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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAY 27 2010**

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 Rife
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electric service company. It seeks to employ the beneficiary permanently in the United States as an underground tunnel supervisor. 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 January 14, 2008 denial, the issues 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, and whether the beneficiary is qualified for the position.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$25.00 per hour (\$52,000.00 per year). The Form ETA 750 states that the position requires four years of experience in the job offered. There is no education requirement or training necessary for the job offered.

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

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 1979 and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year begins on April 1 and ends on March 31. On the Form ETA 750B, signed by the beneficiary on March 3, 2001, the beneficiary claimed to have worked for the petitioner from May 1997 to the present time.

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 record includes W-2 Forms for the beneficiary showing that the petitioner paid him \$37,675.50 in 2001, \$38,169.00 in 2002, \$31,968.00 in 2003, \$37,159.00 in 2004, \$40,220.00 in 2005, and \$41,900.26 in 2006. The record also includes earnings statements for the beneficiary showing that the petitioner had paid him wages

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).

of \$24.75 an hour for 40 hours a week from June 18, 2007 through September 2, 2007. As such, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date until the record closed on September 17, 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts 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. The record before the director closed on September 17, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, 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, 2002, 2003, 2004, 2005 and 2006, as shown in the table below.

- In 2001, the Form 1120 stated net income of \$54,032.00
- In 2002, the Form 1120 stated net income of -\$314,622.00
- In 2003, the Form 1120 stated net income of -\$38,127.00
- In 2004, the Form 1120 stated net income of \$36,301.00
- In 2005, the Form 1120 stated net income of -\$1,902.00
- In 2006, the Form 1120 stated net income of \$88,552.00

As the record includes wages paid to the beneficiary for 2001, 2002, 2003, 2004, 2005 and 2006, the petitioner must show the ability to pay the difference between wages paid and the proffered wage. As such, the petitioner needs to show its ability to pay \$14,324.50 in 2001, \$13,831.00 in 2002, \$20,032.00 in 2003, \$14,841.00 in 2004, \$11,780.00 in 2005, and \$10,099.74 in 2006. Therefore, for the years 2001, 2004, and 2006 the petitioner did have sufficient net income to pay the proffered wage. The petitioner did not have sufficient net income to pay the proffered wage in 2002, 2003 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.

Net current assets are the difference between the petitioner’s current assets and current liabilities.² A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage

²According 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.

using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2003 and 2005, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of -\$38,411.00
- In 2003, the Form 1120 stated net current assets of \$68,971.00
- In 2005, the Form 1120 stated net current assets of \$4,102.00

Therefore, for the year 2003, the petitioner did have sufficient net current assets to pay the proffered wage. The petitioner did not have sufficient net current assets to pay the proffered wage in 2002 and 2005.

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 appeal, counsel asserts that the correction made by the Department of Labor to the Form ETA 750 listing the rate of pay to be \$25.00 an hour was in error as the Prevailing Wage Determination had been approved at \$22.98 an hour. Nevertheless, the AAO finds the Form ETA 750 was certified with the correction to the rate of pay. As such, the AAO finds the proffered wage to be \$25.00.

Counsel further asserts that the beneficiary has over four years experience as an Underground Repairer and two years and three months experience as an Underground Supervisor, and that this experience tremendously helps the beneficiary because he can work as an underground supervisor. The record includes a statement from [REDACTED] stating that the beneficiary worked in the position of underground repairer from February 1992 until December 1994 when he was designated underground supervisor. He maintained this supervisory position until March 30, 1997. The Form ETA 750 requires the applicant to have four years experience in the job offered which is the position of underground tunnel supervisor. Documentation included in the record shows the beneficiary to be in a supervisory position from December 1994 to March 30, 1997, approximately two years and three months. There is no other documentation in the record to show the beneficiary to have supervisory experience. As such, the AAO finds the petitioner has demonstrated the beneficiary to have the required four years experience in the job offered as an underground tunnel supervisor.

Counsel's assertions on appeal 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. Furthermore, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the employment letter on behalf of the beneficiary that states the beneficiary was employed in a supervisory position for less than the required four years.

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 *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 was established in 1979 and employs 20 people. According to the tax returns submitted into the record, the petitioner's gross receipts were \$2,324,531.00 in 2001, \$2,470,591.00 in 2002, \$1,520,756.00 in 2003, \$2,390,007.00 in 2004, \$2,278,893.00 in 2005, and \$2,997,835 in 2006. Its compensation of officers was \$65,268.00 in 2001, \$65,520.00 in 2002, \$39,502.00 in 2003, and \$9,176.00 in 2004. There is no amount listed on the tax returns in 2005 and 2006 for compensation of officers. The tax returns submitted into the record also show the total wages paid to employees to be \$68,250.00 in 2001, \$57,902.00 in 2002, \$40,182.00 in 2003, \$24,881.00 in 2004, \$21,806.00 in 2005, and \$19,468.00 in 2006. There is no evidence of the petitioner's reputation included in the record. 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 evidence also does not establish the beneficiary to possess the required experience in the job offered.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.