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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

[Redacted]

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date: **DEC 30 2010**

IN RE:

Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$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 immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates residential care facilities. It seeks to employ the beneficiary permanently in the United States as a maintenance and repair worker 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 continuing ability to pay the proffered wage from the priority date to the present. Therefore, the director 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 June 16, 2009 denial, the primary issue in this case is whether or not the petitioner has established its 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 22, 2002. The proffered wage as stated on the Form ETA 750 is \$1,740.80 per month (\$20,889.60 per year). On the petition, the petitioner claims that the business was established on January 1, 1981, and has a gross annual income of \$423,406, net annual income of \$27,272 and six employees. On the Form ETA 750B signed on April 10, 2002, 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 submitted the beneficiary's W-2 forms for 2002 through 2007 and paystubs for 2008. The beneficiary's W-2 forms show that the petitioner paid the beneficiary \$6,600 in 2002, \$14,400 in 2003, \$15,600 in 2004, \$13,200 in 2005, \$15,376 in 2006, and \$20,478.85 in 2007. The beneficiary's paystubs show that the petitioner paid the beneficiary \$870.40 semi-monthly and the year-to-date earning as of December 16, 2008 was \$20,889.60. Therefore, the petitioner demonstrated that it paid the beneficiary the full proffered wage in 2008. However, the petitioner failed to establish its ability to pay the instant beneficiary the full proffered wage from 2002 to 2007 through examination of wages actually paid to the beneficiary and thus, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the difference of \$14,289.60 in 2002, \$6,489.60 in 2003, \$5,289.60 in 2004, \$7,689.60 in 2005, \$5,513.60 in 2006, and \$410.75 in 2007 between wages actually paid to the beneficiary and the proffered wage respectively.

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. 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 total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the 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).

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. We reject, however, the idea 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 an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. The record contains the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2002 through 2007. 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 23 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on December 17, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). The petitioner submitted Page 1 and Page 4 of its Form 1120S tax returns for these years. While Page 1 reflects the ordinary income on line 21 and Page 4 contains Schedule L showing the net current asserts, without Schedule K, the AAO cannot determine whether the petitioner had income, credits, deductions or other adjustments from sources other than a trade or business, and further cannot determine the figure to be considered as net income for the petitioner for these years. Therefore, the petitioner failed to demonstrate that it had sufficient net income to pay the instant beneficiary the difference between wages actually paid to the beneficiary and the proffered wage for 2002 through 2007.

The petitioner's tax returns demonstrate its net current assets as below.

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.

- In 2002, the Form 1120S stated net current assets of [REDACTED]
- In 2003, the Form 1120S stated net current assets of [REDACTED]
- In 2004, the Form 1120S stated net current assets of [REDACTED]
- In 2005, the Form 1120S stated net current assets of [REDACTED]
- In 2006, the Form 1120S stated net current assets of [REDACTED]
- In 2007, the Form 1120S stated net current assets of [REDACTED]

In 2002, the petitioner did not have sufficient net current assets to pay the instant beneficiary the difference of \$14,289.60 between wages actually paid to the beneficiary and the proffered wage; in 2003, the petitioner had sufficient net current assets to pay the instant beneficiary the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage; in 2004, the petitioner did not have sufficient net current assets to pay the instant beneficiary the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage; in 2005, the petitioner had sufficient net current assets to pay the instant beneficiary the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage; in 2006, the petitioner had sufficient net current assets to pay the instant beneficiary the difference of [REDACTED] between wages actually paid to the beneficiary and the proffered wage; and in 2007, the petitioner did not have sufficient net current assets to pay the instant beneficiary the difference of \$410.75 between wages actually paid to the beneficiary and the proffered wage.

The petitioner failed to submit evidence showing that it had sufficient net income to pay the proffered wage in 2002 through 2007 and the petitioner failed to demonstrate that it had sufficient net current assets to pay the instant beneficiary the proffered wage for 2002, 2004 and 2007 and therefore, the petitioner failed to establish its continuing ability to pay the instant beneficiary the proffered wage through examination of wages paid to the beneficiary and the petitioner's net income or net current assets although it establish the ability to pay for 2003, 2005, 2006 and 2008.

On appeal, counsel urges that the petitioner established its ability to pay the proffered wage with a combination of the petitioner's net income and Schedule L Cash. However, that calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that

were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

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 which have been pending 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 petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater 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).

USCIS records indicate that the petitioner has at least two Immigrant Petition for Alien Worker (Form I-140) approved.³ Therefore, the petitioner must also show that it had sufficient net income or net current assets to pay one proffered wage for 2002 through 2005 and two more from 2006 to the present in addition to the instant beneficiary. *See* 8 C.F.R. § 204.5(g)(2). However, the record of proceedings does not contain any regulatory-prescribed evidence showing that the petitioner paid the beneficiaries of the approved petitions the full proffered wages or had sufficient net income or net current assets to pay the beneficiaries the proffered wages in addition to the instant beneficiary during the all relevant years. Therefore, it also failed to establish its ability to pay multiple proffered wages from the priority date to the present.

USCIS may also 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

_____ was filed for Cuenta on July 14, 2006 with the priority date of May 8, 2006 and approved on September 26, 2006. USCIS does not contain any record showing that the beneficiary of this petition has been adjusted to permanent resident status or that the approval of the petition has been revoked.

_____ was filed for Santiago on July 9, 2007 with the priority date of April 22, 2002 and approved on September 23, 2008. USCIS does not contain any record showing that the beneficiary of this petition has been adjusted to permanent resident status or that the approval of the petition has been revoked.

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 submit complete tax returns to demonstrate that it had sufficient net income to establish its ability to pay the proffered wages for all relevant years 2002 through 2007, and also failed to demonstrate that it had sufficient net current assets to pay all proffered wages to the instant beneficiary and the beneficiaries of the approved petitions. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all these years were uncharacteristically unprofitable years for the petitioner. In addition, given the record as a whole, the petitioner's history of filing immigrant 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 grounds of denial in the director's June 16, 2009 decision. The petitioner failed to establish that its continuing ability to pay all proffered wages as of the priority date. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.