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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

PUBLIC COPY

BE

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

MAY 28 2010

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 appeal will be dismissed. The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a hardwood and laminate flooring business. It seeks to employ the beneficiary permanently in the United States as a floor layer. As required by statute, the petition is accompanied by the Application For Alien Employment Certification which was certified by the United States Department of Labor (DOL) with a priority date of April 12, 2001. 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, and that the record did not establish that the beneficiary was qualified to perform the duties of the proffered position as of the priority date of the labor certification (April 12, 2001). 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 July 12, 2007 denial, the issues in this case are 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 to perform the duties of the proffered 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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor, not of a temporary or seasonal 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 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). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$20.26 per hour (\$42,140.80 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or in the related occupation of finish carpenter.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

On appeal, counsel submits a brief setting forth the basis of the appeal. The record contains the following documents which are relevant to the issues on appeal:

- Copies of the petitioner's tax returns for tax years 2001 – 2006;
- Copies of the beneficiary's Form 1099 for tax years 2000 – 2006;
- An affidavit from the petitioner's president;
- Experience letters from past employers of the beneficiary (Capri Floors and Modern Finishing); and
- Profit and Loss statements from the petitioner for years 2004 – 2007;

The petitioner's president also submitted copies of corporate bank statements for years 2004 – 2007. 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.

The evidence in the record of proceeding shows that the petitioner is currently structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

On appeal, counsel asserts that the record is sufficient to establish the petitioner's ability to pay the proffered wage, and that experience letters from the beneficiary's prior employers establish that the beneficiary is qualified to perform the duties of position.

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.

The record establishes that the beneficiary was paid wages by the petitioner as an independent contractor during the requisite period as follows:

- 2006 Form 1099 - \$19,157.00;
- 2005 Form 1099 - \$25,744.85;
- 2004 Form 1099 - \$14,256.00;
- 2003 Form 1099 - \$49,293.50;
- 2002 Form 1099 - \$43,285.50; and
- 2001 Form 1099 - \$35,004.00.

The proffered wage for the offered position is \$20.26 per hour, or \$42,140.80. The petitioner has established its ability to pay the proffered wage in the years 2002 and 2003 because it paid the beneficiary wages in excess of the proffered wage during those years. The wage evidence, however, does not establish that the petitioner had the ability to pay the proffered wage in years 2001, 2004, 2005 or 2006. The petitioner must establish that it had the ability to pay the difference between wages actually paid to the beneficiary and the proffered wage. For years 2001, 2004, 2005 and 2006, the petitioner must establish that it had the ability to pay the beneficiary the following wages (the difference between wages paid and the proffered wage) respectively: \$7,136.80; \$27,884.80; \$16,395.95; and \$22,983.80.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

River Street Donuts 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 or about May 14, 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. The corporate tax returns for the petitioner in years 2001 – 2006 reveal net incomes in the following amounts:

- 2001 - \$39,819.00;

- 2002 - \$27,078.00;
- 2003 - \$13,689.00;
- 2004 - \$1,367.00;
- 2005 - (\$19,625.00); and
- 2006 - \$68,202.00.

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 23 for tax years 2001 – 2003, line 17e for tax years 2004 and 2005, and line 18 for tax year 2006, of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its Schedule K for tax years 2001 and 2006, the petitioner's net income is found on Schedule K of its tax returns for those years.

Thus, the petitioner has established that it had sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage in 2001 and 2006. As previously stated, it has established its ability to pay the proffered wage in 2002 and 2003 because it paid the beneficiary wages exceeding the proffered wage in those years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The relevant corporate tax returns submitted by the petitioner reveal the following net current assets:

- 2004 - \$3,156.00 (Beneficiary Wages - \$14,256.00)

- 2005 - (\$6,703.00) (Beneficiary Wages - \$25,744.85)

