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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: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 07 057 53139

Date:
AUG 25 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:

[REDACTED]

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 in the business of fabricating metal designs and manufacturing iron works. It seeks to employ the beneficiary permanently in the United States as a designer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage. The director also found that the petitioner had failed to pay the beneficiary the full proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 July 7, 2008 denial, the single issue in this case is 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.

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. In addition, section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 9089 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 ETA Form 9089 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 ETA Form 9089 was filed and accepted for processing by the DOL on August 14, 2006. The proffered wage stated on that form is \$16.27 per hour or \$33,841.60 per year. The ETA Form 9089 also states that the position requires a minimum of an associate's degree in design. At Part K of the ETA Form 9089, the petitioner claims that it has employed the beneficiary since April 1, 2006.

To qualify for the preference visa under section 203(b)(3) of the Act, the petitioner must therefore have the ability to pay the beneficiary \$16.27/hour or \$33,841.60/year from August 14, 2006 until the beneficiary obtains lawful permanent residence. To show that ability, the petitioner submitted copies of the following documents:

- IRS Forms 1120, U.S. Corporation Income Tax Return, for 2004-2007;
- The beneficiary's Form W-2 for 2007;
- Cancelled checks payable to the order of "cash" issued by the petitioner in 2006 and 2007 (front and back);
- The petitioner's bank statements from November 1, 2006 through March 31, 2008;
- Payroll records for January 2008 through April 2008;
- A property deed and an appraisal report showing \$295,000 as the appraised value of the property where the petitioner fabricates metal and iron; and
- Other miscellaneous documents such as the company's flyers, brochures, and sample products.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claims to have been established in January 1997, to currently employ 3 workers, and to have gross annual income and net annual income of \$375,048 (FY 2005) and \$228,431 (FY 2005), respectively.

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.¹

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 individual labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of

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).

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.

As noted above, the petitioner submitted copies of cancelled checks payable to the order of cash as evidence of payments to the beneficiary for her services as a designer in 2006 and 2007. The director, however, declined to use these cancelled checks in determining the petitioner's ability to pay the proffered wage.

On appeal, counsel for the petitioner asserts that the beneficiary was in the United States illegally and had no work authorization or social security number, and thus, the only way for the petitioner to compensate her for her services in 2006 and 2007 was by giving her checks made payable to cash. Counsel states that the beneficiary endorsed and cashed most of these cancelled checks.² In addition, counsel asserts that the petitioner claimed to have spent \$30,175 in 2006 and \$31,690 in 2007 for "outside services," and the beneficiary was the recipient of this spending.³

However, the petitioner fails to provide evidence such as payroll or accounting records to verify that the cancelled checks made payable to the order of cash were paid to the beneficiary for design services. Similarly, the record is devoid of evidence regarding payments for outside services. There is no evidence in the record that shows what the payments for outside services are for. The assertions of counsel alone do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO agrees with the director that the cancelled checks and the payments for outside services as reflected on the petitioner's tax returns are not evidence of the petitioner's ability to pay.

² Upon review, the AAO notes that the beneficiary endorsed some of the checks for a total of \$5,560 in 2006 and \$2,600 in 2007.

³ The petitioner's tax return for 2006 is incomplete and does not show \$30,175 spent on outside services.

Nevertheless, the record establishes that the beneficiary was employed and paid by the petitioner in 2007 and 2008. A review of the beneficiary's W-2 and the petitioner's payroll records shows that the beneficiary received \$6,710 from the petitioner in 2007 and \$10,370 as of December 31, 2008.

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date, the petitioner must be able to pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$33,841.60 in 2006 and \$27,131.60 in 2007.⁴ The petitioner can pay the difference between the two wages through its net income or net current assets.

If the petitioner chooses to pay the difference between the two wages – actual and proffered wage – through its net income, USCIS will 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 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

⁴ The 2008 payments will not be considered at this time since the appeal was submitted in August 2008.

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 118. "[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 May 20, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120. The petitioner's tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006 the Form 1120 stated net income (loss) of \$1,309.
- In 2007 the Form 1120 stated net income (loss) of \$8,961.

As stated above, the petitioner must have net annual income of at least \$33,841.60 in 2006 and \$27,131.60 in 2007 to show its ability to pay the proffered wage. Since the petitioner's 2006 and 2007 net income is less than the required amounts to meet its burden of proving by a preponderance of the evidence, the AAO finds that the petitioner did not have sufficient net income to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. The petitioner's tax returns demonstrate its net current assets (liabilities) for 2006 and 2007, as shown in the table below.

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.

- In 2006, the Form 1120 stated net current assets (liabilities) of (\$27,107).
- In 2007, the Form 1120 stated net current assets (liabilities) of (\$25,337).

Therefore, the AAO concludes that the petitioner has failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date or from August 14, 2006.

To show that the petitioner has sufficient assets to pay the proffered wage, it submitted a copy of a property deed and an appraisal report of the property. The deed indicates that the property is owned by Aharon Elperin, the sole shareholder of the corporation. Further, the property, according to the appraisal report, is worth \$295,000.

The director declined to consider the property as evidence of the petitioner's ability to pay since the property did not belong to the petitioner or the corporation. The director stated:

A corporation is a separate and distinct legal entity from its owners and shareholders. Consequently, any 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). USCIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

On appeal, the petitioner submitted a deed assigning the real property to the petitioner (the corporation). Counsel contends that USCIS now must consider the real property as evidence of the petitioner's ability to pay.

As noted above, the AAO conducts appellate review on a *de novo* basis. Upon *de novo* review, the AAO finds that the real property in this case is not an asset that is readily convertible into cash. Further, it is unlikely that the petitioning corporation or its owner would sell the property to pay the beneficiary's wage. Moreover, a petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The director also did not accept the petitioner's bank statements, indicating that the petitioner's reliance on these types of documents is misplaced. The director stated that bank statements are not among the three types of evidence specifically enumerated in 8 C.F.R. § 204.5(g)(2). Further, even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept or the petitioner to submit additional evidence such as bank statements, 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. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Finally, 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 cash specified on Schedule L.

The AAO agrees, and does not accept the petitioner's bank statements as evidence of the petitioner's ability to pay the proffered wage.

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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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. As in *Sonegawa*, 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 AAO recognizes that the petitioner has been in a competitive business since 1997. Nevertheless, the evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage in 2006 or 2007. In addition, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 1997. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements.

While the record contains some evidence regarding the petitioner's products and viability, it does not establish that the petitioner has the continuing ability to pay the proffered wage. In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, we conclude that the petitioner has not established that it had the ability to pay the salary offered as of the priority date and continuing to present.

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.