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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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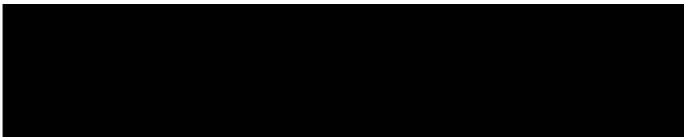
Petitioner:

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.

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 sustained.

The petitioner is a software provider. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 for 2003, 2004 and 2005. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes 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 February 27, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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.

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 June 30, 2003. The proffered wage as stated on the Form ETA 750 is \$44.25 an hour (\$92,040.00 per year). The Form ETA 750 states that the minimum level of education required for the position is a bachelor's degree or equivalent foreign degree, and the minimum level of experience required is two years in the job offered or two years in a related programmer, analyst, software or systems engineer 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.¹

On appeal, relevant evidence submitted by counsel includes a statement of the petitioner's historical track record of profitability; a statement of the petitioner's reasonable expectations of increased profits for the future; a statement of the petitioner's cash on hand; bank statements for the petitioner; and W-2 forms for the petitioner. The record also includes the petitioner's offer of employment to the beneficiary; a resume, a foreign credential evaluation, a university degree and grade transcripts for the beneficiary; copies of the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return, for 1999, 2000, 2001, 2002, 2003, 2004 and 2005; copies of the beneficiary's W-2 forms for 1999, 2000, 2001, 2002, 2003, 2004 and 2005; statements from [REDACTED] Certified Public Accountant; balance sheets for the petitioner; and copies of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003, 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 1992 and to currently employ 18 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, the beneficiary does not claim to have worked for the petitioner.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) failed to consider all of the evidence establishing the ability of the petitioner to pay the proffered wage.

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

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).

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 (Reg. Comm. 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 asserts that it has employed the beneficiary as a software engineer from March 2002 to the present time. The AAO notes that the petitioner must show its ability to pay the proffered wage as of the priority date, in this case June 30, 2003. The AAO observes that the record includes W-2 Forms and IRS Form 1040, U.S. Individual Income Tax Returns for the beneficiary showing that the petitioner paid the beneficiary \$65,618.01 in 2003; \$64,773.48 in 2004; and \$60,822.29 in 2005.² The AAO thus finds that the petitioner has not established that it paid the beneficiary an amount at least equal to the proffered wage during the given period. The petitioner must establish that it can pay the difference between the wages paid and the proffered wage.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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.

² The petitioner also submitted Form W-2 statements for 1999, 2000, 2001 and 2002. However, as those wages were paid before the priority date, they cannot be used to establish the petitioner's ability to pay, but would be considered generally in considering the totality of circumstances.

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).

The record before the director closed on February 20, 2007 with the receipt by the director of the petitioner’s response to the director’s request for evidence (RFE). As of that date, the petitioner’s 2006 federal income tax return was not yet due. The petitioner’s tax returns demonstrate its net income for 2003, 2004 and 2005 as shown in the table below.

- In 2003, the Form 1120S stated net income³ of -\$21,331.00.
- In 2004, the Form 1120S stated net income of \$34,673.00.
- In 2005, the Form 1120S stated net income of -\$88,006.00.

Therefore, for the year 2003, the petitioner did not have sufficient net income to pay the difference between the wages paid of \$65,618.01 and the proffered wage of \$92,040.00; and for the year 2005, the petitioner did not have sufficient net income to pay the difference between the wages paid of \$60,822.29 and the proffered wage of \$92,040.00. The AAO finds that for the year 2004, the petitioner did have sufficient net income to pay the difference between the wages paid of \$64,773.48 and the proffered wage of \$92,040.00.

The director states that the petitioner is also offering the same proffered wage on another petition and the beneficiary in that petition was paid roughly the same over this period of time. The Service

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

approved the petitioner's third petition in which the beneficiary's proffered wage was \$42.75 per hour. The director further notes that the beneficiary in the instant case was not paid at or above the proffered wage, therefore the petitioner cannot establish the ability to pay the difference in any year, as the petitioner has used the remaining amounts from net income or net current assets.

In response to the director's decision, counsel submits a statement of the petitioner's cash on hand which notes the gross salaries it has paid its employees for 2002, 2003, 2004, 2005 and 2006. While the AAO acknowledges this statement, it notes that in general, 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.

Furthermore, 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.⁴ 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 Mater 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 ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 tax returns demonstrate its end-of-year net current assets for 2003 and 2005.

- In 2003, the Form 1120S stated net current assets of \$39,167.00.
- In 2005, the Form 1120S stated net current assets of \$19,717.00

Therefore, for the year 2005 the petitioner did not have sufficient net current assets to pay the difference between the wages paid of \$64,773.48 and the proffered wage of \$92,040.00. The AAO

⁴ Counsel identified two other petitions that the petitioner filed on behalf of other beneficiaries during the relevant time period.

⁵ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

finds that for the year 2003, the petitioner did have sufficient net current assets to pay the difference between the wages paid of \$65,618.01 and the proffered wage of \$92,040.00

Thus, from the date 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 for 2005 through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts that USCIS erred in failing to take into account the petitioner's historical track record of profitability, cash on hand sufficient to pay the wage, and a reasonable expectation of increasing profits in the future. *Attorney's statement.*

Counsel submits bank statements for the petitioner to support his assertion that the petitioner has cash on hand sufficient to pay the proffered wage. Counsel's reliance on the balances in the petitioner'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 income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel asserts that the petitioner has demonstrated its ability to pay under *Matter of Sonogawa*. *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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

The petitioner's size, longevity, number of employees, and officer compensation, cannot be overlooked. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1992 and employs approximately 18 employees. The petitioner has been in business for over fifteen years. Based on the petitioner's tax returns, their gross income has always been above \$2.9 million and they pay salaries and wages each year of over \$1.5 million. Additionally, the petitioner submitted the beneficiary's Form W-2 statements to evidence partial payment of the proffered wage and that they have employed the beneficiary since 1999. As previously noted, 2005 was the only year that the petitioner was unable to demonstrate that it had the ability to pay the proffered wage. In that year, the petitioner paid approximately two-thirds of the proffered wage. Additionally, the AAO observes that 2005 was an uncharacteristically unprofitable year for the petitioner, which the petitioner documented as its engineering services division in St. Louis, Missouri was closed at the end of 2005 because of operational losses. See *petitioner's statement*. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.