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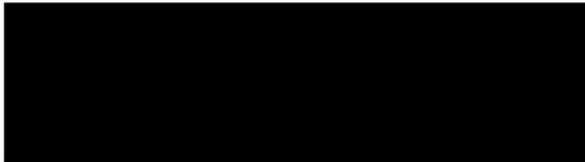
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



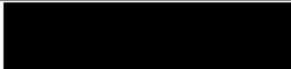
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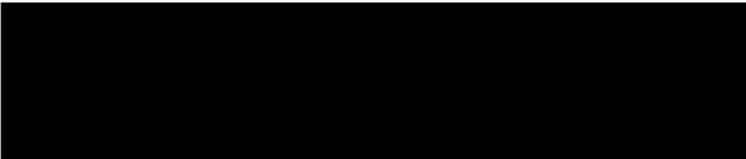
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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. 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 denial, an 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.

Beyond the decision of the director, an additional issue in this case is whether or not the petitioner has the ability to pay the proffered wages to each of the beneficiaries that it sponsored from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.¹

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

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

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1988).

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 September 23, 2004. The proffered wage as stated on the Form ETA 750 is \$78,000.00 per year. The Form ETA 750 states that the position requires a "Bachelors or Equiv." in "Comp. Sci., CIS, MIS, Math, Engg (Elect./Comm.)" and two years of experience in the offered position or two years of experience in the related occupation of "Senior/Systems Admin. or any exp. providing skills in described duties."

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ 70 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on September 21, 2004, 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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

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 during any relevant timeframe including the period from the priority date in 2004 until 2007. The petitioner submitted the beneficiary's W-2 statements for 2006 and 2007 showing wages paid by the petitioner to the beneficiary in the amounts of \$24,752.00 and \$122,553.20 respectively. Therefore, in 2007, the petitioner paid the beneficiary the proffered wage. However, the petitioner did not pay the beneficiary 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS 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).

The record before the director closed on July 11, 2007, 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 federal income tax return for 2007 was not yet due. Therefore, the petitioner’s income tax return for 2006 was the most recent return available. The petitioner’s tax returns demonstrate its net incomes as shown in the table below.

- In 2004, the Form 1120S stated net income³ of \$29,980.00.
- In 2005, the Form 1120S stated net income of \$328,043.00.
- In 2006, the Form 1120S stated net income of \$645,173.00.

Therefore, for 2004 the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁴ A corporation’s year-end current assets are shown

³ 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), and on line 18 (2006) of Schedule K. *See Instructions for Form 1120S, 2006*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 29, 2009) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income deductions and other adjustments shown on its Schedule K for 2004, 2005, and 2006, the petitioner’s net income is found on Schedule K of its tax returns.

⁴According 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,

on Schedule L, lines 1 through 6. 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 as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$32,999.00.

Therefore, for 2004 the petitioner did not have sufficient net current assets to pay the proffered wage.

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 beneficiary the proffered wage as of the priority date through an examination of its net income or net current assets in 2004.

On appeal, prior counsel and the petitioner have filed legal briefs.

According to prior counsel, in 2004, the prevailing wage of \$78,000.00 should be prorated from the priority date, e.g. September 23, 2004, and therefore, the petitioner is only responsible to pay a prorated prevailing wage for "the remaining 99 days of 2004." According to counsel the prorated amount is \$26,000.00⁵ (e.g. 266/365 times \$78,000.00). Counsel continues on by contending that the petitioner's net profits in 2004 were \$20,827.00 (Form 1120S, Line 21), and they may be added to the petitioner's "average bank balance" of \$33,431.75 to equal \$54,258.75. Therefore, counsel contends that his calculations demonstrate that, since \$54,258.75 is more than the prorated amount of \$26,000.00, and this establishes the petitioner's ability to pay in 2004. Prior counsel's contentions are misplaced.

Although, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date, the AAO will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Further, counsel's reliance on the average monthly balances 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

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.

⁵ The correct prorated amount is \$21,156.16.

