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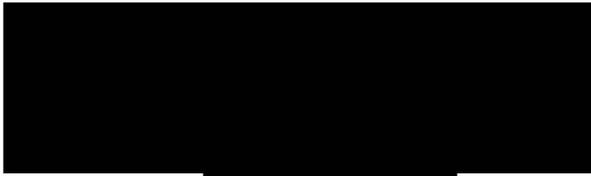
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

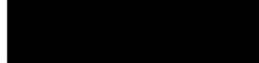


**U.S. Citizenship
and Immigration
Services**

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 16 2010

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IN RE:

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 printing company. It seeks to employ the beneficiary permanently in the United States as an assistant press operator. 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 July 25, 2007 denial, the single 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)(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 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$21.67 per hour (\$45,073 per year).¹ The Form ETA 750 states that the position requires three years of experience as a press operator.

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 997, 1002 n. 9 (2d Cir. 1989). 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 a C corporation. On the petition, the petitioner claimed to have been established in 1947 and to currently employ 22 workers. According to the tax returns in the record, the petitioner's fiscal year is April 1 to March 31. On the Form ETA 750B, signed by the beneficiary on March 31, 2001, the beneficiary stated that he began working for the petitioner in February 2000.

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

¹ It appears that the DOL required the petitioner to change the wage to \$21.67 prior to certification as the initial wage is "whited out" and \$21.67 is typed in box 12 for rate of pay. The petitioner's owner signed and dated the change prior to certification. A petitioner is required to pay the wage certified by DOL.

² 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).

petitioner's ability to pay the proffered wage. The petitioner submitted the following IRS Form W-2s for the beneficiary:

- In 2001, the Form W-2 stated that the petitioner paid the beneficiary \$25,132.59.
- In 2002, the Form W-2 stated that the petitioner paid the beneficiary \$25,852.33.
- In 2003, the Form W-2 stated that the petitioner paid the beneficiary \$23,137.50.
- In 2004, the Form W-2 stated that the petitioner paid the beneficiary \$22,970.
- In 2005, the Form W-2 stated that the petitioner paid the beneficiary \$23,085.
- In 2006, the Form W-2 stated that the petitioner paid the beneficiary \$22,467.59

The amounts reflected on the Form W-2s for all of these years are less than the proffered wage. As such, the petitioner must demonstrate its ability to pay the difference between the actual wages paid and the proffered wage; in 2001, the difference is \$19,941; in 2002, the difference is \$19,221; in 2003, the difference is \$21,936; in 2004, the difference is \$22,103; in 2005, the difference is \$21,988; and in 2006, the difference is \$22,606. The petitioner also submitted payroll records for 2007 indicating that it paid the beneficiary \$7,511.44 from January 1 through April 25, 2007. We cannot extrapolate from these pay records that the rate reflected would continue to be paid or even that the beneficiary continued to work for the entire year. The pay stubs thus only establish the amount received for the period of time covered.

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 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.

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, 558 F.3d 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*, 719 F.Supp. 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 June 7, 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, it is unclear whether the petitioner’s 2006 federal income tax return was due. The petitioner’s tax returns demonstrate its net income for tax years 2000 to 2005, as shown in the table below.

- The 2000 Form 1120 stated net income (loss) of -\$55,013.³
- The 2001 Form 1120 was not submitted.
- The 2002 Form 1120 was not submitted.
- The 2003 Form 1120 stated net income (loss) of -\$185,524.
- The 2004 Form 1120 stated net income (loss) of -\$103,574.
- The 2005 Form 1120 stated net income of \$107,621.⁴

For the years 2003, and 2004, the petitioner’s tax returns demonstrated negative net income for each year. Therefore, for 2003 and 2004, the petitioner did not have sufficient net income to pay the

³ The petitioner’s 2000 return covers April 1, 2000 to March 31, 2001, which is before the priority date and would not demonstrate the petitioner’s ability to pay from April 2001 onwards. Based on the petitioner’s tax year, the period between March 31, 2001 and April 1, 2003 was not covered by the tax returns submitted.

⁴ Based on the petitioner’s tax year, this return would cover up to March 31, 2006.

difference between the actual wage paid and the proffered wage. The petitioner failed to submit its 2001 or 2002 tax return and therefore cannot establish its ability to pay for those years. The petitioner's 2000 tax return covers a time period before the priority date and is, therefore, not relevant to the petitioner's ability to pay from 2001 onward and will be considered only generally. The petitioner demonstrated sufficient net income in 2005 to evidence its ability to pay the difference between the proffered wage and the actual wages paid.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ 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 tax years 2000 through 2005, as shown in the table below.

- The 2000 Form 1120 stated net current assets of \$54,612.⁶
- The 2001 Form 1120 was not submitted.
- The 2002 Form 1120 was not submitted.
- The 2003 Form 1120 stated net current assets (liabilities) of -\$74,902.
- The 2004 Form 1120 stated net current assets (liabilities) of -\$165,493.

Therefore, for the tax years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the difference between the actual wages paid to the beneficiary and 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 wages paid to the beneficiary, or its net income or net current assets except for 2005.

Counsel asserts in her brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Specifically, she

⁵According 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.

⁶ As noted above, this would represent a time period before the priority date and not evidence the petitioner's ability to pay from April 2001 onwards.

argues that the financial reports prepared by the petitioner's accountant demonstrate the petitioner's ability to pay and that a bank statement submitted reflects a line of credit sufficient to pay the proffered wage.

Counsel contends on appeal that the director violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence in the form of a second request for evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director issued a request for evidence to which the petitioner failed to adequately respond.

Counsel asserts on appeal that USCIS failed to consider the petitioner's financial reports, which "the district director [sic] assumed . . . were not audited, when in fact, the statements have a notation 'see Accountant's report.'" Counsel asserts that this "could indicate the financial statements may have been audited or even certified." The financial statement in the record, included both in response to the director's RFE and on appeal, is submitted on appeal with a letter dated December 6, 2005 from [REDACTED], which states that the accountants undertook a "review" of the petitioner's records and that "[a] review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole." Contrary to counsel's assertions on appeal, the evidence in the record indicates that the financial statements were not audited. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Similarly, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. The bank statement evidencing the line of credit is dated January 2, 2007. The priority date is April 2001. Therefore, it is unclear that the line of credit was available in 2001. As noted above, a petitioner

must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The petitioner submitted a bank statement reflecting a line of credit of \$60,000, but submits no information regarding how it will be used to augment the petitioner's business. As such, this line of credit is insufficient to establish the petitioner's ability to pay.

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, the tax returns show that the petitioner did not have one "off" year like in *Sonogawa*, but instead the tax returns, outside of 2005, reflect consistent negative net income instead of positive income and the net current assets are also negative. We again note that the petitioner failed to submit its tax returns for tax years 2001 and 2002 despite the director's specific request for

evidence. Further, the petitioner did not submit any tax returns after 2005 on appeal to help establish that the financial situation of its business was different than what was portrayed on its earlier tax returns. Additionally, the tax returns reflect declining gross receipts and declining amounts of salaries paid from 2001 to 2005. Nothing in the record documents the petitioner's reputation in the industry similar to the situation presented in *Sonegawa*.

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. 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.