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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

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FILE:

LIN 07 141 52037

Office: NEBRASKA SERVICE CENTER

Date:

APR 08 2010

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 construction company which seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary and the combined proffered wages of two other aliens named in Forms I-140, Immigrant Petition for Alien Work, also filed by the company beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

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) provides 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 priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. See 8 C.F.R. § 204.5(d). The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 was accepted for processing on December 13, 2004. It lists the proffered wage as \$28.61 per hour based on a 40 hour workweek which equates to \$59,509 per year. The job offered is for a stone mason and the position requires two years experience in the job offered or in a related occupation.

The petitioner is structured as a C corporation, was established in 1995, had gross annual income of \$1,594,350, and employed 13 persons at the time of filing. The petitioner's IRS Form 1120, U.S. Corporation Income Tax Returns, reflects it operates on a calendar year basis. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on December 7, 2004, he listed the petitioner as an employer, but did not indicate when he started working for the petitioner. However, the beneficiary's Form G-325 A, Biographic Information, he signed on June 4, 2007 and submitted with his Form I-485, Application to Register Permanent Residence or Adjust Status, he stated that he was self-employed as a stonemason from July 1999 to June 4, 2007.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750 labor certification application. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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, United States 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 (Reg. Comm. 1967).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of December 13, 2004 and onwards.

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 next examines the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation

of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120. The petitioner's IRS Form 1120 tax returns demonstrate its net income for the years of the requisite period below:

<u>Year</u>	<u>Net Income</u>
2004	-\$33,092
2005	\$24,182
2006	\$3,950

Therefore, for the years 2004 through 2006, the petitioner did not have sufficient net income to pay the proffered wage.

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.¹ 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 net current assets for the required period, as shown in the table below:

<u>Year</u>	<u>Net Current Assets</u>
2004	-\$5,410
2005	\$20,588
2006	\$69,709

¹According 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.

Therefore, for the years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the USDOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for 2006.

On appeal, counsel resubmits additional documentation that was already considered by the director including New York State quarterly combined withholding forms and wage reporting and unemployment insurance returns for 2004, 2005 and 2006. Counsel indicates that the beneficiary is already working for the petitioner and states that he is submitting two of the beneficiary's weekly pay checks and asserts that one pay stub represents 40 hours of work at \$21.50 per hour and the second pay stub represents 33 hours of work at \$21.50. It is noted the two "pay checks" or "pay stubs" submitted on appeal are dated November 9, 2007 and November 23, 2007. It is impossible to discern whether they are paychecks or pay stubs. If they are paychecks, they do not show the bank upon which they were drawn. If they are pay stubs, the information asserted by counsel can not be verified from them as they do not show the hours the beneficiary worked during the two weekly periods, the salary he was paid or the number of hours that he worked. Nor do they contain normal employee identifiers such as his position title, his address, or his employee identification or social security number. Therefore, the two pay checks or pay stubs are of little probative value in this proceeding.

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 record reflects the petitioner generated gross receipts or sales of \$2,937,729 in 2004, \$3,552,679 in 2005 and \$3,617,984 in 2006. During those years, the two officers who equally own the common

stock of the corporation each received salaries of \$485,000 in 2004, \$440,000 in 2005 and \$630,000 in 2006. The business has been in operation since 1995, employed 13 persons when the Form I-140 was filed and shows an increase in revenues from 2004 to 2006.

On appeal, counsel states that the two persons who receive significant salaries and are the owners of the firm have told him that they are willing to sacrifice a portion of their salary if needed to have this Form I-140 approved. USCIS does not “pierce the corporate veil” and look to the assets of the corporation’s owners to satisfy the corporation’s ability to pay the proffered wage as 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). However, counsel is not suggesting that USCIS examine the personal assets of the petitioner’s owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of the firm. Despite the director’s concern about multiple filings involving Forms I-140 for the beneficiary and two other aliens, the evidence reflects the petitioner had the ability to pay for all three of these individuals had it been required to do so. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic, the proffered salary of \$59,509 can be paid and that the petitioner has the continuing ability to do so.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner met that burden.

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