



U.S. Citizenship
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Office: NEBRASKA SERVICE CENTER

Date:

AUG 10 2009

IN RE:

Petitioner:

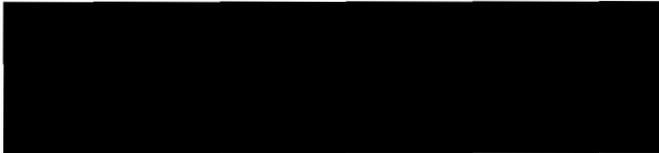
Beneficiary:



PETITION:

Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home construction firm. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. As required by statute, an ETA Form 9089, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence contends that the petitioner has demonstrated its ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on August 16, 2005. The proffered wage as stated on the ETA Form 9089 is \$12.78 per hour or \$26,582.40 per year. Part K of the ETA Form 9089 indicates that the beneficiary has worked for the petitioner since November 1, 2002.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on September 25, 2006, it is claimed that the petitioner was established in 1980, claims an annual gross income of over \$400,000, an annual net income of \$117,032 and currently employs four workers.

In support of its continuing financial ability to pay the certified wage of \$26,582.40 per year, the petitioner provided a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2005. Its net income is reported as \$14,406.² Schedule L reflects the petitioner's current assets and current liabilities. Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets. In this case for 2005, its current assets were \$16,297 and its current liabilities of \$5,980 yielded net current assets of \$10,317.

Although requested to provide the first four pages of its 2006 federal income tax return, audited financial statement or annual report, the petitioner responded that they were "on extension." It provided Schedule C of the beneficiary's individual income tax return for 2006. That reflected that the beneficiary operated his own construction business and reported gross receipts or sales of \$27,040. However, it did not show who paid this money to the beneficiary through a Form

² 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. 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 17e (2003) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

1099 or any other documentation. Accordingly, the beneficiary's tax return would not evidence that the petitioner paid him these wages.

The director denied the petition on January 29, 2008. The director concluded that neither the petitioner's net income of \$14,406, nor its net current assets of \$10,317 were sufficient to pay the proffered salary of \$26,582.40.

On appeal, counsel claims that USCIS overlooked monies paid to the beneficiary on a regular basis by the petitioner. Counsel submits copies of negotiated checks drawn on the petitioner's business payable to the beneficiary. For 2006, they total \$36,065 and for 2007, they total \$41,747.03.

The record reflects that the director did not consider this evidence because it was not submitted until the appeal. Further, the AAO would find this evidence more persuasive of the petitioner's ability to pay the proffered wage in these two years if they were accompanied by first-hand documentation from the petitioner that they: 1) represented payment for cabinet maker services rendered by the beneficiary and not for some other debt; and 2) if the total of \$41,747.03 for 2006 paid to the beneficiary was somehow reconciled with the \$27,040 declared by the beneficiary as his 2006 gross receipts or sales. Further, the priority date is in 2005. Even if these amounts paid to the beneficiary demonstrated the petitioner's ability to pay the proffered wage, the ability to pay has not been established as of the priority date as required by the regulation at 8 C.F.R. § 204.5(g)(2). In 2005, as noted by the director, neither the petitioner's net income nor its net current assets were sufficient to cover the beneficiary's proposed wage offer of \$26,582.40.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner may have employed the beneficiary, but the payments made were not verified to be wages, the amount paid in 2006 did not correspond to the beneficiary's gross receipts or sales reported on his Schedule C, Profit or Loss from Business, and no evidence of compensation paid was provided to the record for 2005.

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.

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 116. "[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).

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically

unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, based on the submission of one income tax return, it may not be concluded that this represents the kind of framework of profitability such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonegawa*.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is August 16, 2005. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for those years, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent periods of time.³

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.

³ The petitioner stated in its response to the request for evidence that it sponsored another beneficiary. It is unclear from the record when that petition was filed. If that overlapped the current petition, the petitioner would need to demonstrate that it could pay the respective proffered wage for each individual until each obtained permanent residence.