



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy **PUBLIC COPY**

B6



File: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 05 2009
LIN 07 152 52014

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

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 is a commercial maintenance business. It seeks to employ the beneficiary permanently in the United States as a contract manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Application), 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, 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 August 7, 2007, an issue in this case is 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 DOL. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on October 15, 2004. The petitioner filed the Form I-140 on May 2, 2005, and the petitioner identified on that form is Priority International Corp., 1290 Weston

Rd., Suite #306, Weston, Florida. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour (\$41,600.00 per year). The Form ETA 750 states that the position requires one year of experience in the offered position.

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

Evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, by DOL; a letter from the petitioner dated April 19, 2007; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2003, 2004, 2005, and 2006; approximately 21 pages of the petitioner's business checking account statements for the period December 31, 2006, to January 31, 2007, with photocopies of cancelled checks; the petitioner's Articles of Amendment changing its corporate name; a "Written Statement of Shareholder;" an "Assignment of Incorporator;" "Articles of Amendment" dated November 10, 1997; "Assignment of Stock Interest" dated November 13, 1997; three "Resignation" documents; a corporate information brochure; an explanatory letter from I&BC Immigration and Business Consultants, dated June 12, 2007; the petitioner's unaudited financial statements dated December 31, 2006, and June 30, 2007;² and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a "C" corporation. On the petition the petitioner claimed to have been established in 1997 and to currently 15 employ workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The gross annual income stated on the petition was \$311,086.00. On the Form ETA 750,

¹ 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).

² The petitioner's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, 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.

signed by the beneficiary on September 21, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that DOL should have “remanded” the application for alien employment certification submitted by the petitioner to correct asserted errors. The AAO has no jurisdiction to review whether DOL assigned the proper O*NET code to the offered job, and whether the prevailing wage of \$20.00 assigned is correct; such matters are within the exclusive purview of DOL to determine. It appears the petitioner listed the wage of \$20.00 per hour on the labor certification. Nothing indicates that DOL required the petitioner to change the wage of \$20.00 per hour. As the Application was certified at the above rate, the petitioner cannot now claim that it desires to pay the beneficiary less and still satisfy its obligation to pay the proffered wage. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

There are other issues raised by the petitioner relating to a prior labor certification and the beneficiary’s eligibility for an earlier priority date, its cancellation, and the contents of the subject labor certification. These issues are beyond the jurisdiction of the director and AAO to review, adjudicate or determine. Further, the AAO has no jurisdiction to determine adjustment of status matters. These matters will not be discussed further.

The petitioner states on appeal that the petitioner is a business established in 1996, with a sound business reputation which is demonstrated by “continuous and ongoing high volume of revenues,” that its “income history” has been stable for the past three years and its gross revenues in 2005 were “slightly lower due to a very active hurricane season.”

The petitioner also states that the director failed to “properly interpret the petitioner’s corporate tax returns,” that it “has paid hundreds of thousand dollars in labor costs in 2004, 2005, 2006 and 2007;” and concludes, “the denial of this employment based immigrant visa petition is not justified.”

Accompanying the appeal, the petitioner submits a legal brief and additional evidence which is the petitioner’s U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2004, 2005, and 2006; approximately 87 pages of 1099-MISC statements issued by the petitioner to its contract workers in 2004, 2005 and 2006; and, the petitioner’s unaudited financial statements as of June 30, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, 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 (BIA 1967).

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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. 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 returns³ demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2004, the Form 1120 stated net income⁴ of <\$125.00>.⁵
- In 2005, the Form 1120 stated net income of <\$2,248.00>.
- In 2006, the Form 1120 stated net income of \$24,797.00.

Since the proffered wage is \$41,600.00 per year, the petitioner did not have sufficient net income to pay the proffered wage from the priority date for years 2004, 2005, and 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

³ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date but will be examined generally. Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2003 federal income tax return generally.

⁴ Form 1120, Line 28.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 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 2004, 2005 and 2006 were \$13,266.00, \$6,158.00 and \$27,009.00.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of its net income or net current assets for years 2004, 2005 and 2006.

The petitioner asserts in her brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

As already stated, the petitioner states on appeal that the petitioner is an established business since 1996, with a sound business reputation which is demonstrated by "continuous and ongoing high volume of revenues," that its "income history" has been stable for the past three years, and its gross revenues in 2005 were "slightly lower due to a very active hurricane season."

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), 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

⁶ 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.

⁷ 8 C.F.R. § 204.5(g)(2).

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.

We note that the petitioner through its tax returns submitted for 2004, 2005 and 2006, has failed to demonstrate its ability to pay the proffered wage through its stated net income or its net current assets. Therefore, assuming for the sake of argument, adverse weather conditions effected the petitioner's commercial maintenance business (which has not been explained in the record), the petitioner still failed to show its ability to pay the proffered wage in 2004 and 2006. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2004, 2005 and 2006, was an uncharacteristically unprofitable period for the petitioner.

