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File:



Office: NEBRASKA SERVICE CENTER

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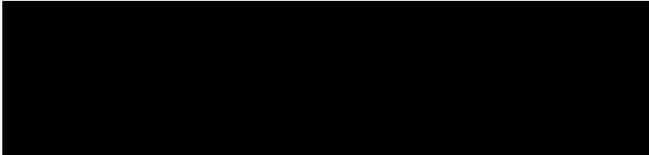
Petitioner:

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 language services business. It seeks to employ the beneficiary permanently in the United States as an interpreter. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent 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. The director denied the petition accordingly.

The record demonstrated 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 3, 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. The petitioner has also failed to demonstrate that the beneficiary possesses the requisite experience for the proffered position.

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 9089 Application for Permanent Employment Certification was accepted for processing by the DOL national processing center. 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 9089 Application for Permanent 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 9089 was accepted on October 11, 2005.¹ The proffered wage as stated on the Form ETA 9089 is \$25.03 per hour (\$52,062.40 per year). The Form ETA 9089 states that the position requires two years of experience in the proffered 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.²

Relevant evidence in the record includes copies of the following documents: Form ETA 9089 Application for Permanent Employment Certification approved by the DOL; Paiboon Publishing's California business licenses for 2006 and 2007³; California fictitious business name statements for Paiboon Publishing to do business as Thai & Lao Language Services for 1996 to 2006; the petitioner's owner's bank statements from 2004 to 2006⁴; financial statements regarding Paiboon

¹ It has been approximately three and a half years since the Application for Alien Employment Certification has been accepted and the proffered wage established. 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).

³ The AAO notes that the petitioner has submitted evidence that it filed fictitious name statements with the state of California for Paiboon Publishing, Inc. and Paiboon Publishing to do business as Thai & Lao Language Services for 1996 to 2006. Paiboon Publishing incorporated in 2004. The AAO finds the evidence submitted to establish that Paiboon Publishing Incorporated is the owner and operator of the petitioning company.

⁴ Counsel's reliance on the balances in the petitioner's owner'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. Second, bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay a proffered wage. Third, 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 petitioner's taxable

Publishing Incorporated for 2005, 2006, and part of 2007⁵; documents for Paiboon Poomsan Publishing in Thailand⁶; and documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding does not show whether the petitioner is structured as a C or an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to employ one worker currently. The net annual income and gross annual income stated on the petition were \$61,000.00 and \$84,000.00 respectively.⁷ On the Form ETA 9089, signed by the beneficiary on April 15, 2006, the beneficiary claimed to have worked for the petitioner from January 2004 to April 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition later based on the Form ETA 9089, 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*

income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. Furthermore, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

⁵ The AAO notes that these "audited" financial statements are of Paiboon Publishing Incorporated, the petitioner's sister business operating in Thailand. A Thai auditing service has audited them. There is no evidence that this service is licensed to audit U.S. companies' financials in the U.S., that the Certified Public Accountant (CPA) is located in the U.S., or that the audit was conducted pursuant to the Generally Accepted Accounting Principles (GAAP).

⁶ The AAO notes that these documents are of Paiboon Publishing Incorporated operating in Thailand. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The AAO notes that the general manager of Paiboon Publishing Incorporated in Thailand has claimed that it is a "sister" company to the petitioner. The AAO also notes that these documents list monetary amounts in Thai baht rather than U.S. dollars.

⁷ The AAO notes that the petitioner's represented net annual income is only \$8,937.60 greater than the beneficiary's proffered salary.

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 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.

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 AAO notes that the petitioner has not submitted any tax returns, annual reports, or properly audited financial statements as required by 8 C.F.R. § 204.5 (g)(2) as evidence of its ability to pay the proffered salary. The petitioner has therefore not demonstrated its continuing ability to pay since the priority date based upon its net income.

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 If

⁸ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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.

Because the petitioner has not submitted any regulatory-prescribed evidence of its ability to pay the proffered salary, the petitioner has not demonstrated its continuing ability to pay since the priority date based upon its net current assets.

Accordingly, from the priority date or when the Form ETA 9089 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.

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 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established by counsel that any year since the priority date in 2005 was an uncharacteristically unprofitable year for the petitioner.

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 October 11, 2005. 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

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.

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).

In the instant case, the Application for Permanent Employment Certification, Form ETA 9089, part H sets forth the minimum education, training, and experience that an applicant must have for the position of interpreter. In the instant case, the applicant must have two years of experience in the job offered, the duties of which are delineated in Part H Item 11 of the Form ETA 9089, and since this is a public record, need not be recited in this decision.

The beneficiary set forth his credentials on the Form ETA 9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part K, eliciting information of the beneficiary's work experience, he represented that he worked as an interpreter for the Asian Community Legal Plus Center from August 1995 to February 1998 and as an interpreter for the petitioner from January to April of 2004.

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

(ii) *Other documentation—*

(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 petitioner submitted a letter from the Asian Community Legal Plus Center dated February 28, 1998 stating that the beneficiary worked for the center as an interpreter and community service worker from

August 1995 to February 1998. The AAO finds the letter to contain the name of the employer, the address of the employer, and the title of the employer. The letter provides a description of the experience of the alien as required by 8 C.F.R. § 204.5(l)(3)(ii)(A) and appears to be acceptable evidence that the beneficiary has the qualifying two years of experience as required by the proffered position. The petitioner also submitted a letter from the Asian Community Legal Plus Center dated July 7, 1995 stating that the beneficiary worked for the center as a community voluntary worker focusing on interpreting and translating services from June 1994 to the present. The AAO finds the letter to contain the name of the employer, the address of the employer, and the title of the employer. The letter provides a description of the experience of the alien as required by 8 C.F.R. § 204.5(l)(3)(ii)(A) and appears to be acceptable evidence that the beneficiary has the qualifying two years of experience as required by the proffered position. The record of proceeding also contains a USCIS Form G-325A Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form under a section eliciting information about the beneficiary's last occupation, he represented that he began working for the Asian Community Legal Plus Center as an interpreter in August of 1996 above a warning for knowingly and willfully falsifying or concealing a material fact.

The petitioner also submitted a letter from the Rountree Law Offices dated June 20, 1996 stating that the beneficiary worked for the firm as an interpreter and translator from 1994 to the present. The AAO finds the letter to lack the title of the employer. The contents of the letter do not comply with 8 C.F.R. § 204.5(l)(3)(ii)(A). The AAO further notes that the beneficiary did not list this work experience on the Form ETA 9089 labor certification or the USCIS Form G-325A Biographic Information sheet, which elicits the applicant's employment information for the last five years. The G-325A sheet states, "APPLICANT'S EMPLOYMENT LAST FIVE YEARS. (IF NONE, SO STATE.) LIST PRESENT EMPLOYMENT FIRST." Thus, the letter does not constitute acceptable evidence that the beneficiary has the qualifying two years of experience as required by the proffered position.

The AAO finds that there are too many inconsistencies, discrepancies, and suspicions clouding the evidence pertaining to the beneficiary's qualifications for the proffered position. Counsel did not address these discrepancies within the record.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: "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. at 591-592 also 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."

Because of the inconsistencies and discrepancies in the information and evidence provided, the AAO finds that the totality of the petitioner's evidentiary submissions fail to establish that the beneficiary has two years of qualifying employment experience proving that he is qualified to perform the duties of the proffered position. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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*, 299 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.