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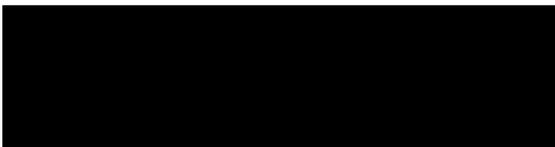
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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NOV 10 2010

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 petitioner is a construction company/developer. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 May 5, 2008 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 or not the beneficiary has two years experience in the proffered position as required by the Form ETA 750.

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 May 21, 2004. The proffered wage as stated on the Form ETA 750 is \$24.60 per hour (\$51,168 per year). The Form ETA 750 states that the position requires two years experience in the proffered position.

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.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 1990, to have a gross annual income of \$1,393,884, and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year runs on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 5, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 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 from the priority date. The petitioner has submitted evidence on appeal, however, that he paid the beneficiary wages as follows:

- 2007 W-2 Form - \$5,720.²

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).

² The petitioner's president, [REDACTED], stated in a letter dated June 2, 2008 that the beneficiary began working for his company as an employee on November 15, 2007.

It is noted that counsel submitted, for the first time on appeal, Forms 1099 claiming that the beneficiary had been paid by the petitioner as a subcontractor the following sums:

- 2007 Form 1099 - \$1,785.
- 2007 Form 1099 - \$26,136.³
- 2006 Form 1099 - \$37,247.
- 2005 Form 1099 - \$32,077.
- 2004 Form 1099 - \$35,420.50.

These alleged wage payments, however, will not be considered. The director specifically asked the petitioner in a request for evidence issued on January 3, 2008 to submit evidence establishing its ability to pay the proffered wage. The director stated, in part, that this ability could be demonstrated by showing that the “petitioner has already been remunerating the beneficiary at a rate equal to or greater than the proffered wage.” In response to the director’s request for evidence, the petitioner did not claim to have paid the beneficiary any wages except in 2007 when the beneficiary was paid \$5,720. The petitioner claimed that the beneficiary began working for the company in November 2007 after he received work authorization. The beneficiary did not claim to work for the petitioner on Form ETA 750B, which he signed on May 5, 2004. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner’s March 21, 2008 RFE response letter stated that the beneficiary would replace contract labor. The petitioner did not state that the beneficiary had ever been employed as contract labor. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director’s request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.⁴

Thus, it will be necessary for the petitioner to establish that it can pay the full proffered wage in 2004, 2005 and 2006, and that in 2007 it had the ability to pay the difference between wages paid to the beneficiary and the proffered wage. That sum is set forth below:

³ The petitioner issued the beneficiary two separate Forms 1099 for 2007. The reason for this is unclear.

⁴ Even if we considered the wages paid on Forms 1099, such amounts would have been deficient to show the petitioner’s ability to pay the proffered wage.

- Difference between 2007 wages paid and the proffered wage - \$45,448.

USCIS records indicate that in addition to the present beneficiary, the petitioner has filed three other Immigrant Petitions for Alien Worker (Form I-140). One was filed on March 20, 2003, the second on May 19, 2003, and the other on January 5, 2004. Nothing shows that the other three beneficiaries here adjusted status to permanent residence. The petitions have a priority date of April 30, 2001. Therefore, the petitioner must show that it had not only the ability to pay the present beneficiary the proffered wage from the priority date onward, but the ability to pay the proffered wages of the other three sponsored workers as well from each respective priority date until each beneficiary adjusts status.

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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. "[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 March 25, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns demonstrate its net income for 2004 through 2007, as shown in the table below.

- In 2004, the Form 1120 stated net income of \$604.
- In 2005, the Form 1120 stated net income of \$1,458.
- In 2006, the Form 1120 stated net income of (\$27,048).
- In 2007, the Form 1120 stated net income of \$13,756.

Therefore, for the years 2004 through 2006, the petitioner's tax returns do not show sufficient net income to pay the proffered wage. The petitioner's 2007 tax return does not show that the petitioner had sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage.⁵ Additionally, the record does not establish that the petitioner has paid the proffered wages of the other three sponsored workers with approved Form I-140 petitions, or that the petitioner's net income would support paying four proffered wages.

