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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]  
LIN 07 019 52974

Office: NEBRASKA SERVICE CENTER

Date: **AUG 18 2010**

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

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 landscape contracting company. It seeks to employ the beneficiary permanently in the United States as a stone mason. 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 demonstrated its ability to pay the proffered wage. 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 January 12, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the date the labor certification was filed onward.

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 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 September 25, 2003. The proffered wage as stated on the Form ETA 750 is \$19.97 per hour (\$41,537 per year).<sup>1</sup> The Form ETA 750 states that the position requires two years of experience as a stone mason.

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<sup>1</sup> The labor certification states an overtime rate of \$29.95, but does not list that overtime is required.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

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 2003 and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. On the Form ETA 750B, signed by the beneficiary in 2003, the beneficiary stated that he currently worked for the petitioner, but did not list a start date.

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. The petitioner submitted the following IRS Form W-2s for the beneficiary:

- In 2004, the Form W-2 stated that the petitioner paid the beneficiary \$13,350.00.
- In 2005, the Form W-2 stated that the petitioner paid the beneficiary \$13,190.00.
- In 2006, the Form W-2 stated that the petitioner paid the beneficiary \$16,428.00.

The amounts reflected on the Form W-2s for 2004, 2005, and 2006 are less than the proffered wage. As such, the petitioner must demonstrate its ability to pay the difference between the actual wages paid and the proffered wage; in 2004, the difference is \$28,187; in 2005, the difference is \$28,347; and in 2006, the difference is \$25,109. On appeal, the petitioner submitted pay statements evidencing that it paid the beneficiary \$12,396.00 from January 1 to October 7, 2007. This amount

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<sup>2</sup> 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).

is less than the proffered wage. The petitioner would need to demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which for 2007 would be \$29,621.

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 (1<sup>st</sup> 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*, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 12, 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 2006 federal income tax return was the most recently available return. The petitioner’s tax returns demonstrate its net income for 2003 to 2006, as shown in the table below.

- The 2003 Form 1120 stated net income of \$1,245.
- The 2004 Form 1120 stated net income of \$2,115.
- The 2005 Form 1120 stated net income of \$4,179.
- The 2006 Form 1120 stated net income of \$2,225.

For the years 2003, 2004, 2005, and 2006, the petitioner’s tax returns demonstrated insufficient net income to demonstrate the ability to pay the difference between the actual wages paid and the proffered wage.

If the net income the petitioner demonstrates it had available during that 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. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>3</sup> 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 tax returns demonstrate its end-of-year net current assets for tax years 2003, 2004, 2005, and 2006, as shown in the table below.

- The 2003 Form 1120 stated net current assets of \$10,856.
- The 2004 Form 1120 stated net current assets of \$12,341.
- The 2005 Form 1120 stated net current assets of \$60,547.
- The 2006 Form 1120 stated net current assets of \$37,352.

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<sup>3</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner demonstrated sufficient net current assets to pay the difference between the actual wages paid to the beneficiary and the proffered wage in 2005 and 2006 only. The petitioner's net current assets were insufficient to demonstrate its ability to pay the difference between the actual wages paid and the proffered wage in 2004 and the full proffered wage in 2003. The record does not contain the petitioner's 2007 tax return as it was unavailable at the time of filing and appeal, so that we cannot determine whether the petitioner can pay the difference between the wages paid and the proffered wage in that year.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner did not establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, and its net income and 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.

The petitioner presented no evidence that it had one off year or that the financial picture presented by its tax returns is inaccurate. The tax returns in the record establish that the petitioner's gross receipts were steady from 2004 through 2006, but significantly lower in 2003, the year of the priority date. On appeal, counsel states that the petitioner had over \$100,000 in assets in 2004 and depreciation of \$54,641 that could be counted toward the ability to pay the proffered wage. The petitioner's assets were used in determining its ability to pay the wage in the calculation above concerning the net current assets; they may not be used in isolation as the petitioner's liabilities can affect the availability of those assets. We also note, as stated above, that the federal courts have upheld USCIS's position that net income is proper without consideration of depreciation. *River Street Donuts, LLC*, 558 F.3d 111;

*Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 *Chi-Feng Chang*, 719 F. Supp. 532; *K.C.P. Food Co., Inc.*, 623 F. Supp. 1080; *Ubeda*, 539 F. Supp. 647. The petitioner submitted no evidence of its reputation or other information to liken its situation to that of *Sonegawa*. Counsel also states on appeal that the officer compensation paid by the petitioner should be considered in assessing the petitioner's ability to pay the proffered wage. The tax returns show that the petitioner has two officers and the amount of the officer compensation is relatively low. Further, the record contains no evidence that the officers would be willing or able to forego their compensation to pay the proffered wage. 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 or all its sponsored workers' wages.

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.