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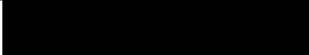


**U.S. Citizenship
and Immigration
Services**

B6



FILE:



Office: TEXAS SERVICE CENTER

Date: FEB 16 2010

SRC 07 065 51128

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the Service Center in accordance with below.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook. 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 September 12, 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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$12.83 per hour (\$26,686.40 per year). The Form ETA 750 states that the position requires two years of experience.

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.¹ Relevant evidence in the record includes the front page of the petitioner's Form 1120 2001 to 2006 tax returns, W-2 forms issued by the petitioner to the beneficiary, reviewed financial statements prepared by independent accountants, and a letter from the Chief Financial Officer about the petitioner's ability to pay the proffered wage. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

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 1997 and to currently employ 715 workers. According to the tax returns in the record, the petitioner's fiscal year is loosely based on the calendar year.² Based on the submitted W-2s, it appears that the beneficiary began working for the petitioner in 2000.

On appeal, counsel asserts that the petitioner's high gross annual income, its high asset amount, and its high payroll amount evidences its ability to pay the proffered wage.

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

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).

² The petitioner listed on Form I-140 is [REDACTED] with a FEIN of [REDACTED]. The tax returns submitted are for [REDACTED] and subsidiaries with a FEIN of [REDACTED]. The Form 1120 states that it is a "consolidated return." Reviewed accountant statements list the petitioner as a "wholly owned subsidiary of [REDACTED]." In 2001 and 2002, the Form 1120 showed that the calendar year and the petitioner's fiscal year were the same. In 2003, the petitioner's fiscal year began December 25, 2002 and ended December 30, 2003. In 2004, the petitioner's fiscal year began December 31, 2003 and ended December 28, 2004. In 2005, the petitioner's fiscal year began on December 29, 2004 and ended January 3, 2006. In 2006, the petitioner's fiscal year began on January 4, 2006 and ended January 2, 2007.

evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted W-2 forms for 2000 to 2006 (the 2000 W-2 is omitted as irrelevant to the petitioner's ability to pay as the labor certification was accepted in 2001),³ as shown in the table below.

- In 2001, the W-2 indicated that the petitioner paid the beneficiary \$14,096.81.
- In 2002, the W-2 indicated that the petitioner paid the beneficiary \$10,903.20.
- In 2003, the W-2 indicated that the petitioner paid the beneficiary \$10,290.
- In 2004, the W-2 indicated that the petitioner paid the beneficiary \$16,493.52.
- In 2005, the two W-2s submitted indicated that the petitioner paid the beneficiary \$8,580.13 and \$11,509.08 for a total of \$20,089.21.⁴
- In 2006, the W-2 indicated that the petitioner paid the beneficiary \$22,272.39.

In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage. As the proffered wage is \$26,686.40, the petitioner must demonstrate that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which in 2001 is \$12,589.59; in 2002 is \$15,783.20; in 2003 is \$16,396.40; in 2004 is \$10,192.88; in 2005 is \$6,597.19; and in 2006 is \$4,414.01.

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*

³ The 2000 W-2 statement indicates that the petitioner paid the beneficiary \$16,357.81 in 2000. As the priority date is April 19, 2001, the amount received by the beneficiary prior to this date would not evidence the petitioner's ability to pay the proffered wage. However, the wages paid in 2000 will be considered generally.

⁴ The reason that the petitioner issued the beneficiary two separate W-2 statements is unclear.

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, 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).

The petitioner submitted page 1 of its Forms 1120 on appeal. The petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 to 2006, as shown in the table below.⁵

⁵ The petitioner submitted its tax returns for the first time on appeal, but only submitted the first page of those returns instead of a complete copy of the return. The petitioner should submit full copies of its tax returns to verify that the petitioner is included as a subsidiary in the consolidated returns for

- In 2001, the Form 1120⁶ stated net income (loss) of -\$2,618,766.
- In 2002, the Form 1120 stated net income (loss) of -\$500,439.
- In 2003, the Form 1120 stated net income (loss) of -\$1,155,510.
- In 2004, the Form 1120 stated net income (loss) of -\$183,375.
- In 2005, the Form 1120 stated net income of \$283,711.
- In 2006, the Form 1120 stated net income of \$289,902.

