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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

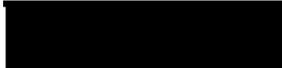


U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

Petitioner:

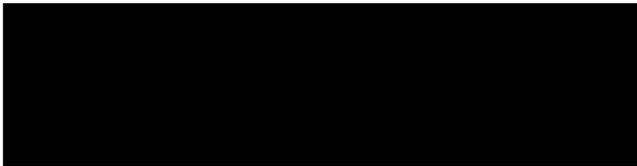


Beneficiary:

DEC 02 2010

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. § 203 (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 your 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 \$630. 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner manufactures telephone keypads. It seeks to employ the beneficiary permanently in the United States as a sales engineer. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to establish that the petitioner had the continuing ability to pay the proffered wage, and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and contends that the director erred in denying the petition.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea*

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

²The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

House, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on June 24, 2004.³ The proffered wage is stated as \$71,650 per year. Part B of the Form ETA 750, signed by the beneficiary on June 1, 2004, indicates that the petitioner has employed the beneficiary since June 2003.

On Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), filed on February 7, 2007, it is claimed that the petitioner was established on September 9, 1993, employs four workers and reports gross annual income of \$4.4 million.

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 overall 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 support of its ability to pay the proffered wage of \$71,650 per year, the petitioner provided copies of its 2004, 2005 and 2006 Form 1120, U.S. Corporation Income Tax Return(s). The returns reflect that the petitioner's fiscal year is a standard calendar year.

Year	2004	2005	2006
Net Income ⁴	-\$601,076	-\$324,473	\$36,124

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

⁴The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net

Current Assets	\$2,810,442	\$1,809,243	\$2,761,326
Current Liabilities	\$2,503,563	\$2,471,121	\$2,497,041
Net Current Assets	\$ 306,879	-\$ 661,878	\$ 264,285

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁶

The petitioner also provided copies of the beneficiary's Wage and Tax Statements (W-2s) for 2005, 2006, and 2007. They indicate that the petitioner paid wages to the beneficiary as follows:

Year	Wages Paid	Difference from Proffered Wage of \$71,650
2005	\$34,928.35	-\$36,721.65
2006	\$34,273	-\$37,377
2007	\$41,349.21	-\$30,300.79

The petitioner additionally provided copies of its bank statements covering January to February 2007; June 2007; and October through December 2007, as well as copies of bank statements for January through March 2008. On appeal, additional copies of its May 2008 bank statements were submitted.

operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage. Here, it is noted that for the 2005 tax return, the figure used for "taxable income" is on line 30 because the petitioner did not complete line 28.

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.

⁶ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

Additionally, the petitioner submitted a copy of the beneficiary's pay voucher for the two-week period ending March 28, 2008, a copy of a Chinese accountants' review report of [REDACTED] and Subsidiaries." [REDACTED] is stated to be the petitioner's Taiwanese parent company.

The director denied the petition based on the petitioner's failure to establish its continuing ability to pay the proffered wage. The director noted that on May 20, 2008, he had requested evidence of the ability to pay the proffered wage for 2006 and 2007 in the form of tax returns, audited financial statements or annual reports, but had not received evidence for 2007. He rejected consideration of the petitioner's bank statements as the basis to judge its ability to pay for 2007 and 2008 and determined that the beneficiary's 2008 pay voucher suggested an annual salary of \$43,749.94, which is less than the proffered wage.

On appeal, counsel asserts that a copy of an Internal Revenue Service application for extension of time to file its 2007 federal income tax return had been submitted. Since the tax return was unavailable, counsel asserts that then copies of the petitioner's bank statements supported the petitioner's ability to pay the proffered wage should suffice. Further, counsel submits a letter from [REDACTED] the petitioner's regional general manager, who states that the foreign parent company has the financial ability to support its U.S. subsidiary, if necessary. Finally, citing *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), counsel asserts that the petitioner's negative figures for net income and net current assets indicated on its 2005 federal income tax return is uncharacteristic and should be overlooked in view of its overall viability.