The sum of the petitioner's net assets plus the wages paid to the beneficiary in 2004 and 2005 was insufficient to pay the proffered wage in those years. Thus, it has not been established that the petitioner had the ability to pay the proffered wage in those 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 *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 had gross receipts as follows in the relevant tax years: 2001 - \$741,750.00; 2002 - \$764,959.00; 2003 - \$625,196.00; 2004 - \$579,914.00; 2005 - \$499,906; and 2006 - \$733,492.00. The petitioner paid officer compensation in 2001 of \$30,000, 2004 of \$29,875.00, and 2005 of \$30,000.00. While the petitioner indicates on the Form I-140 that it has seven employees, it does not list any employee wages on any of its tax returns. The gross receipts of the petitioner throughout the requisite period have fluctuated from a low of \$499,906.00 in 2005, to a high of \$764,959.00 in 2002. The receipts are those associated with a small business and do not establish a pattern of steadily increasing cash receipts. In an affidavit from the petitioner's president, the petitioner states that it will employ the beneficiary on a full time basis and use less independent contractor labor than in the past, thus, paying the beneficiary the wages that would otherwise be used to pay an independent contractor. The petitioner states that it has already begun using the services of the beneficiary more frequently and decreasing its reliance on subcontractors. In support of this assertion, the petitioner submitted copies of pay checks paid to the beneficiary in the year 2007, with the wages totaling \$30,966.00 through July 26, 2007. The pay check copies are only of the face of the checks, however, and do not establish that the checks were actually cashed through the petitioner's bank. The check copies are, therefore, of no probative value.

The petitioner submitted copies of profit and loss statements for 2004, 2005, and 2006 showing that it paid to various subcontractors wages for work performed that would now be performed by the beneficiary. The examples designated by the petitioner show that it paid subcontractor wages as follows that would now be performed by the petitioner instead: 2004 - \$42,055.45; 2005 - \$20,144.00; and 2006 - \$33,858.00. The \$42,055.45 subcontractor payment example in 2004 is highlighted on the Profit and Loss statement with a handwritten annotation that says "same kind of work." Thus, according to the profit and loss statements provided, the wages actually paid to the beneficiary in those years, plus the sums paid to subcontractors that would be assigned to the beneficiary, exceed the amount of the proffered wage. It is important to note, however, that the profit and loss statements are not part of audited financial statements, nor are they supported by business records, invoices or other documentation to establish the authenticity of the financial information provided. Nor did the petitioner provide copies of cancelled checks for the wages paid to the designated subcontractors to prove that those sums had actually been paid. 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)).

With regard to the petitioner's assertion that the beneficiary would perform duties previously performed by subcontractors, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not 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. Moreover, there is no evidence that the positions referenced involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. It is important to note that the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal. Further, the record does not contain evidence of any unusual event which adversely impacted the petitioner's business during the requisite period. 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. This portion of the director's decision is affirmed.

Finally, the petitioner states that the following experience letters establish that the beneficiary has experience performing the duties of the proffered position as set forth on the Form ETA 750:

- The petitioner submitted a letter stating that the beneficiary was employed by it, performing the same duties set forth on the Form ETA 750, from June of 2000 until the date of the labor certification (April 12, 2001), a period of at least nine months.
- [REDACTED] submitted a letter stating that the beneficiary was employed by it performing the duties of the proffered position set forth on the labor certification from April of 1997 until October of 1998, a period of at least 17 months.
- [REDACTED], submitted a letter stating that the beneficiary was employed by it performing the duties of the proffered position set forth on the labor certification from November of 1998 until April of 1999, a period of at least four months.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 750, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of floor layer. The ETA Form 750 indicates that there are no minimum educational requirements or training requirements to qualify for the proffered position, and that the applicant must have at least two years of experience in the proffered position or in the related occupation of finish carpenter. There are no additional special requirements for the position listed on the ETA Form 750.

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 experience letters from [REDACTED] and [REDACTED], include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary.¹ See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The job duties described in each experience letter is substantially similar, if not identical, to the job duties for the position set forth on the ETA 750. The director found the experience letters to lack credibility because the letters contained the same language and asked for original letters in a request for evidence. In response to the director's request, letters were provided from [REDACTED], and [REDACTED]

[REDACTED]. The information provided in these two letters is consistent with previous letters and employment/experience information set forth on the ETA 750. The AAO finds no basis for challenging the credibility of the experience letters. All experience letters submitted by the petitioner comply with 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Thus, the beneficiary had at least 30 months experience performing duties identical to those set forth on the labor certification as of the priority date of the labor certification. The beneficiary's qualifications to perform the duties of the position have been established. This portion of the director's decision is withdrawn.

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.

¹ The experience letters also match the beneficiary's represented employment experience on the Form ETA 750B.