As already stated, the petitioner states that it "has paid hundreds of thousand dollars in labor costs in 2004, 2005, 2006 and 2007" and concludes "the denial of this employment based immigrant visa petition is not justified." Reliance on the petitioner's contractor compensation expense is misplaced. The suggestion that labor expenses should be treated as assets available to pay the proffered wage is not persuasive. Labor cost expenses are stated in those tax returns that do not demonstrate the petitioner's ability to pay the proffered wage. Independent contractor labor expense paid to contractors is not a discretionary expenditure. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. None of the Form 1099-MISC statements submitted by the petitioner demonstrates compensation paid by the petitioner to the instant beneficiary.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The Beneficiary's Qualifications as a Contract Manager

Beyond the decision of the director, an issue in this case is whether the petitioner demonstrated by sufficient evidence that the beneficiary meets experience and other requirements of the labor certification. 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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

As stated, the petitioner seeks to employ the beneficiary permanently in the United States as a contract manager. The petitioner must 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).

The regulation 8 C.F.R § 204.5(l)(3)(ii) states in pertinent part:

(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.

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The labor certification requires that the beneficiary have one year of experience in the position offered. According to the labor certification the job duties of contract manager are stated as "Marketing and negotiation of new service contracts. Handling operations of new and current service contracts."

The petitioner in a letter dated April 19, 2007, set forth a description of the job duties as follows:

- Marketing and negotiation of new services.
- Handling operations of new and current service contracts.
- Maintain records of goods ordered and received.
- Locate vendors of materials, equipment or supplies, and interview them to determine product availability and terms of sales.
- Prepare and process requisitions and purchase orders for supplies and equipment.
- Control purchasing department budgets.
- Interview and hire staff, and oversee staff training.
- Review purchase order claims and contracts for conformance to company policy.
- Analyze market and delivery systems to assess present and future material availability.
- Develop and implement purchasing and contract management instructions, policies, and procedures.
- Participate in the development of specifications for equipment, products or substitute materials.
- Resolve vendor or contractor grievances, and claims against suppliers.

On the Form ETA 750, Part B as signed by the beneficiary on September 21, 2004, the beneficiary stated that his prior job experience was in real estate sales as a real estate agent. He described his

job duties in the two positions he held as “Marketing and Sales of Real Estate Properties.” The first job position listed was from February 2002 to February 2004, and the second position was from February 2004 with no end date stated. Neither of the two jobs was designated by title as contract manager nor did the beneficiary list that he performed similar contract manager duties as stated above.

There is one statement and three letters found in the record submitted by the petitioner to demonstrate the beneficiary’s prior employment experience. A statement dated May 20, 2004, was submitted by [REDACTED] on what appears to be his personal stationery. According to Mr. [REDACTED] the beneficiary has been his “commercial acquaintance” in different ventures during 15 years in four industries none of which are stated to involve commercial maintenance. According to [REDACTED] the beneficiary was involved with the electronic trading, pharmaceutical, telecommunication, and real estate industries as a marketing and logistic coordinator. Since Mr. [REDACTED] statement is not from a prior employer or trainer, the statement has slight probative value in this matter. Further, it fails to document that the beneficiary has one year of experience as a contract manager.

The earliest of the three letters offered into evidence is dated January 19, 1998. It is from [REDACTED] as administration director of [REDACTED], Caracas, Venezuela. According to [REDACTED], the beneficiary founded that company approximately 30 years ago as a “wholesale company for disposable products.”

Although [REDACTED] identifies himself in the letter as the administration director of the Venezuelan company in his letter dated in 1998, he also stated that the company was sold in 1991. According to [REDACTED] the beneficiary was the executive director of the company from 1981 until 1991. [REDACTED] also stated that the beneficiary directed and managed the sales and marketing of company products, managed company accounts and its contractual obligations with government entities. [REDACTED] provided no description of the duties of executive director that would allow a comparison to be made between this prior position and the offered job. The beneficiary failed to list this experience on Form ETA 750. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the decision’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B lessens the credibility of the evidence and facts asserted.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner submitted a letter dated March 9, 2001 from [REDACTED] of LIA Travel, C.A., Caracas, Venezuela. According to [REDACTED] the beneficiary worked with the company as part of its International Consulting Marketing Team since February 1999 with no termination date noted. According to the letter the beneficiary has expertise with durable goods international distributions, natural and health products manufacturing, wholesale and retail, and telecommunications services and home phone providers. The letter from [REDACTED] does not relate to the commercial maintenance business or detail job duties such as those stated in the labor certification of the offered position. The

beneficiary did not list this experience on the Form ETA 750. *See Matter of Leung*, 16 I&N Dec. 2530. The letter has slight probative value in this matter.

A letter was also submitted from Weston, Florida stating that the beneficiary was employed as a real estate agent from February 2002 to January 2004. While no job duties were stated, it is reasonable to assume that the duties of a real estate agent are not the same as a contract manager as stated above. The letter has probative value in this matter to indicate that the beneficiary's stated work experience from February 2002 to January 2004 was not as a contract manager but as a real estate agent.

None of the above three letters or the statement is sufficient evidence to demonstrate that the beneficiary has the requisite one-year of prior experience as a contract manager. The petitioner has failed to demonstrate that the beneficiary meets any experience and other requirements of the labor certification.

Also, as already stated, the evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.