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 2004 tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L.

Additionally, counsel contends that the petitioner's net profits may be added to the petitioner's average yearly bank balance in 2004 as evidence of the petitioner's ability to pay the prorated proffered wage. Correlating the cash amounts stated in counsel's contention with the petitioner's tax return for 2004, it is clear that counsel is suggesting combining petitioner's net income in 2004 with the cash in the petitioner's bank checking account received by the business for that year as stated on Schedule "L" as current assets. USCIS will consider separately, the net income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. To do otherwise would be duplicative of petitioner's net income. Also, on Schedule "L," it is the net current asset figure that is important as calculated above. Again, counsel is disregarding the use of Schedule "L", as a balance sheet that shows both current assets and current liabilities. Therefore, the cash and other current assets are reduced as is calculated above to reach the net current asset figure. Further, prior counsel offers no regulation or case precedent that would allow such a calculation combining the petitioner's net profits and average bank balances in 2004 to demonstrate the petitioner's ability to pay the proffered wage in 2004.

The petitioner submitted a legal brief dated May 5, 2008. The petitioner makes a similar assertion as prior counsel as stated above that the prevailing wage may be prorated citing for support a USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. According to the petitioner, since the petitioner's net current assets were approximately \$33,000.00 in 2004, this amount is more than the prorated prevailing wage of \$26,000.00. Therefore, according to the petitioner, its calculation demonstrates that it can pay the prorated prevailing wage in 2004. The petitioner's interpretation of the language in that memorandum is overly broad and it does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for policy guidance therein. If the AAO were to interpret and apply the memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by the interoffice guidance memorandum as interpreted by the petitioner without binding legal effect. As already stated, the proffered wage is not prorated in 2004. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

Additionally, the petitioner cites generally the case decisions of *Matter of Sonogawa*, 12 I&N Dec. 612, and *Matter of Great Wall*, 16 I&N Dec. 142. Further, the petitioner cites the USCIS adopted decision of *Matter of Chawathe*, A74 254 994 (AAO 2006), for the proposition that that the preponderance of the evidence standard of proof is applicable to most administrative immigration proceedings.

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. The

petitioning entity in *Sonegawa* 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 *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.

Prior counsel asserts that information in a letter from the petitioner's accountant dated August 13, 2007, evidences its ability to pay the proffered wage. According to the petitioner's accountant, the petitioner was incorporated in 1998, and its gross receipts have increased from 2004 to 2006, i.e. \$4,930,581.00 to \$6,962,232.00 respectively. The accountant states that the petitioner's payroll expense is documented by the petitioner's Employers Quarterly Federal Tax Form (Form-941) statements in the record. According to the accountant, the "swings" in the petitioner's net income from one year to the next are accounted for by the expenditures necessary to obtain immigration approvals, such as transporting of individuals, training, and "bench time" before placement of the new employees with its customers. In the context of this case, these expenses are for the petitioner ordinary, non-discretionary business expenses, not unique one-time expenditures. Further, the accountant has not substantiated his assertion by detailing the varying expenses for immigration approvals, transporting of individuals, training, and "bench time" from year to year to show why 2004 was a unique year in which unique expenses resulted in depressed net income. In the instant case, no unique circumstances were shown providing sufficient evidence why the petitioner could not pay the proffered wage from net income or net current assets in 2004. 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.

Further, from a review USCIS' electronic database, the AAO has identified an additional ground of ineligibility. Beyond the decision of the director, an additional issue in this case is whether or not the petitioner has the ability to pay the proffered wages to each of the beneficiaries that it sponsored from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence

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 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 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. at 144-145 (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 Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). According to the electronic records of USCIS, the petitioner has filed approximately 275 immigrant (USCIS Form I-140) and nonimmigrant (USCIS Form I-129) petitions since 2003.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage for the subject beneficiary in 2004, nor did the petitioner demonstrate that it had either net income or net current assets sufficient to pay the wages for all sponsored beneficiaries from 2003 and onwards.

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed.