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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

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FILE:

LIN-07-183-51974

Office: NEBRASKA SERVICE CENTER

Date: JUL 01 2009

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

J. F. Grissom
John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 computer development and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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. As required by statute, the petition was accompanied by certification from the Department of Labor. 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.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, the petitioner has not overcome the director's valid concerns.

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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 22, 2005. The proffered wage as stated on the Form ETA 750 is \$84,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1999, a gross annual income of "\$5 Million +," a net income of "Enough to Pay Alien's Salary" and 60 employees. In support of the petition, the petitioner submitted its 2005 amended Form 1120S, Internal Revenue Service (IRS) U.S. Income Tax Returns for an S Corporation.

On November 15, 2007, the director issued a request for additional evidence, noting that the petitioner had filed petitions for multiple beneficiaries. The director advised that the petitioner's net income was not consistently represented with these petitions. The director requested that the petitioner submit a transcript of account from the IRS. The director also requested that the petitioner

submit a list of all Form I-140 petitions filed with U.S. Citizenship and Immigration Services (USCIS).

In response, the petitioner asserted that it had the ability to pay the proffered wage and that it had paid the beneficiary \$77,174 through November 30, 2007. The petitioner advised that it wished to withdraw eight petitions it had filed for other beneficiaries and that 19 petitions remain pending. The petitioner relied on bank statements and credit lines in addition to the 2005 tax return previously submitted and its 2006 tax return. The petitioner further stated that it has assets in India that it is ready, able and willing to invest. The petitioner submitted its transcript of account for 2005 confirming the information in the amended 2005 tax return.

The tax returns reflect the following information for the following years:

| | 2005 | 2006 |
|---------------------|-------------|-------------|
| Net income | \$110,550 | \$128,702 |
| Current Assets | \$74,780 | \$86,602 |
| Current Liabilities | \$220,000 | \$377,686 |
| Net current assets | (\$145,220) | (\$291,084) |

In addition, the petitioner submitted Forms W-2 for the beneficiary reflecting that the petitioner paid the beneficiary \$37,960 in 2005 and \$59,969.41 in 2006. Both Forms W-2 are issued to the beneficiary at an address in Washington state. The petitioner is located in Delaware.¹

The director concluded that the petitioner's credit line and bank statements were not persuasive and questioned whether the assets in India could be easily liquidated. The director further asserted that the petitioner had not fully complied with the request for a list of all immigrant petitions filed by the petitioner. The director explained that the petitioner had filed 58 such petitions and had withdrawn only eight.² Even considering the list supplied by the petitioner, the director noted that the difference between the wages paid to those beneficiaries and the proffered wage for those beneficiaries was far more than the petitioner's net income.

On appeal, counsel makes the following assertions: (1) the original tax returns submitted reflect sufficient net income to pay the difference between wages paid and the proffered wage for this beneficiary; (2) new tax returns prepared using "accrual-basis accounting" reflect a net income of \$405,672 in 2005 and \$690,405 in 2007 (but only \$35,798 in 2006); (3) payments to subcontractors

¹ The Washington Secretary of State's website, http://www.secstate.wa.gov/corps/corps_search.aspx (accessed May 14, 2009 and incorporated into the record of proceedings), does not reflect that the petitioner is registered to do business in that state.

² Our review of USCIS records reveals that the petitioner has filed 449 immigrant and nonimmigrant petitions since January 1, 2005, although we acknowledge that this figure includes some petitions for the same individual filed as renewals or duplicates. As stated above, the petitioner only claimed to employ 60 employees when it filed the instant petition.

would be available to pay the proffered wage; (4) the petitioner's bank statements, credit line and ability to invest new funds should be considered; (5) the petitioner can be expected to continue to grow at the rate projected for the information technology field by the U.S. Bureau of Labor Statistics, 68 percent, and in fact, has shown a consistent increase in revenue and wages paid and (6) the petitioner's overall financial situation warrants a finding that the petitioner has the ability to pay the proffered wage pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l. Comm'r. 1967).

The petitioner submits previously submitted documents and unsigned Forms 1120S purportedly prepared using the accrual method and a Form W-2 issued to the beneficiary for 2007. The Form W-2 purports to document that the petitioner paid the beneficiary \$71,629.10. This Form W-2, issued to the beneficiary at a Washington State address, is inconsistent with the pay stub purporting to document that the petitioner had paid the beneficiary year to date wages of \$77,174 through November 30, 2007.

Review of Evidence Relating to This Beneficiary

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), USCIS will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 claims to have employed and paid the beneficiary \$37,960 in 2005, \$59,969.41 in 2006 and at least \$71,629.10 in 2007.

As stated above, the petitioner issued the Forms W-2 to the beneficiary at a Washington State address even though the petitioner is located in Delaware and the record contains no evidence that the petitioner is registered to do business in Washington or any contracts to subcontract employees to a business in Washington. In fact, the nature of the petitioner's business is unclear as it appears that the petitioner both contracts its employees out to other employers as well as spending approximately \$1,000,000 per year hiring its own subcontractors. Moreover, the Form W-2 for 2007 submitted on appeal is inconsistent with the November 30, 2007 pay statement, which showed a larger wage amount. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The petitioner has not resolved these inconsistencies.

