

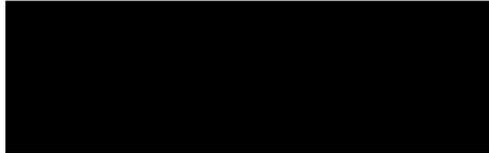
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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: DEC 16 2010

IN RE:

Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 \$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 Director, Nebraska Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a metal iron works company. It seeks to employ the beneficiary permanently in the United States as an ARC welder pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification) approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and that the underlying labor certification does not support the requested classification of the petition. Accordingly, the petition was denied.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(i) of the Act also provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The 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.

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 On appeal, the petitioner argues that the incorrect box was erroneously marked on the I-140 petition. Box e, “a skilled worker, requiring at least two years of specialized training or experience” should have been marked, and therefore, requests for correction of the box in part 2, to box 2-e.

Here, the Form I-140 was filed on June 28, 2007. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for “any other worker (requesting less than two years of training or experience).”

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

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).

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

In this case, the underlying Form ETA 750 indicates that the proffered position requires five years of experience in the related occupation as the minimum requirements, and therefore, the Form ETA 750 was certified under the skilled worker classification category. However, the petitioner requested classification as an unskilled worker on the Form I-140 and attempted to change this request to that of a skilled worker or professional on appeal. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition for skilled worker with a new properly obtained labor certification for that classification.

The AAO notes that if the petition would not be denied for being filed to seek a wrong classification, it would otherwise be denied because the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present.

The regulation 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 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 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 December 16, 2003. The proffered wage as stated on the Form ETA 750 is \$16.36 per hour (\$34,028.80 per year). On the petition, the petitioner claims that it has been in the business since 1981, and has a gross annual income of \$1,461,981, a net annual income of \$64,127, and 15 employees. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, 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 did not submit the beneficiary's W-2 form, 1099 forms or other documentary evidence showing that the petitioner paid the beneficiary compensation in the relevant years. The petitioner failed to establish its ability to pay the proffered wage from 2003 to the present through examination of wages actually paid to the beneficiary.

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). 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

As alternate method, USCIS also reviews the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 evidence in the record of proceeding shows that the petitioner was structured as a C corporation and filed its tax return on the Form 1120, U.S. Corporation Income Tax Return. The petitioner selected as an S corporation and filed Form 1120S, U.S. Income Tax Return for an S Corporation,

² 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.

from January 26, 2004. The record contains the petitioner's Form 1120 for the fiscal year 2003 and Form 1120S for 2004 through 2007. The petitioner's tax returns demonstrate its net income and net current assets as below.

- In the fiscal year 2003 (10/1/03-9/30/04), the Form 1120 stated net income³ of \$22,915 and net current assets of \$9,293.
- In 2004 (1/26/04-12/31/04)⁴, the Form 1120S stated net income⁵ of \$3,105 and net current assets of \$1,311.
- In 2005, the Form 1120S stated net income of (\$1,681) and net current assets of (\$25,866).
- In 2006, the Form 1120S stated net income of \$58,252 and net current assets of (\$22,038).
- In 2007, the Form 1120S stated net income of (\$25,814) and net current assets of (\$393).

For 2003 through 2007, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the full proffered wage of \$34,028.80 except for 2006. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2003, the petitioner failed to establish its continuing ability to pay the proffered wage.

Moreover, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries

³ 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.

⁴ The petitioner's Form 1120S for 2004 indicates that it was filed for a period from January 26, 2004 to December 31, 2004 while the petitioner's Form 1120 for the fiscal year of 2003 covers a period from October 1, 2003 to September 31, 2004. The petitioner did not provide any explanation for the overlapped tax period from January 26, 2004 to September 30, 2004. The AAO considers the figures from the petitioner's 2003 tax return for the calendar year of 2003 and the figures from 2004 tax return for the year of 2004 for the purpose of determining whether the petitioner had ability to pay the proffered wage in this matter.

⁵ 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 17e (2004-2005) or line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on November 29, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending and approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, USCIS records show that the petitioner filed Immigrant Petitions for Alien Worker (Form I-140) for additional four workers (one was denied, two approved and the other has an appeal pending with the AAO).⁶ Therefore, the petitioner is obligated to demonstrate its ability to pay at least one proffered wage in 2004, 2005 and 2007, and two in 2006, 2008 and 2009 in addition to the instant beneficiary. The record does not contain any documentary evidence showing that the petitioner paid these additional beneficiaries any compensation in relevant years. As previously discussed, the petitioner did not have sufficient net income or net current assets to pay a single proffered wage in 2003 through 2005, and 2007, and thus it failed to establish its ability to pay all proffered wages these years. Although the petitioner had sufficient net income to pay the instant beneficiary the proffered wage in 2006, it was not sufficient to pay two additional proffered wages that year. Therefore, the petitioner failed to establish its ability to pay all proffered wages for 2006 and further, failed to establish its ability to pay all proffered wages from the priority date to the present.

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

⁶ The detail information about the two approved petitions and one pending appeal is as follows:

- [REDACTED] filed for [REDACTED] on September 22, 2006 with the priority date of July 6, 2006 and approved on December 29, 2006. USCIS records do not contain any record that the beneficiary has been adjusted to lawful permanent resident status and that the approval of the petition has been revoked as of this date.
- [REDACTED] filed for [REDACTED] on August 15, 2008 with the priority date of January 8, 2008 and approved on August 10, 2009. USCIS records do not contain any record that the beneficiary has been adjusted to lawful permanent resident status and that the approval of the petition has been revoked as of this date.
- [REDACTED] filed for [REDACTED] on December 10, 2007 with the priority date of April 29, 2004 and denied on March 6, 2009. USCIS records show that the appeal from the denial is pending with the AAO as of this date.

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.

In the instant case, the petitioner failed to establish its ability to pay a single proffered wage for all relevant years except for 2006 and also failed to establish its ability to pay all proffered wages for 2006. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all the five years 2003 through 2007 were uncharacteristically unprofitable years for the petitioner. In addition, given the record as a whole, the petitioner's history of filing immigrant and nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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.

Counsel's assertions and evidence submitted on appeal cannot overcome the ground of denial in the director's January 15, 2009 decision. The petitioner failed to establish its continuing ability to pay the proffered wages. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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