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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

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FILE:

[REDACTED]
LIN 07 090 53053

Office: NEBRASKA SERVICE CENTER

Date: **JAN 27 2010**

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

[REDACTED]

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 The decision of the director shall be withdrawn, and the matter will be remanded to the director for further consideration.

The petitioner is an energy management and controls business. It seeks to employ the beneficiary permanently in the United States as an electronics technician. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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. Therefore, the director denied the petition.

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.

According to the director's June 17, 2008 denial, the single issue in this case is whether 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 ETA Form 9089 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 ETA Form 9089 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 ETA Form 9089 was accepted on July 7, 2006. The proffered wage as stated on the ETA Form 9089 is \$19.56 per hour (\$40,684.80 per year). The ETA Form 9089 states that the position requires twenty-four months experience in the proffered position.

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 on appeal.¹

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 2001 and to currently employ 4 workers. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on April 12, 2008, 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 an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. There is no evidence in the record that the petitioner employed the beneficiary in 2006. The Form W-2, Wage and Tax Statement, in the record establishes that the petitioner paid the beneficiary: \$31,186.50 in 2007, (\$9,498.30 less than the proffered wage). Thus, the petitioner must demonstrate that it can pay the full proffered wage in 2006 and the difference between wages actually paid to the beneficiary and the proffered wage in 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage from the priority date onwards, USCIS will next examine the net income

¹ 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).

figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, contrary to assertions made on appeal. *See 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 not sufficient. Also showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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).

The record before the director closed on May 6, 2008 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 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax

return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net income² of \$13,374.
- In 2007, the Form 1120S stated net income of \$10,577.

Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the proffered wage.

In 2007, the petitioner's net income added to the wages paid to the beneficiary, \$31,186.50, is more than the proffered wage of \$40,684.80. Thus, the petitioner has shown an ability to pay the proffered wage in 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. However, the petitioner's total assets will not be 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.³ 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

² 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 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf>, accessed January 25, 2009, (which indicates 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 2006 and 2007, the petitioner's net income is found on Schedule K of its tax returns. The director incorrectly used the figure on line 21 of page one of the petitioner's IRS Form 1120S to represent net income in this matter. This did not alter the outcome of the ability to pay analysis in this case. Thus, the petitioner was not harmed by this error.

³According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 2006, as shown in the table below.

- In 2006, the Form 1120S stated net current assets of \$11,276.

Thus, for the year 2006, the petitioner did not have sufficient net current assets to pay the full proffered wage.

However, the petitioner's owner, [REDACTED] submitted a letter dated April 23, 2008 on letterhead stationery in which he stated that if the petitioner had employed the beneficiary from the July 7, 2006 priority date, he would have paid the beneficiary the proffered wage out of his compensation as an officer. The 2006 Form W-2 for [REDACTED] in the record establishes that the petitioner paid him \$65,000 in that year. The 2006 Form 1120S in the record also indicates that the petitioner paid out \$65,000 as officer's compensation in that year. The 2006 Form 1040, U.S. Individual Income Tax Return, filed jointly by [REDACTED] and his spouse [REDACTED] indicates that this couple had an adjusted gross income of \$167,879 in 2006.

The petitioner has sufficiently documented that its owner was willing to forego officer compensation to pay the proffered wage in 2006, and that this owner could have reasonably afforded to have done so.⁴

The petitioner has already established that it had the ability to pay the wage in 2007

Based upon the limited and unique factual circumstances of this case, this office finds that the petitioner has shown the continuing ability to pay the beneficiary the proffered wage beginning from the priority date through 2007. However, the petitioner has not established a continuing ability to pay the proffered wage through the date of this decision. Accordingly, on remand, the AAO directs the director to request additional evidence pertaining to the petitioner's continuing ability to pay the wage in 2008 and 2009.

Regarding other points made by the petitioner directly or through counsel in this proceeding, the AAO would add that any suggestion that "residual" profits from 2005 may be carried forward to 2006 to show an ability to pay the wage is without merit. This office will not consider 24 months of income from 2005 and 2006 as being available to pay the annual proffered wage in 2006. Also net current assets and net income may not be combined when determining a petitioner's ability to pay the proffered wage. This is because net income and net current assets are not two separate sets of funds available to pay the wage. Rather, net income and net current assets represent two different ways to view the funds available to the petitioner. Net income views the petitioner's funds for the year retrospectively, and net current assets view the petitioner's funds for the year prospectively. A net income that is greater than the amount of the proffered wage indicates that a petitioner could

⁴ The AAO withdraws any suggestion made by the director that no portion of officer's compensation may ever be considered as funds available to pay the wage.

have paid the beneficiary the wages during the year out of its income. Net current assets that are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those funds. Also, the AAO will not consider unsupported claims that the petitioner has high profile clients such as [REDACTED]s and [REDACTED] in Manhattan, when analyzing the strength of its business and its ability to pay. In addition, this office will not consider undocumented claims that at all times during the relevant period of analysis the petitioner had over \$100,000 in its business banking account. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Finally, the AAO will not consider documentation of the petitioner's owners' net worth as evidence of its ability to pay the wage. USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the record fails to demonstrate that as of the priority date the beneficiary had acquired the two years of experience as an electronics technician needed to perform the duties of the proffered position. *See Spencer Enterprises, Inc. v. United States*, 229 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. 1989)(which notes that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The ETA Form 9089, Part H, items 6 and 11, set forth the minimum experience that a beneficiary must have for the proffered position of electronics technician. In this case, items 6 and 11 describe the requirements of the proffered position as follows:

The applicant must have 24 months of experience in the job offered, the duties of which are delineated at item 11 as:

Lay out, build test, troubleshoot, repair and modify development and production electronic components, parts, equipment and computer controlled systems.

The beneficiary set forth his credentials on the ETA Form 9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At part K(a), item 1, where the beneficiary is to list his relevant work experience, he stated that he worked as an electronics

technician at [REDACTED], Istanbul, Turkey from June 1, 1993 through January 30, 1996. He did not provide any additional information concerning his employment background that is relevant to the proffered position.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(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.

In the record is the letter dated April 2, 2008 which is signed by [REDACTED] and [REDACTED] Istanbul, Turkey. The letter indicates that the beneficiary performed the duties of an electronics technician at Aras Machine and Services, Inc. from June 30, 1993 through January 1, 1996. However, the letter does not indicate whether the beneficiary worked part-time or full-time in this position. Also, the fact that the letter is written in the English language, not the Turkish language, with an original signature on an 8 ½" by 11" sheet, not the letter size traditionally used in Turkey, calls into question the authenticity of the letter.

Thus, it is not clear from the record whether the beneficiary had acquired 24 months of full-time work experience in the proffered position by the priority date as required by the ETA Form 9089.

The director did not indicate in the notice of decision that the experience letter submitted by the petitioner was deficient. The AAO hereby remands the matter to the director that he might request that the petitioner submit a credible experience letter which delineates the beneficiary's duties and hours worked each week at any qualifying employment such that the director might make a determination as to whether the beneficiary had gained at least 24 months of full-time experience in the proffered position before the priority date of July 7, 2006. The director shall also request proof of the petitioner's continuing ability to pay the proffered wage through 2008 and 2009. The director shall then render a new decision which takes into account any additional evidence provided by the petitioner.

The burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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.