Counsel's assertions are not persuasive. We will not impute the foreign parent's ability to support its U.S. subsidiary's own financial ability to pay the proffered wage through a financial statements prepared for and used in Taiwan. First, it is noted that the corporate petitioner specifically named in the preference petition is the prospective U.S. employer, not the foreign parent.⁷ As such its offer of employment must be accompanied by evidence in the form of federal tax returns, audited financial statements, or annual reports, which establish its continuing ability to pay the proffered wage as of the priority date. It has not been established here that foreign parent, [REDACTED] is the entity employing and paying the wages of the petitioner's employees, and this beneficiary in particular. See *Avena v. INS*, *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997).

Second, the petitioner is a corporation. 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 no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). The court in *Sitar v. Ashcroft*, 2003 WL

⁷ The regulation at 20 C.F.R. § 656.3(1) provides that an employer must possess a valid federal employer identification number (FEIN).

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 fact that the U.S. regional manager, [REDACTED] attests to the foreign parent’s financial capability does not suggest that there is some kind of contractual obligation to pay the specific proffered salary on a full-time permanent basis. Further, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner’s reliance on selected bank statements is misplaced. 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. Bank statements reflect only a part of a petitioner’s financial profile. The petitioner’s election to apply for an extension of time to file its 2007 federal income tax return does not preclude the petitioner’s submission of audited financial statements for 2007. The regulation at 8 C.F.R. § 204.5(g)(2), does not imply or state that bank statements are to be considered a substitution for the required forms of evidence. Further, had the petitioner submitted its 2007 tax return, its cash on hand would have already been considered as part of the review of its current assets indicated on Schedule L, which must be balanced against current liabilities in order to assess net current assets.

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner’s ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner’s net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, as noted below, the petitioner established its ability to pay the proffered wage in 2004 and 2006 through its net current assets, independent of the wages paid to the beneficiary. In 2007, it paid the beneficiary \$41,349.21 in wages, which is \$30,300.79 less than the proffered wage of \$71,650 per year. Further, as the director observed, based on the pay voucher for \$1,682.69 for the two-week period ending March 28, 2008, the petitioner was not paying the proffered wage to the beneficiary at that time. A two-week wage based on the yearly \$71,650 proffered salary would be \$2,755.77.

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); *Taco*

Especial v. Napolitano, 696 F. Supp. 2d. 873 (E.E. Mich. 2010). 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 CIS, 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 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).

In this case, the petitioner established its ability to pay the proffered wage for 2004 and 2006 because its net assets of \$306,879 in 2004 and \$264,285 in 2006 were sufficient to cover the \$71,650 certified salary in those years. The petitioner did not establish its ability to pay the proffered salary in 2007 or 2008 because it failed to submit a federal income tax return or audited financial statement that would demonstrate the ability to cover the difference between the wages paid to the beneficiary and the proffered wage.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, although counsel asserts that the petitioner's negative net income and net current assets for 2005 were uncharacteristic, there were only three federal income tax returns contained in the record. It is additionally not convincing to look at the petitioner's gross receipts or sales. Although substantial, they declined from \$5.5 million in 2004 to \$4.2 million in 2006. Without additional financial information, whether 2005 was unique or uncharacteristic is speculative. Additionally, the petitioner's 2004 tax return reflects substantial negative net income. Although asserted to have been established for over 14 years, the workers have numbered only three to four in recent years and the AAO does not conclude that such factors as historical growth or reputation analogous to those present in *Sonogawa* have been sufficiently demonstrated in this case. The assertions of counsel 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).

For the reasons explained above, the petition may not be approved. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

Beyond the decision of the director, it is noted that Item 14 of the ETA 750 requires that the beneficiary possess a Bachelor of Science in Engineering. Although the record reflects that the beneficiary received a Bachelor of Science from Oklahoma Christian University on December 14, 2001, and his grade transcript reflects that he took some engineering related courses, it also states

that the degree was awarded in “liberal studies.” The record contains no clarification of this anomaly. As it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. As such, the current record does not clearly support that the beneficiary has a Bachelor of Science in Engineering and may not be approved on this basis. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO’s *de novo* authority recognized by federal courts).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

It is additionally noted that [REDACTED] is the petitioner’s regional manager, the highest paid employee listed on the petitioner’s 2005-2008 state quarterly wage reports contained in the record, and one of the petitioner’s three officers as indicated by the tax returns. He and the beneficiary share the same surname. Although this may not be unusual, it also requires clarification if the petitioner sponsors the beneficiary on future employment-based petitions or in any further filings. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

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.