

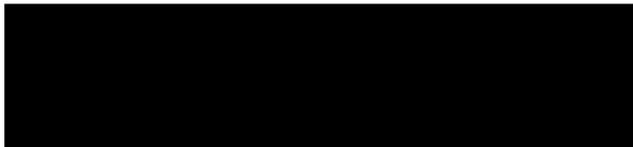
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B5



DATE: FEB 22 2012 OFFICE: TEXAS SERVICE CENTER

FILE:

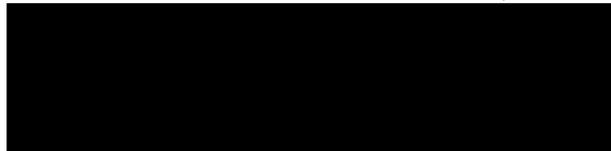


IN RE: Petitioner:
Beneficiary:



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:

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The petitioner filed a motion to reopen and to reconsider the AAO's decision. The motion will be granted, and the petition will be approved.

The petitioner is an IT consulting business. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is January 11, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The petitioner filed the petition with U.S. Citizenship and Immigration Services (USCIS) on April 26, 2007. The director denied the petition on June 1, 2007. The decision concludes that the petitioner failed to establish its ability to pay the proffered wage, and that the petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position as set forth on the labor certification.

The petitioner appealed the decision to the AAO on July 2, 2007. The AAO dismissed the appeal on March 25, 2010. The AAO concurred with the director that the petitioner failed to establish its ability to pay the proffered wage. The AAO considered the years 2005, 2006, 2007, 2008 and 2009, and concluded that the petitioner failed to establish its ability to pay the proffered wage for 2005 and 2006. The AAO decision also withdrew the director's conclusion that the beneficiary did not meet the minimum educational requirements of the offered position.

The petitioner timely filed the instant motion on April 27, 2010. On motion, the petitioner argues that, considering the totality of the circumstances, it has the ability to pay the proffered wage. Specifically, the petitioner points to its gross income, net income, payroll expenses, number of employees, and years in business establish its ability to pay the proffered wage.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.2(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. §

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

103.2(a)(3). A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.2(a)(3). In this case, the brief and supporting documentation submitted on motion satisfied the requirements of a motion to reopen and a motion to reconsider. Accordingly, at issue on motion is whether the petitioner possessed the ability to pay the proffered wage in 2005 and 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). In evaluating whether a job offer is realistic, 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).

The regulation 8 C.F.R. § 204.5(g)(2) states:

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 proffered wage stated on the labor certification is \$70,000 per year. On the petition, the petitioner claimed to have a gross annual income of \$7 million and to employ 75 workers. According to the tax returns in the record, the petitioner is structured as a C corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, USCIS will examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary on December 29, 2004, the beneficiary did not claim to have worked for the petitioner. The record contains the beneficiary's Forms W-2, Wage and Tax Statement, for 2006, which states that the petitioner paid the beneficiary a salary of \$62,458, or \$7,542 less than the proffered wage. Therefore, the petitioner must establish its ability to pay the full \$70,000 proffered wage in 2005 and the \$7,542 difference between the actual wage paid and the

proffered wage in 2006. In addition, as is discussed in more detail below, the petitioner must also establish its ability to pay the proffered wage for I-140 petitions filed on behalf of other beneficiaries during this time.

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). 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 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 petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2005, the Form 1120 stated net income of \$152,556.
- In 2006, the Form 1120 stated net income of \$2,340,634.

Therefore, for 2005 and 2006, the petitioner had sufficient net income to pay the proffered wage.²

However, according to USCIS records, the petitioner has filed over 20 I-140 petitions on behalf of other beneficiaries. Therefore, the petitioner must establish that it has had the ability to pay the combined proffered wages to all of the beneficiaries of its pending petitions. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977).

In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary, and analyze the petitioner’s ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal.³ In addition, USCIS will not consider the petitioner’s ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

² If the petitioner’s net income is not sufficient to establish ability to pay the proffered wage, USCIS will then review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities and a calculated using Schedule L of IRS Form 1120. The petitioner’s tax returns demonstrate its end-of-year net current assets was -\$120,155 in 2005 and -\$872,654 in 2006. Therefore, for 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

³ On motion, counsel claims that the petitioner need only show the ability to pay the proffered wage of other petitions filed on or after the priority date of the instant petition. This is incorrect. The petitioner is obligated to establish its ability to pay the proffered wage from the priority date until each beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Accordingly, the petitioner must establish the ability to pay the proffered wage for any petitions filed prior to the priority date of the instant petition until they are denied, withdrawn or the beneficiary obtains lawful permanent residence.

In order to calculate whether the petitioner has sufficient net income and net current assets, the record must contain the name of each beneficiary, the priority date and proffered wage of each petition, the wage paid to each beneficiary for each year in question, the date any petition has been withdrawn or denied, and the date any beneficiary has obtained lawful permanent residence.

The record of proceeding in this case does not contain the information necessary to determine the total proffered wage that the petitioner must be able to pay or the wages paid to the other beneficiaries. However, in 2006, given the fact that the petitioner paid the beneficiary a salary of only \$7,542 less than the proffered wage, and had net income of \$2,340,634, the AAO is satisfied that the petitioner has the ability to pay the additional beneficiaries, despite the lack of evidence described above. In 2005, the petitioner did not pay the beneficiary any wages, and had net income of only \$152,556. Therefore, for 2005, the petitioner has not established its ability to pay the proffered wage for the beneficiary and the proffered wages to the beneficiaries of the other petitions.

USCIS may also 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 *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.

In the instant case, the petitioner's tax returns state that it was incorporated as a C corporation in 1993. The petitioner's gross sales in 2005 were almost \$9 million. In 2005, the petitioner compensated its officers \$411,731, had a payroll of \$649,753, and paid subcontractors almost \$1.5 million. Based on the longevity and the magnitude of the petitioner's operations, and assessing the totality of the circumstances in this case, it is concluded that, on motion, the petitioner has established that it had the ability to pay the beneficiary the proffered wage from 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 sustained that burden.

ORDER: The motion to reopen and reconsider is granted. The petition is approved.