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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: TEXAS SERVICE CENTER

Date: DEC 21 2010

IN RE: Petitioner:   
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 \$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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a kitchen assistant/customer relations representative. 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 established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the labor certification was not for full-time employment. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 8, 2008 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the labor certification is for full-time employment.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$8.75 per hour (\$18,200.00 per year). The Form ETA 750 states that the position requires one-half month of “minimal – hands on” training.

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>1</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 1982, to have a gross annual income of \$283,558.00, and to currently employ 10 workers. According to the tax returns in the record, the petitioner’s fiscal year runs from July 1<sup>st</sup> until June 30th. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner from August of 2000 until the signature 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner submitted documentation, however, to establish that it paid the beneficiary some wages during the requisite period. The petitioner must, therefore, establish the ability to pay the difference between wages actually paid to the beneficiary and the proffered wage. To establish the wages it paid to the beneficiary the petitioner submitted a 2007 W-2 form and copies of its employer wage and withholding reports for 2004, 2005 and 2006, and for two quarters of 2003. Although the Form ETA 750 signed by the petitioner and the beneficiary states that the beneficiary has been employed

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<sup>1</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).

by the petitioner since August of 2000, no documentation was submitted to establish wages paid to the beneficiary in 2001 or 2002. The documentation submitted shows wages paid as follows:<sup>2</sup>

- 2007 - \$12,821.15 (Wages from W-2 Form for calendar year 2007)<sup>3</sup>
- 2006 - \$14,149.68
- 2005 - \$17,195.13
- 2004 - \$15,705.65
- 2003 - \$15,774.70
- 2002 - Proof of wages paid was not submitted
- 2001 - Proof of wages paid was not submitted

The difference between wages paid to the beneficiary and the proffered wage (\$18,200.00) in all relevant years is set forth below:

- 2007 - \$5,378.65
- 2006 - \$4,050.32
- 2005 - \$1,004.87
- 2004 - \$2,494.35
- 2003 - \$2,425.30
- 2002 - \$18,200.00
- 2001 - \$18,200.00

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<sup>2</sup> Wages reported for 2007 are from the beneficiary's 2007 W-2 Form. All other reported wages were taken from the petitioner's Quarterly Wage and Withholding Reports and relate to the petitioner's fiscal year which runs from July 01 to June 30.

<sup>3</sup> As noted above, the Form W-2 for 2007 shows that the petitioner paid the beneficiary \$12,821.15 during calendar year 2007. The petitioner's tax return for 2007 shows net income of \$6,714.00. However, the 2007 Form W-2 relates to the calendar year, whereas the 2007 tax return relates to the petitioner's fiscal year which runs from July 1, 2007 to June 30, 2008. Thus, determining the petitioner's ability to pay in 2007 is not simply a matter of combining the net income from the 2007 tax return and the wages listed on the 2007 Form W-2. It is not clear how much, if any, of the petitioner's 2007 net income is attributable to calendar year 2007; thus, it is not clear how much, if any, of the petitioner's net income was available to pay the proffered wage in 2007. The record is devoid of evidence establishing that enough of this net income was available in calendar year 2007 to make up the difference.

A petitioner could establish the amount of wages paid during a non-calendar fiscal year by submitting the Forms W-2 for both relevant calendar years (e.g., 2007 and 2008) and detailed payroll evidence establishing when, exactly, the wages were paid to the beneficiary and in what amounts. Conversely, a petitioner could establish the amount of net income available during a calendar year (when the petitioner uses a non-calendar fiscal year) by submitting audited financial statements establishing the availability of net income to pay the difference between the proffered wage and wages actually paid to the beneficiary in that calendar year, as evidenced by a Form W-2.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. 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 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010) (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).

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 July 30, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 was the most recent return available. The petitioner did subsequently submit the 2007 return. The petitioner’s tax returns demonstrate its net income for 2001 through 2007, as shown in the table below.