Therefore, the petitioner demonstrated an ability to pay the difference between the wage received by the beneficiary and the proffered wage in 2005 and 2006, but not in the years prior.

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.⁷ A corporation's year-end current assets are shown 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. As the petitioner did not submit full copies of its tax returns, we do not have Schedule L and are unable to consider the net current assets of the petitioner in its ability to pay.

The petitioner did submit financial statements "reviewed" by independent accountants. The letter accompanying each financial statement stated that the review "consists principally of inquiries of Company personnel and analytical procedures applied to financial data" and is not "an audit in accordance with auditing standards generally accepted." 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 that 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. The unaudited financial statements that counsel submitted with the petition are

⁶ The income for a C corporation can be found on line 29c of the Form 1120. As the petitioner's Form 1120 contains no figure on line 29c of its tax returns for 2001, 2002, 2003, and 2004, we have used the figure provided on line 28 which is "taxable income before net operating loss deduction and special deductions."

⁷ 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.

not persuasive evidence. 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 "Company personnel" and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of the petitioner's employees are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

8 C.F.R. § 204.5(g)(2) provides: "In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." The petitioner submitted an August 24, 2007 letter from [REDACTED], which states that the petitioner is able to pay the prospective wage based on the amount of gross revenue, number of employees, and the length of time that the petitioner has been in business. [REDACTED] also states that the petitioner "has more than adequate cash reserves and well established customer relationships, which ensure the business will continue well into the future." Specifically, [REDACTED] states that the petitioner "currently shows gross revenue of \$10,000,000 to date. It is anticipated that our company will reach \$15,000,000 in gross revenues by the end of 2007." Additionally, [REDACTED] states that the company has been in business for approximately ten years and "it has shown a sign of profit for each of those years." The company employs "over one thousand (1,000) employees. The company has more than adequate cash reserves." As the CFO's letter indicates that the petitioner employs over 1,000 people, [REDACTED] letter provides pertinent evidence of the petitioner's ability to pay the proffered wage.

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

beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Here, the AAO would be willing to accept the CFO's letter combined with W-2 forms, the petitioner's length of time in business, the number of employees, and gross income⁸ as sufficient to establish its ability to pay provided that the petitioner documents that it may be properly included on the consolidated tax returns of [REDACTED]

Although the AAO would sustain the appeal regarding the petitioner's ability to pay upon confirmation that the petitioner may be included on the consolidated tax return of [REDACTED] the petition is not currently approvable. The petitioner should be allowed to address two other issues not raised by the director, in addition to the consolidated return issue. First, although the petitioner seems to operate more than one establishment, the petitioner is identified as [REDACTED]. However, the financial statements indicate that [REDACTED] closed "[o]n the first day of fiscal 2004" after "its lease expired." It appears that the beneficiary was to be employed at [REDACTED]. The petitioner presented no evidence to show where the beneficiary would be employed after [REDACTED] closed. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). Second, the letters that document the beneficiary's experience do not demonstrate that the beneficiary has the requisite two years of experience in the required position as a head cook, or alternate occupation as a cook or chef.⁹ The letter from [REDACTED] of

⁸ The petitioner's consolidated tax returns list the following gross receipts: \$32,033,227 in 2001, \$33,300,443 in 2002, \$32,865,765 in 2003, \$32,826,734 in 2004, \$35,319,425 in 2005, and \$31,466,317 in 2006.

⁹ To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

██████████ states that the beneficiary worked at the restaurant from August 2, 2000 to April 10, 2001, a period of time less than the two years required by the labor certification; the letter does not state if the experience was on a part-time or a full-time basis. The letter from ██████████ general manager of the ██████████ states that the beneficiary worked with ██████████ from August 1992 to December 1999, but does not provide any detail as to the beneficiary's job responsibilities or even the beneficiary's position with the organization. Without this information, we are unable to conclude that the beneficiary's position with the ██████████ included experience relevant to the position detailed on the labor certification.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.