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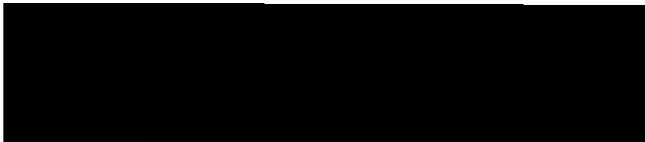
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: APR 08 2010
LIN 07 192 50663

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to § 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).

Perry Rhew
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 motel. Although the petitioner does business in the name of [REDACTED] its correct corporate name is listed as the [REDACTED] according to Virginia State Corporation Commission records. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by the Application For Alien Employment Certification which was certified by the United States Department of Labor (DOL) with a priority date of April 25, 2001. 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 further noted that an experience letter submitted by the applicant was undated and as a result it could not be determined if the document is credible since it was not supported by other documentation such as tax documents or pay vouchers. 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 September 10, 2007 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary is qualified to perform the duties of 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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor, not of a temporary or seasonal 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 ETA Form 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). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$21.08 per hour (\$43,846.40 per year). The Form ETA 750 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. On appeal, counsel submits a brief setting forth the basis of the appeal. By letter dated October 1, 2007, counsel requested an extension of time through December 13, 2007 to submit additional evidence in support of the appeal. To date no additional evidence has been submitted and the record is deemed complete. The record contains the following documents which are relevant to the issues on appeal:

- A letter from [REDACTED] Lahore, Pakistan which states that the beneficiary was employed by that organization as a Front Desk Manager from November 14, 1987 until April 2, 1990. The beneficiary's responsibilities included "guest relations, staff related issues, check ins, managing daily routine, task[s] of [the] hotel, coordinating with [the] accounts department and overall supervision."
- The petitioner's corporate tax returns for years 2001 through 2006.

The petitioner's president also submitted a copy of his personal bank statement, a copy of the petitioner's bank statement, and copies of the personal tax returns for the petitioner's president for tax years 2004 and 2006. 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. The personal bank records and tax returns of the petitioner's president are also not relevant to the petitioner's ability to pay the prevailing wage. 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 evidence in the record of proceeding shows that the petitioner is currently structured as an S corporation but was a C corporation in 2001. On the petition, the petitioner claimed to have been established in 2001 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

On appeal, counsel asserts that the record is sufficient to establish the petitioner's ability to pay the proffered wage, and that an experience letter from the beneficiary's prior employer establishes that the beneficiary is qualified to perform the duties of position.

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, 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).

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 beneficiary has not been previously employed by the petitioner.

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 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 USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record before the director closed on or about August 21, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. The corporate tax returns for the petitioner in years 2001 – 2006 reveal net incomes in the following amounts:

- 2001 - \$42,635.00 (The 2001 tax return was filed as a C Corporation. The net income was taken from line 28 of the 2001 corporate income tax return); 2002 - \$44,401.00; 2003 - \$41,717.00; 2004 - \$22,833.00; 2005 - \$45,311.00; and 2006 - \$42,698.00.

For tax years 2002 through 2005, the petitioner filed tax returns as an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 for tax year 2003 and line 17e for tax years 2004 and 2005 of Schedule K. *See Instructions for Form 1120S, 2003, 2004 and 2005*, at <http://www.irs.gov/pub/irs-pdf/ill20s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its

Schedule K for tax years 2003, 2004 and 2005, the petitioner's net income is found on Schedule K of its tax returns for those years.

Thus, the petitioner did not have sufficient net income to pay the proffered wage in 2001, 2003, 2004 or 2006. The proffered wage is \$43,846.40. The petitioner established its ability to pay in 2002 and 2005 through its net income.

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. 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.

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 relevant corporate tax returns submitted by the petitioner reveal the following net current assets:

2001 - (\$102,283.00); 2003 - \$10,382.00; 2004 - \$26,761.00; and 2006 - \$6,125.00.

Thus, the petitioner lacked sufficient net current assets to pay the proffered wage during 2001, 2003, 2004 and 2006.

Therefore, 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 as of the priority date based upon its net income or net current assets.

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.

In the instant case, the petitioner had gross receipts as follows in the relevant tax years: 2001 - \$249,969; 2002 - \$230,939; 2003 - \$198,948; 2004 - \$242,767; 2005 - \$219,429; and 2006 - \$234,044. The petitioner paid officer compensation in 2001 of \$24,000, and \$48,000 in 2003. Officer compensation was not paid in any other tax year. The petitioner's tax returns indicate that salaries were paid as follows in relevant tax years: 2001 - \$47,198; 2002 - \$46,814; 2003 - \$7,314; 2004 - \$60,260; 2005 - \$46,814; and 2006 - \$47,198. The Form I-140 states that the petitioner has four employees. The gross receipts of the petitioner were less in 2006 than in 2001, and have fluctuated during the relevant tax years from a low of \$198,948 in 2003 to a high of \$249,969 in 2001. The nominal gross receipts of the petitioner do not indicate that the petitioner's business is growing and that increasing receipts are expected. The salaries paid to all employees, even when coupled with officer compensation, are only slightly more than the proffered wage for the beneficiary alone, except for the year 2004 when the petitioner paid total compensation of \$60,260. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The AAO affirms this portion of the director's decision.

Finally, the petitioner states that an experience letter submitted by [REDACTED] [REDACTED] establishes that the beneficiary has the required two years of experience to perform the duties of the proffered position. The experience letter details relevant work experience of more than two years .

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

The ETA Form 750, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of hotel manager. The ETA Form 750 indicates that there are no

minimum educational requirements or training requirements to qualify for the proffered position, and that the applicant must have at least two years of experience in the proffered position. There are no additional special requirements for the position listed on the ETA Form 750.

The duties of the proffered position, as stated in item 13 of the ETA Form 750, are to “[m]anage [the] motel for efficiency[,] [p]lan [and] implement policies of operation[,] hire, train [and] supervise employees, [and] [a]ddress customer complaints/inquiries.”

At section 15(b) of the ETA Form 750, the beneficiary indicated that she was employed by ██████████ in Lahore Pakistan from November of 1987 until April of 1990. The beneficiary’s represented duties with that employer match the duties of the proffered position. While employed by ██████████, the beneficiary: managed the hotel for efficiency; hired, trained and supervised employees; planned and implemented policies of operation; addressed customer complaints; and managed the books of the organization.

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 experience letter submitted by ██████████ satisfies the applicable regulation. The letter provides the name, address and title of the beneficiary’s employer and a description of the training she received. The letter states that the beneficiary worked for ██████████ as a front desk manager from November 14, 1987 until April 2, 1990. During that period of employment the beneficiary’s duties included guest relations, staff related issues, guest check-in, managing daily operations, coordinating with the accounts department and duties associated with overall supervision of the operation. The duties performed by the beneficiary while employed by ██████████ are substantially similar to the duties of the proffered position. The experience letter establishes the beneficiary’s qualifications for the offered position. Thus, this portion of the director’s decision is withdrawn.

The director also denied the petition because the beneficiary currently resides in South Dakota but the job offer in Virginia. While the AAO agrees that this casts doubt on the realistic nature of the job offer, such speculation exceeds the eligibility criteria under review at this step in the immigrant visa proceedings since the job offer is prospective.

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.

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.