

identifying data deleted to
prevent of early unwarranted
invasion of personal privacy

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

B6



File:

LIN 06 166 53825

Office: NEBRASKA SERVICE CENTER

Date: JUN 01 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, 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 operates a handcrafted furniture business. It seeks to employ the beneficiary permanently in the United States as a production coordinator. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification certified by the U.S. 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 and that the beneficiary possessed the requisite experience. The director denied the petition accordingly.

The record demonstrates that the appeal was properly filed, was timely, and made 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 denial dated May 4, 2007, the basis for denial of this case was 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 and whether or not the beneficiary possesses the requisite experience.

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 24, 2001 and certified on March 22, 2005.¹ The proffered wage as stated on the Form ETA 750 is \$14.45 per hour (\$30,056.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in an unnamed related occupation.

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.²

¹ It has been over eight years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, Form ETA 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

² The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750 Application for Alien Employment Certification approved by the DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2001 to 2005; the beneficiary's IRS Form W-2 Wage and Tax Statements for 2001 to 2006 issued by the petitioner in the amounts of \$19,150.00, \$19,520.00, \$20,192.00, \$20,275.81, \$22,812.00, and \$27,072.00 respectively; a profit and loss statement and a letter from an accountant from 2007 regarding the petitioner's financial status³; the beneficiary's pay stubs for work performed for the petitioner in 2005⁴; photos of the petitioner's burned down factory in 1999, and documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1991 and to employ 12 workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$49,771.00 and \$606,020.00 respectively. On the Form ETA 750, signed by the beneficiary on April 16, 2001, the beneficiary claimed to have worked for the petitioner since April 1999.⁵

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner paid the beneficiary during that period. If the petitioner

³ There is no indication that the financial statements submitted were audited, and they were not accompanied by an auditor's report. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁴ The AAO notes that these pay stubs constitute insufficient evidence of wages paid, because there is no evidence included with them that their corresponding checks were cashed and processed by a bank.

⁵ The AAO notes that the petitioner has only submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2001 to 2006.

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 paid the beneficiary the full proffered wage from the priority date.

Counsel submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2001 to 2006 issued by the petitioner in the amounts of \$19,150.00, \$19,520.00, \$20,192.00, \$20,275.81, \$22,812.00, and \$27,072.00 respectively. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$30,056.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$10,905.40, \$10,535.80, \$9,863.72, \$9,780.19, \$7,244.00, and \$2,984.00 from 2001 to 2006, respectively.

If the petitioner does not establish that it 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. 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 that exceeded the proffered wage 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.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the IRS Form 1120S stated net income of -\$139,146.00.⁶

⁶ The AAO notes that 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* IRS, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-prior/fl120s--2002.pdf>, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-prior/fl120s--2003.pdf>, Instructions for Form 1120S, 2004, at <http://www.irs.gov/pub/irs-prior/fl120s--2004.pdf>,

- In 2002, the IRS Form 1120S stated net income of -\$2,957.00.
In 2003, the IRS Form 1120S stated net income of -\$56,486.00.
- In 2004, the IRS Form 1120S stated net income of \$6,354.00.
- In 2005, the IRS Form 1120S stated net income of \$776.00.⁷

The petitioner did not demonstrate that it had sufficient net income to pay the difference between wages actually paid and the proffered wage for 2001 to 2006.

If the net income the petitioner demonstrates it had available during the 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. 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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1120S 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 net current assets during 2001 were -\$90,895.00.
- The petitioner's net current assets during 2002 were -\$208,271.00.
The petitioner's net current assets during 2003 were -\$140,546.00.
- The petitioner's net current assets during 2004 were -\$137,730.00.
- The petitioner's net current assets during 2005 were -\$161,217.00.⁹

Instructions for Form 1120S, 2005, at <http://www.irs.gov/pub/irs-prior/fl120s--2005.pdf> (last visited April 22, 2009). The petitioner had income from sources other than from a trade or business in 2002 to 2005, so USCIS takes the net income figure from Schedule K for those years. However, in 2001, the petitioner's income is exclusively from trade or business, so USCIS takes the net income figure from line 21 on the first page.

⁷ The AAO notes that the petitioner did not submit its IRS Form 1120S tax return for 2006.

⁸ 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.

⁹ The AAO again notes that the petitioner did not submit its IRS Form 1120S tax return for 2006.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for 2001 to 2006 even if the petitioner's net current assets are combined with wages paid to the beneficiary.

Accordingly, from the priority date or when 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 through an examination of wages paid to the beneficiary, its net income, or its net current assets.

USCIS electronic records show that the petitioner filed one other Form I-140 petition which has been pending during the time period relevant to the instant petition. 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 simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The other petition submitted by the petitioner in May 2006 was approved in July 2006. The record in the instant case contains no information about the proffered wage for the beneficiary of that petition, about the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. Furthermore, no information is provided about the current employment status of the beneficiary, the date of any hiring, and any current wages of the beneficiary. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner or to other beneficiaries for whom the petitioner might wish to submit Form I-140 petitions based on the same approved Form ETA 750 labor certification.

On appeal, the petitioner asserts that the fire that destroyed its factory in 1999 and the lawsuit that it was involved in with BB&T Bank until 2005 caused its business to suffer uncharacteristic losses. 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 (BIA 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 *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. The AAO notes that the petitioner has been in business since 1991 and did experience losses due to the fire and lawsuit, but it has not established historical growth since these occurrences and has not demonstrated its ability to pay the proffered salary.¹⁰ 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 fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is April 24, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

¹⁰ The AAO notes that the fire occurred in 1999 and preceded the priority date of April 24, 2001.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in an unnamed related occupation. The AAO finds the undated letter submitted by D-zign & M-printz to lack the title of the employer and a description of the type of work that the beneficiary did for that company from May 1998 to December 1999. Thus, the letter fails to provide the title of the employer and a description of the experience of the alien as required by 8 C.F.R. § 204.5(l)(3)(ii)(A) and therefore is not acceptable evidence that the beneficiary has the qualifying experience as required by the proffered position. The AAO finds the other undated letter submitted by D-zign & M-printz to provide conflicting information by stating that the beneficiary worked for that company in the printing area from April 1998 to December 1999. The AAO finds the March 6, 2006 letter submitted by Cisson Interiors, Inc. to conform to the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and to be acceptable evidence that the beneficiary worked with the sanding and finishing of drywall. However, the petitioner has not submitted any evidence showing that this experience conforms to the Form ETA 750 requirements that the beneficiary possess two years of experience in the proffered position of production coordinator or two years of experience in an unnamed related occupation. The AAO notes that, contrary to the position descriptions provided within the experience letters submitted, the beneficiary claimed on the Form ETA 750 that she worked as a print coordinator for Z-zign and M-printz from April 1998 to December 1999 and as a production coordinator for Cisson Interiors, Inc. from December 1997 to April 1998. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

The director noted in his May 4, 2007 decision that the petitioner had submitted contradictory evidence regarding the beneficiary's prior work experience dates. However, on appeal, neither counsel nor the petitioner included additional evidence to this effect.

The AAO notes that the beneficiary claimed on the Form ETA 750 to have worked for the petitioner

as a production coordinator since April 1999, which would have provided her with the requisite two years of experience in the proffered position prior to the April 24, 2001 priority date. However, the petitioner has only submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2001 to 2006 and no concrete evidence that she worked for the company from April 1999 to April 2001. Accordingly, the petitioner has not demonstrated that the beneficiary possesses the requisite experience for the proffered position.

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.