 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.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8

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).

C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. 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 the instant case, the ETA Form 9089 was accepted by the DOL on January 23, 2007. The proffered wage as stated on the ETA Form 9089 is \$75,400 per year. On the petition, the petitioner claims that it has been established in 2002, to have a gross annual income of \$1,620,855, to have a net annual income of \$175,847, and to currently employ 30 workers.

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 did not claim to have worked for the petitioner and the petitioner did not submit any documentary evidence such as W-2 or 1099 forms to demonstrate that the petitioner hired and paid the beneficiary. The petitioner submitted the beneficiary's paystubs, W-2 form and individual tax return for 2006 showing that the beneficiary was paid \$45,000 in 2006 by AVCO Consulting Inc. However, the compensation paid by another corporation cannot establish the petitioner's ability to pay the beneficiary the proffered wage. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage as of the priority date through the examination of wages already paid to the beneficiary. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the instant beneficiary the proffered wage from 2007 onward.

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.

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.² 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 record contains the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation Income Tax Return, for 2005 through 2007. The tax returns show that the petitioner is structured as an S corporation and its fiscal year is based on the calendar year. However, the petitioner's tax returns for 2005 and 2006 are not necessarily dispositive since the priority date in the instant case is January 23, 2007. The petitioner's 2007 tax return shows that the petitioner had net income³ of \$196,330 and net current assets of \$378,939. The petitioner's 2007 tax return appears that the petitioner had sufficient net current assets or net income to pay the instant beneficiary the proffered wage of \$75,400 in 2007.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

²According 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.

³ 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 18 (2007) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on May 12, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

USCIS records show that the petitioner filed 22 I-140 immigrant petitions (including the instant petition) and 134 I-129 nonimmigrant petitions. Of the 22 I-140 immigrant petitions, 17 I-140 immigrant petitions were approved⁴ by USCIS for which the petitioner is obligated to pay 17

⁴ USCIS records show that the 17 approved immigrant petitions are as follows:

- [REDACTED] filed on August 31, 2006 with the priority date of June 8, 2006, and approved on September 27, 2006. The beneficiary's I-485 adjustment of status application was pending with USCIS as of November 12, 2009.
- [REDACTED] filed on November 21, 2006 with the priority date of March 16, 2006, and approved on February 8, 2007. The beneficiary was adjusted to lawful permanent resident status on August 2, 2008.
- [REDACTED] filed on November 21, 2006 with the priority date of April 25, 2003, and approved on May 24, 2007. The beneficiary was adjusted to lawful permanent resident status on April 15, 2008.
- [REDACTED] filed on December 6, 2006 with the priority date of September 25, 2006, and approved on October 4, 2007.
- [REDACTED] filed on January 26, 2007 with the priority date of January 23, 2006, and approved on July 26, 2007. The beneficiary's I-485 adjustment of status application was pending with USCIS as of March 24, 2009.
- [REDACTED] filed on February 26, 2007 with the priority date of June 8, 2006, and approved on March 6, 2007.
- [REDACTED] filed on May 31, 2007 with the priority date of January 13, 2007, and approved on June 29, 2007. The beneficiary was adjusted to lawful permanent resident status on November 6, 2009.
- [REDACTED] filed on July 6, 2007 with the priority date of January 27, 2006, and approved on November 21, 2008. The beneficiary's I-485 adjustment of status application was pending with USCIS as of May 9, 2009.
- [REDACTED] filed on July 10, 2007 with the priority date of June 8, 2006, and approved on August 10, 2009.
- [REDACTED] filed on July 11, 2007 with the priority date of January 23, 2006, and approved on February 9, 2008. The beneficiary's I-485 adjustment of status application was pending with USCIS as of July 6, 2009.
- [REDACTED] filed on July 11, 2007 with the priority date of March 17, 2006, and approved on January 10, 2008. The beneficiary's I-485 adjustment of status application was pending with USCIS as of March 29, 2010.
- [REDACTED] filed on July 12, 2007 with the priority date of January 29, 2007, and approved on March 7, 2008. The beneficiary's I-485 adjustment of status application was pending with USCIS as of June 8, 2009.
- [REDACTED] filed on July 20, 2007 with the priority date of December 11, 2006, and approved on April 26, 2008. The beneficiary's I-485 adjustment of status application was pending with USCIS as of May 5, 2009.
- [REDACTED] filed on July 28, 2007 with the priority date of February 24, 2007, and approved on May 16, 2008. The beneficiary's I-485 adjustment of status application was pending with USCIS as of April 22, 2010.

proffered wages in 2007, 15 in 2008 and 10 in 2009 as well as H-1B employees in addition to the instant beneficiary. Therefore, the petitioner must establish the ability to pay 18 proffered wages in 2007, 16 proffered wages in 2008 and 11 proffered wages in 2009 in the instant case.

