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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]
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Office: NEBRASKA SERVICE CENTER

Date: MAR 09 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:



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.

Perry Khew
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 sustained. The petition will be approved.

The petitioner operates an auto body repair business. It seeks to employ the beneficiary permanently in the United States as an auto body repairer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. 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 demonstrates that the appeal was properly filed, was timely, and made 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 dated July 25, 2007, the basis for denial of this case was 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 March 28, 2002 and certified on March 3, 2006. The proffered wage as stated on the Form ETA 750 is \$22.26 per hour (\$46,300.80 per year). The Form ETA 750 states that the position requires three years of 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 upon appeal.¹

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750 Application for Alien Employment Certification approved by the DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2002 to 2006; [REDACTED] and [REDACTED] IRS Form W-2 Wage and Tax Statements for 2002 to 2005 issued by the petitioner and letters stating that they no longer work for the petitioner; the petitioner's bank statements from 2002 to 2007²; and documentation concerning the beneficiary's qualifications.

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 1974 and to employ 10 workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The petitioner did not list its net annual income and gross annual income on the

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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 Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

petition. On the Form ETA 750, signed by the beneficiary on March 14, 2002, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner 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 paid the beneficiary the full proffered wage from the priority date. Counsel concedes that the beneficiary has not worked for the petitioner.

If the petitioner does not establish that it paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage 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.

The record before the director closed on May 11, 2007 with the receipt by the director of the petitioner's response to the director's request for evidence. As of that date, the most current and available federal income tax return was for 2006. The petitioner's tax returns demonstrate its net income for 2002 to 2006, as shown in the table below.

- In 2002, the IRS Form 1120S stated net income of \$18,842.00.³

³ The AAO notes that 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S

- In 2003, the IRS Form 1120S stated net income of \$20,182.00.
- In 2004, the IRS Form 1120S stated net income of \$13,763.00.
- In 2005, the IRS Form 1120S stated net income of \$33,844.00.
- In 2006, the IRS Form 1120S stated net income of \$62,767.00.

The petitioner did not have sufficient net income to pay the proffered wage for 2002 to 2005. The petitioner demonstrated its ability to pay in 2006 due to its net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1120S 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.

Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See IRS, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-prior/f1120s--2002.pdf>, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-prior/f1120s--2003.pdf>, Instructions for Form 1120S, 2004, at <http://www.irs.gov/pub/irs-prior/f1120s--2004.pdf>, Instructions for Form 1120S, 2005, at <http://www.irs.gov/pub/irs-prior/f1120s--2005.pdf>, Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/f1120s--2006.pdf> (last visited November 5, 2009). The petitioner had income from sources other than from a trade or business in 2002 to 2006, so USCIS takes the net income figure from Schedule K for those years.

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The petitioner's net current assets during 2002 were -\$2,555.00.
- The petitioner's net current assets during 2003 were \$14,751.00.
- The petitioner's net current assets during 2004 were \$6,782.00.
- The petitioner's net current assets during 2005 were \$11,745.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for 2002 to 2005.

Accordingly, from the priority date of March 28, 2002, the petitioner has not established the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets.

On appeal, counsel asserts that the petitioner had paid salaries to [REDACTED] and [REDACTED] who are no longer working for its business. Counsel asserts that the funds used for such positions could instead be used to pay the beneficiary's proffered wage. The evidence in the record names these workers, contains competent evidence of the wages paid and fulltime employment, verifies that their duties are those of the proffered position as set forth on the Form ETA 750, and contains evidence that the petitioner has replaced or will replace them with the beneficiary. On appeal, counsel has submitted letters stating that [REDACTED] and [REDACTED] previously worked for the petitioner as auto body repairers, but no longer work there. The petitioner's owner also submitted a letter stating that the beneficiary will be replacing these two prior workers.

The AAO notes that, in his July 25, 2007 decision, the director found that the petitioner had not yet established that it was replacing these two employees with the beneficiary. The AAO finds that the petitioner has now submitted sufficient evidence on appeal to show replacement. The letters from both of the prior employees stating that they no longer work for the petitioner as auto body repairers, the petitioner's letter stating that it will be replacing them with the beneficiary, and the evidence of wages paid constitute sufficient evidence of replacement.

The AAO further notes that the director stated in his decision that it was not clear whether both of the two employees had ceased working for the petitioner. The director noted that one of the employees had stated that he stopped working for the petitioner in February 2006, but that the petitioner's Forms 941 for 2006 stated that he had been employed in the fourth quarter of that year. On appeal, that employee, [REDACTED] submitted a signed and notarized letter indicating that he did stop working for the petitioner in February 2006 as a full-time employee, but that he returned there temporarily to work during the last quarter of 2006 until March 2007 due to a high increase in business volume. The AAO finds this letter to be a legitimate reason as to why the petitioner's tax returns reflected that he was still working for the petitioner at the end of 2006. Due to this new evidence submitted on appeal, the AAO does not find any inconsistencies in the record of proceeding that would preclude the beneficiary from replacing these two prior employees.

Counsel has submitted these two prior employees' IRS Forms W-2 for 2002 to 2005. In 2005, these two employees were paid more than the proffered wage. From 2002 to 2004, they were collectively paid \$4,050.80, \$3,550.80, and \$2,700.80 less than the proffered wage. Based upon the petitioner's net income alone for those years, it appears that it would have the ability to cover the rest of these wage expenses and pay the beneficiary the proffered wage. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Counsel's assertions on appeal outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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. The petitioner has maintained between approximately \$1.5 million and \$1.7 million in gross sales since the priority date, has been in business since 1974, and has employed 10 workers. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

The evidence submitted establishes that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is March 28, 2002. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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. 1989)(noting that the AAO reviews appeals on a *de novo* basis). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 regulation at 8 C.F.R. § 204.5(l)(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.

The Form ETA 750 states that the position requires three years of experience in the proffered position. The petitioner submitted a letter from [REDACTED] to document the beneficiary's prior work experience. The AAO notes that the letter states that the beneficiary worked for that employer as an auto body repairer from July 1977 to December 1979, a total of approximately two and a half years, not the required three years. The petitioner submitted no further

documentation regarding the beneficiary's prior work experience. The submitted letter fails to document accurately that the beneficiary had the full three years of required experience as an auto body repairer as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position. The director did not note that this evidence was missing within his July 25, 2007 decision.

The AAO sent the petitioner a request for evidence on December 1, 2009 asking the petitioner to provide evidence documenting that the beneficiary worked as an auto body repairer for a total of three full years, thus demonstrating that the beneficiary has the qualifying experience required by the proffered position. The petitioner submitted a letter from [REDACTED] to document the beneficiary's prior work experience. The AAO notes that the letter states that the beneficiary worked for that employer as an automobile repairer from January 1980 to May 1983, a total of almost three and a half years. The submitted letter demonstrates that the beneficiary had the full three years of required experience as an auto body repairer as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). The representations that the beneficiary had made on the Form ETA 750B also corroborate the information contained within this letter. Therefore, the letter is sufficient evidence and is acceptable to document that the beneficiary has the qualifying experience as required by the proffered position.

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 met that burden.

ORDER: The appeal is sustained. The petition will be approved.