- In 2007, the Form 1120 stated net income of \$6,714.00.<sup>4</sup>
- In 2006, the Form 1120 stated net income of \$2,822.00.
- In 2005, the Form 1120 stated net income of \$6,044.00.
- In 2004, the Form 1120 stated net income of \$32,544.00.
- In 2003, the Form 1120 stated net income of (\$7,895.00).
- In 2002, the Form 1120 stated net income of (\$14,273.00).
- In 2001, the Form 1120 stated net income of \$8,826.00.

Therefore, for the years 2001 and 2002, the petitioner did not demonstrate the ability to pay the proffered wage. For 2003 and 2006, the petitioner did not demonstrate the ability to pay the difference between wages paid to the beneficiary and the proffered wage. The petitioner’s tax returns for 2004 and 2005 demonstrate sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage based on the petitioner’s fiscal year and quarterly wages paid. It should be noted that based upon the 2001 priority date, the petitioner’s 2000 federal tax return (covering fiscal year July 1, 2000 to June 30, 2001) must also be considered in determining the petitioner’s ability to pay the proffered wage from the priority date. The petitioner did not submit this tax return.

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. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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<sup>4</sup> As noted above, in footnote 3, the petitioner submitted the beneficiary’s W-2 statement for 2007, and the petitioner’s tax return is based on a fiscal year. As the time frames of the evidence do not correlate, we cannot determine from the evidence before us whether the petitioner can pay the difference between the wages paid and the proffered wage in 2007.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</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 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of (\$10,471.00).
- In 2002, the Form 1120 stated net current assets of (\$25,387.00).
- In 2003, the Form 1120 stated net current assets of (\$34,220.00).
- In 2004, the Form 1120 stated net current assets of (\$9,306.00).
- In 2005, the Form 1120 stated net current assets of (\$6,397.00).
- In 2006, the Form 1120 stated net current assets of (\$6,254.00).
- In 2007, the Form 1120 stated net current assets of (\$1,477.00).

Therefore, for the years 2001 through 2007, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between the proffered wage and wages actually paid to the beneficiary. As previously stated, however, the petitioner has shown the ability to pay the required wage in fiscal years 2004 and 2005 based upon its net income and quarterly wages paid to the beneficiary.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the proffered wage as of the priority date in 2001, 2002, 2003, 2006 or 2007 through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel states that the petitioner is not required to pay the proffered wage until such time as the beneficiary is authorized to work. Counsel also asserts that the petitioner's tax returns establish the ability to pay the proffered wage. While the petitioner is not required to pay the beneficiary the proffered wage until the beneficiary adjusts to permanent residence status, the petitioner must establish its ability to pay from the time of the priority date based on regulatory requirements. As previously noted:

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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<sup>5</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.

*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.

On appeal, counsel submitted unaudited financial statements in support of its petition. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the 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 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.

As previously noted, the petitioner has not established its continuing ability to pay the required wage based upon an examination of its net income or net current assets from the priority date forward (2001, 2002, 2003, 2006 or 2007). The petitioner's net income never exceeded \$34,220.00 during the relevant period, and was as low as (\$14,273.00). It had negative net current assets during each year of the relevant period. The petitioner has not established that its reputation in the industry is

such that it is more likely than not that it would have the ability to pay the proffered wage from the priority date onward. The petitioner's gross income decreased from a high of \$603,470.00 in 2001 to \$249,049.00 in 2008. The gross income decreased in each year from 2001 through 2006. The tax returns of the petitioner show that officer compensation has decreased from a high of \$96,300.00 in 2001 to \$12,400.00 in 2007. Likewise, employee wages have decreased from a high of \$196,071.00 in 2002 to \$89,420.00 in 2007. The record does not establish organizational growth or a history of sustained profitability. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

It must further be noted that while the petitioner states the offered position is a full-time permanent position, the Form ETA 750 is certified for only a part-time position (22 hours per week). The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, [REDACTED] for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). USCIS must look to the job offer portion of the labor certification to determine the requirements for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The Form ETA 750 certified for only 22 hours will not support a full-time position. For this additional reason, the petition must be denied.

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.