In response to the director's request for evidence and on appeal, the petitioner argues that it paid partial proffered wages to some of the approved beneficiaries which would establish the petitioner's ability to pay the proffered wages through the examination of wages already paid to the beneficiaries. The record contains copies of 2007 W-2 forms for some of the approved beneficiaries. These W-2 forms show that the petitioner paid nine of the approved beneficiaries a total of \$565,541.42 in 2007 and thus the petitioner must demonstrate that it had sufficient funds to pay the difference of \$143,499.58 in 2007 between wages actually paid the nine approved beneficiaries and the proffered wages.⁵ The petitioner did not submit any documentary evidence showing that the petitioner paid the other eight approved beneficiaries. The petitioner must demonstrate that it had additional net income or net current assets to pay these eight beneficiaries the full proffered wages of \$633,340 in 2007. Therefore, the petitioner must demonstrate that it had at least net income or net current assets of \$776,839.58 to pay the proffered wages for the approved beneficiaries in 2007 before it establishes the ability to pay the instant beneficiary the proffered wage of \$75,400 that year.

As previously discussed, the petitioner had net income of \$196,330 and net current assets of \$378,939 in 2007. The petitioner's net income or net current assets in 2007 were insufficient to pay the proffered wages and the differences between wages actually paid to the beneficiaries and the proffered wages of \$776,839.58 for those 17 beneficiaries of the approved petitions. The petitioner failed to establish ability to pay the proffered wages to the approved beneficiaries in 2007 and also failed to establish ability to pay the instant beneficiary the proffered wage of \$75,400 in 2007, the year of the priority date in the instant case.

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- [REDACTED] filed on February 4, 2008 with the priority date of May 12, 2007, and approved on July 28, 2008.
 - [REDACTED] filed on February 14, 2008 with the priority date of May 13, 2007, and approved on July 15, 2008.
 - [REDACTED] filed on February 19, 2008 with the priority date of May 11, 2007, and approved on August 13, 2008.

⁵ The submitted W-2 forms show that in 2007 the petitioner paid [REDACTED] \$69,550, [REDACTED] \$61,300, [REDACTED] \$59,386.20, [REDACTED] \$76,550, [REDACTED] \$61,806, [REDACTED] \$40,700, [REDACTED] \$71,700, [REDACTED] \$58,049.22 and [REDACTED] \$66,500, and their proffered wages are \$87,381, \$62,171, \$62,171, \$87,381, \$75,400, \$87,381 \$81,578 \$81,578 and \$84,000 respectively. The petitioner also confirms that the proffered wages are \$87,381 for [REDACTED] \$81,578 for [REDACTED] and \$75,400 for [REDACTED]. The AAO assumes that the petitioner offered the same rate of proffered wage as the one for the instant beneficiary to [REDACTED] for whom the petitioner did not provide proffered wage information.

The petitioner prorated the proffered wages for the portion of the year that occurred after the priority date when it calculated the differences between wages actually paid to the beneficiaries of the approved petitions. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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

The record does not contain documentary evidence to demonstrate that the petitioner had sufficient net income or net current assets to pay all proffered wages in 2008 onward. Without regulatory-prescribed evidence to demonstrate that the petitioner paid the full proffered wages to the approved beneficiaries and the instant beneficiary or that the petitioner had sufficient net income or net current assets to pay all these proffered wages, the AAO cannot determine that the petitioner has established continuing ability to pay all proffered wages including the proffered wage for the instant beneficiary as of the priority date and continue to the present. Therefore, the petition cannot be approved. Accordingly, the director's March 4, 2008 decision is affirmed.

Beyond the director's decision, the AAO has identified additional grounds of ineligibility. 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).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree

followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on July 12, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a Bachelor's degree in computer science or engineering is the minimum level of education required. Line 6 reflects that the proffered position requires 60 months (five years) of experience in the job offered. Line 7 reflects that no alternate field of study is acceptable. Line 8 reflects that an alternate combination of education and experience is acceptable and Lines 8s indicate the acceptable alternate combination as follows: Master's degree plus two years of experience. Line 9 reflects that a foreign educational equivalent is

acceptable. However, Line 14 further provides following specific skills or other requirements: "In lieu of a 4 year bachelor's degree, will accept a three year foreign degree in Computer Science or Engineering and a one-year post graduate diploma."

The plain language on the ETA Form 9089 clearly indicates that the educational requirement of the proffered position may be met with a three-year foreign degree in computer science or engineering plus a one-year post graduate diploma, and thus, the job offer portion of the ETA Form 9089 does not require a U.S. master's degree or bachelor's degree as the minimum educational requirement for the proffered position. Therefore, the petition cannot be approved for the requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. In this matter, the appropriate remedy would be to file another petition for classification as a skilled worker pursuant to section 203(b)(3)(i) of the Act.

The evidence submitted does not establish that the ETA Form 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the petition cannot be approved for the classification sought.

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.