Even if we accept the amounts on the Forms W-2 as credible despite the beneficiary's residence in Washington State and the inconsistency between the November 30, 2007 pay stub and the 2007 Form W-2, the petitioner paid the beneficiary \$46,040, \$24,031 and \$12,371 less than the proffered wage in 2005 through 2007.

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *River Street Donut, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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 the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

As acknowledged by the director, the petitioner's net income is sufficient to cover the difference between the proffered wage and the wages purportedly paid to the beneficiary. The petitioner, however, must demonstrate its ability to pay the proffered wage for all of the beneficiaries for whom it has petitioned with a similar priority date. To hold otherwise would lead to the untenable result that a company could utilize the same evidence to show its ability to pay ten different beneficiaries

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

whose petitions have the same or similar priority dates and obtain approval of all ten petitions despite having the ability to pay only one of them.

Accrual Accounting Based Tax Returns

On appeal, the petitioner submits unsigned tax returns containing very different net income and net current assets from the previously submitted returns and the transcripts of account provided by the IRS. Specifically, these amended but unsigned returns provide:

| | 2005 | 2006 | 2007 |
|---------------------|-----------|------------|-----------|
| Net income | \$405,672 | \$35,798 | \$690,405 |
| Current Assets | \$490,730 | \$376,429 | \$946,926 |
| Current Liabilities | \$340,978 | \$465,295 | \$511,805 |
| Net current assets | \$149,752 | (\$88,866) | \$435,121 |

On appeal, counsel does not contest the director's finding that the petitioner must demonstrate its ability to pay \$477,607.89 in 2005 and \$380,207.52 in 2006, the difference between the proffered wage and the wages paid in those years to the nine beneficiaries acknowledged by the petitioner in response to the director's request for additional evidence. The petitioner's small net income and negative net current assets in 2006 cannot demonstrate the petitioner's ability to pay all of the proffered wages during that year.

Moreover, the petitioner initially reported income when it was received, consistent with the cash convention, but has amended the tax returns to include income earned during a given fiscal year but not received during that year, which would be consistent with an accrual accounting method. The petitioner's choice of accounting methods has attributed income to various years as appropriate, and those amounts may not now be shifted to other years as convenient to the petitioner's present purpose. Changing from the cash method to the accrual method may change the year-to-year distribution of the petitioner's current assets, but the petitioner has not satisfactorily demonstrated why changing from the cash to accrual method would make available tens of thousands of dollars that would otherwise not have appeared in any year.

The petitioner has presented two vastly different pictures of its net income and net current assets, with no documentation to show why the second unsigned version is more credible than the first, which has been filed with the IRS as demonstrated by the transcript of account. As stated above, 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 591-92. The record does not resolve these inconsistencies.

In light of the above, the petitioner has not demonstrated that its net income or net current assets are sufficient to pay the difference between the wages paid and the proffered wage for this beneficiary and the nine other beneficiaries documented by the petitioner. Moreover, the petitioner has not

contested the director's finding that the petitioner actually filed far more petitions than the nine it documented in response to the director's request for additional evidence.

Payments to Subcontractors

The beneficiary in the matter before us and several of the other beneficiaries are already working for the petitioner. The petitioner has not explained how the beneficiaries who are already working for the petitioner will replace any subcontractors. Thus, the petitioner has not demonstrated that the adjustment of status of this beneficiary and the other beneficiaries already working for the petitioner will make subcontractor wages available to pay their proffered wage.

Bank Statements, Credit Line and Foreign Assets

Counsel's reliance on the balances in the petitioner's 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. Moreover, funds expended in one year to pay the proffered wage of all of the beneficiaries would no longer be available to pay those beneficiaries in subsequent years. Finally, 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 cash specified on Schedule L considered above in determining the petitioner's net current assets. Cash assets must be balanced against the petitioner's current liabilities.

Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) for the proposition that the petitioner's line of credit should be considered. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church's ability to pay the proffered wage. Here, counsel is asserting that USCIS should treat the petitioner's line of credit as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the line of credit.

The petitioner's line of credit will not be considered for two reasons. First, since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date

after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l. Comm'r. 1977).

On appeal, counsel does not attempt to address the director's concern that the petitioner had not demonstrated that its assets in India could be easily liquidated. According to a table of the petitioner's interest in the Indian company, the petitioner's interest is 3,100,000 Indian Rupees or \$65,085.60.⁴ Much of the company's worth is land, which is not a current or liquid asset that is easily made available to pay the proffered wage.

Thus, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

Business Growth and the Petitioner's Overall Financial Situation

As stated above, counsel asserts that the petitioner can be expected to grow "in correlation" to the 68 percent growth rate projected by the U.S. Bureau of Labor Statistics for the entire information technology industry. Counsel further asserts that the U.S. Department of Labor's website provides: "America continues to suffer from a shortage of qualified IT workers." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner provides no evidence to support these assertions.

Regardless, we are not persuaded that an individual company can be expected to grow at the same rate as the industry. For example, some growth may also occur through the appearance of new companies and not every company will be as successful as its competitors.

Matter of Sonogawa, 12 I&N Dec. at 612, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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

⁴ According to www.oanda.com/convert/classic (accessed May 21, 2009 and incorporated into the record of proceeding).

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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2005 and 2006 were uncharacteristically unprofitable years for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage of the beneficiary in that matter before us or the many beneficiaries with similar priority dates during 2005 or subsequently. Therefore, the petitioner has not established that it 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.