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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:

SRC 07 048 52914

Office: TEXAS SERVICE CENTER

Date: **MAR 30 2010**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 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 Director, Texas Service Center, denied the petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The visa petition is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence with the motion demonstrates that the petitioner had sufficient funds to pay the proffered wage.

The petitioner is an elder and childcare placement service.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a nurse's aide. 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 motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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<sup>1</sup> On appeal and on motion, counsel states that the petitioner has changed its name from [REDACTED] to [REDACTED]. Counsel requests that the AAO's decision be sent to the petitioner under the new name. However, a review of the petitioner's status at the website, <http://corp.sec.state.ma.us/corp/corptest/CorpSearchSummary.asp?ReadFromDB=True...>, (accessed on March 11, 2010) reveals that [REDACTED] is still active. It also reveals that [REDACTED] was established on January 26, 2007, and is still active. As counsel has not submitted any evidence that [REDACTED] and [REDACTED] are one and the same, the AAO's decision will be sent to the petitioner of record, [REDACTED].

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As set forth in the AAO's April 6, 2009 dismissal, 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 November 2, 2002. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year). The Form ETA 750 states that the position requires six months of experience in the job offered of nurse's aide or six months of experience in the related occupations of home health aide or pediatric aide. The Form ETA 750 also requires that the alien beneficiary possess a home health aide certificate, nursing assistant/aide certificate or pediatric aide certificate.

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 2001, to have a gross annual income of \$128,567.00, and to currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 25, 2004, the beneficiary claimed to have worked for the petitioner from February 2002 to the present (March 25, 2004).

Relevant evidence submitted on motion includes counsel's brief, a copy of the owner's 2008 Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return; a partial copy of the owner's proposed 2008 Form 1040, U.S. Individual Income Tax Return; a copy of an unaudited profit and loss statement for [REDACTED] for 2008;<sup>3</sup> a copy of the petitioner's 2007 Form 1120, U.S. Corporation Income Tax Return, for the period January 1, 2007 through March 31, 2007; a partial copy of the petitioner's 2006 Form 1120; and copies of the petitioner's 2007 first quarter and [REDACTED] second through fourth quarter Forms 941, Employer's Quarterly Federal Tax Returns.

On motion, counsel states that the petitioner has established its ability to pay the proffered wage of \$31,200 based on the totality of the circumstances. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and several non-precedent decisions in support of her contention.

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 petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage in 2002 and 2004 through 2007. Counsel has submitted copies of Forms W-2, Wage and Tax Statements, Forms 1099-MISC,

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<sup>3</sup> Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. In addition, the unaudited profit and loss statement is for New [REDACTED]. Again, there is no evidence in the record that establishes that New [REDACTED] and [REDACTED] are one and the same. However, the AAO will not consider the statements even if [REDACTED] and [REDACTED] are determined to be the one and the same as the statements are unaudited.

Miscellaneous Income, and Wage and Tax Summaries, issued by the petitioner on behalf of the beneficiary, for the years 2002 through 2006. No evidence of wages paid to the beneficiary in 2007 was submitted. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage in 2007 and the difference between the proffered wage of \$31,200 and the actual wages paid to the beneficiary in 2002 and 2004 through 2006. Those differences are \$7,928, \$14,792.50, \$23,540, and \$5,011.57, respectively. The wages paid to the beneficiary in 2003 were \$33,420, \$2,220 more than the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage in 2003 based on the actual wages paid to the beneficiary in that year.

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 (1<sup>st</sup> 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* 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).

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 (line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return). The petitioner’s tax returns demonstrate its net income for 2002 and 2004 through 2007, as shown in the table below.

- In 2002, the Form 1120-A stated net income of -\$60,384.
- In 2004, the Form 1120 stated net income of -\$28,880.
- In 2005, the Form 1120 stated net income of \$2,547.
- In 2006, the Form 1120 stated net income of \$6,915.
- In 2007, the Form 1120 stated net income of \$27,320.

Therefore, for the years 2002, 2004, and 2005, the petitioner did not have sufficient net income to pay the difference between the proffered wage of \$31,200 and the actual wages paid to the beneficiary in those years. In addition in 2007, the petitioner did not have sufficient net income to pay the entire proffered wage of \$31,200. In 2006, the petitioner did have sufficient net income to pay the difference of \$5,011.57 between the proffered wage of \$31,200 and the actual wages paid to the beneficiary in 2006. Therefore, the petitioner has established its ability to pay the proffered wage in 2006 from its net income, but not in 2002, 2004, and 2005.

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. 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.<sup>4</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-

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<sup>4</sup>According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

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 2002, 2004, 2005, and 2007, as shown in the table below.

- In 2002, the Form 1120-A stated net current assets of \$0.
- In 2004, the Form 1120 stated net current assets of \$0.
- In 2005, the Form 1120 stated net current assets of \$509.
- In 2007, the Form 1120 stated net current assets of \$0.

Therefore, for the years 2002, 2004, and 2005, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage of \$31,200 and the actual wages paid to the beneficiary in those years. In addition in 2007, the petitioner did not have sufficient net current assets to pay the entire proffered wage of \$31,200.

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.

On motion, counsel asserts:

Under the "totality of circumstances" approach, the current petitioner, [REDACTED] [REDACTED] has demonstrated its ability to pay the proffered wage despite some leaner years because, as discussed below, the petitioner has reasonable expectations of a continued increase in business and profits and financial viability.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and several non-precedent decisions in support of her contention.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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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.

Therefore, the AAO will not consider any non-precedent decisions when evaluating the petitioner's continuing ability to pay the proffered wage from the priority date.

On motion, counsel claims that the petitioner has established its ability to pay the proffered wage based on its "reasonable expectations of a continued increase in business and profits and financial viability." However, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Further, the petitioner is obligated to establish its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). 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 petitioner 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).

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 petitioner's tax returns indicate it was incorporated on July 1, 2001. The petitioner has provided its tax returns for the years 2002 through 2007, with none of the tax returns

establishing the petitioner's ability to pay the proffered wage of \$31,200.<sup>5</sup> In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Furthermore, the petitioner's gross receipts and wages paid have not consistently increased, but instead, have fluctuated severely over the years. 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. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

**ORDER:** The motion to reopen is granted. The AAO's decision of April 6, 2009 is affirmed. The petition remains denied.

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<sup>5</sup> The petitioner established its ability to pay the proffered wage of \$31,200 in 2003 by paying the beneficiary more than the proffered wage in that year.