



U.S. Citizenship
and Immigration
Services

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FILE:

Office: TEXAS SERVICE CENTER

Date:

DEC 28 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:

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, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fish, meat, poultry market. It seeks to employ the beneficiary permanently in the United States as a fish shucker 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), approved by the 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 therefore, denied the petition.

The record shows that the appeal is properly filed and 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

As set forth in the director's August 21, 2008 denial, the primary 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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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.

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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000 per year. On the petition, the petitioner did not provide any information about its date establish, gross annual income, net annual income or current number of employees. 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, 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 Sonegawa*, 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 any documentary evidence, such as Form W-2, Form 1099 or paystubs, showing that the petitioner employed and paid the beneficiary in any years 2001 through the present. On appeal, counsel submits the beneficiary's individual income tax returns for 2005 and 2006 claiming that the beneficiary had adjusted gross income of \$26,000 and \$25,168 in 2005 and 2006 respectively. Counsel asserts that these amounts show that the petitioner has met the criteria in showing the ability to pay the proffered wage. Counsel's reliance on the beneficiary's total adjusted gross income in determining the petitioner's ability to pay the proffered wage through examination of wages actually paid the beneficiary by the petitioner is misplaced. The beneficiary's income from other employers or self-employment cannot be used in determining the petitioner's ability to pay the beneficiary the proffered wage. However, the AAO notes that the beneficiary's individual income tax returns contain New York State Department of Taxation and Finance's Summary of Federal Form W-2 Statements for 2005 and 2006. The summaries show that the petitioner paid the beneficiary wages, tips other compensation of \$26,000 in 2005 and \$13,500 in 2006. While the petitioner demonstrated that it paid the beneficiary the full proffered wage in 2005 and a partial proffered wage in 2006, the petitioner must

demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage of \$25,000 in the years 2001 through 2004 and the difference of \$11,500 between wages actually paid to the beneficiary and the proffered wage in 2006.

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). On appeal, counsel's reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

On appeal, counsel asserts that the petitioner's depreciation deduction should be considered in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on depreciation deduction is misplaced. 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. We reject, however, the counsel's assertions on appeal that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

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 is structured as a C corporation. According to the tax return in the record, the petitioner's fiscal year runs from November 1 to October 31. The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years 2001 through 2005. The petitioner's tax returns demonstrate its net income and net current assets as below.

- In the fiscal year of 2001 (11/1/01-10/31/02), the Form 1120 stated net income³ of (\$1,410) and net current assets of (\$22,723).
- In the fiscal year of 2002 (11/1/02-10/31/03), the Form 1120 stated net income of \$0 and net current assets of (\$22,088).
- In the fiscal year of 2003 (11/1/03-10/31/04), the Form 1120 stated net income of \$3,240 and net current assets of (\$61,194).
- In the fiscal year of 2004 (11/1/04-10/31/05), the Form 1120 stated net income of \$987 and net current assets of (\$62,908).
- In the fiscal year of 2005 (11/1/05-10/31/06), the Form 1120 stated net income of \$2,109 and net current assets of (\$55,789).

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.

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.

In the instant case, priority date falls on April 30, 2001, however, the petitioner's tax return for its fiscal year 2001 covers from November 1, 2001 to October 31, 2002. The record does not contain any regulatory-prescribed evidence, such as annual report, tax return or audited financial statements, covers the priority date of April 30, 2001 in this case. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2001 because it failed to submit regulatory-prescribed evidence for the calendar year of 2001 or the fiscal year of 2000 covering November 1, 2000 to October 31, 2001.

For the fiscal year of 2001, the petitioner's tax return indicates that both its net income and net current assets were negative, and therefore, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the full proffered wage. For the fiscal year of 2002, the petitioner had zero net income and negative net current assets, and thus, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the full proffered wage. For the fiscal years of 2003, the petitioner had net income of \$3,240 and negative net current assets, however, the petitioner's net income was still insufficient to pay the beneficiary the full proffered wage of \$25,000. As discussed previously, in the calendar year of 2005 the petitioner paid the beneficiary the full proffered wage, and therefore, the petitioner has already established its ability to pay the proffered wage for that year. In 2006, the petitioner paid the beneficiary a partial proffered wage of \$13,500, and the petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the difference of \$11,500 between wages actually paid to the beneficiary and the proffered wage. The petitioner's tax return for its fiscal year of 2005, which covers most of the calendar year 2006, indicates that the petitioner had net income of \$2,109 and negative net current assets during that period. Therefore, the petitioner did not have sufficient net income or net current assets to pay the beneficiary the difference between wages actually paid to the beneficiary and the proffered wage for the fiscal year 2005.

For the fiscal year of 2006 (11/1/06-10/31/07), the record does not contain any documentary evidence showing that the petitioner paid the beneficiary any compensation or regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements to demonstrate that the petitioner had sufficient net income or net current assets to pay the proffered wage for this period. The record before this office closed on September 10, 2008 the instant appeal was filed with the AAO. As of that date the petitioner's regulatory-prescribed financial documentation, such as annual report, federal tax return or audited financial statements for its fiscal year 2006 should have been available. However, the petitioner did not submit its annual report, tax return or audited financial statements for the fiscal year 2006, nor did counsel explain why any of these documents was not submitted despite the petition was denied by the director solely based on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL except for the year 2005, the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wages through examination of wages paid to the beneficiary and the petitioner's net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, while counsel asserts that the petitioner has been in the business since 1995, the petitioner's tax returns show that among the five years for which the petitioner submitted its tax returns, no single year had the petitioner sufficient net income to pay a new employee, and the petitioner's net current assets were always negative. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that those five years were uncharacteristically unprofitable years for the petitioner. 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 on appeal cannot overcome the ground of denial in the director's August 21, 2008 decision. The petitioner failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continues to the present except for 2005. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.