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.

⁵ Even if we considered the Form 1099 payments issued to the beneficiary, the petitioner could not establish its ability to pay for all years based on the combined wages and the petitioner's net income.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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 using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 through 2007, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of \$29,544.
- In 2005, the Form 1120 stated net current assets of \$89.
- In 2006, the Form 1120 stated net current assets of \$1,791.
- In 2007, the Form 1120 stated net current assets of (\$7,402).⁷

Therefore, for the years 2004 through 2006, the petitioner's tax returns do not show sufficient net current assets to pay the proffered wage. The petitioner's 2007 tax return does not show sufficient net current assets to pay the difference between wages paid to the beneficiary and the proffered wage. Additionally, the record does not establish that the petitioner has paid or could pay the proffered wages of the other three sponsored workers with approved Form I-140 petitions from the petitioner's net current assets.

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 states that the petitioner has demonstrated the ability to pay the proffered wage from the priority date onward. Counsel asserts that the beneficiary will replace other subcontractors employed by the petitioner, and that the beneficiary was already being compensated by the petitioner as a subcontractor. Counsel states that the wages already paid to the beneficiary as a subcontractor plus the wages paid to subcontractors the beneficiary will replace exceed the proffered wage. Counsel further asserts that the petitioner's bank records establish its ability to pay the proffered wage.

⁶According 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.

⁷ Similarly, even if we consider the Form 1099 wages paid to the beneficiary, those amounts combined with the petitioner's net current assets would be insufficient to show the petitioner's continued ability to pay the proffered wage from the priority date onward.

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.

The corporate bank statements submitted by the petitioner do not establish its ability to pay the proffered wage. 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.

Counsel advised, and the petitioner stated in a letter dated March 21, 2008, that the beneficiary will replace two subcontractors that it paid wages to in 2004 (total paid \$64,394), and two subcontractors it paid wages to in 2005 (total paid \$56,700). In a letter dated June 2, 2008, the petitioner states that it intends to dismiss two subcontractors it paid wages to in 2004 (total paid \$64,394), two that it paid wages to in 2005 (total paid \$56,700), two that were paid wages in 2006 (total paid \$47,599) and two that were paid wages in 2007 (total paid \$43,650). The record does not, however, state the specific duties of these workers or verify their full-time employment. Thus, it cannot be determined that the workers to be replaced performed the duties of the position as stated on the Form ETA 750. 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. 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.⁸ Additionally, as the petitioner submitted Forms 1099 showing that it has employed the beneficiary already as a subcontractor, it is unclear how the beneficiary could be taking on additional work of other subcontractors or replacing multiple workers.

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

⁸ 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.

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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's tax returns demonstrate minimal or negative net income and net current assets in all relevant years. The record does not demonstrate that the petitioner's reputation in the industry is such that it is more likely than not that it had the continuing ability to pay the proffered wage from the priority date. 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 director also found that the record did not establish that the beneficiary met the experience requirements (two years of experience in the proffered position) set forth on the Form ETA 750. The petitioner initially submitted a letter from ██████████, which stated that the beneficiary was employed by ██████████ as a carpenter from November 1980 to July 1983, and setting forth the beneficiary's duties. The letter did not include the address or title of the author, or state the relationship, if any, of the author to the stated employer and does not meet regulatory requirements. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). On appeal, the petitioner submitted a second letter dated June 3, 2008 and signed by ██████████, which stated that Mr. ██████████ was a coworker of the beneficiary at the Polish company ██████████. According to Mr. ██████████, the company is now defunct. The letter states that the beneficiary worked for that company as a carpenter from November 1980 to July 1983, and set forth the beneficiary's duties in that regard. The letter does not establish the required experience for the beneficiary. The letter's author does not state that he worked with the beneficiary from November 1980 to July 1983, only that the two had been coworkers at that company for some unspecified period of time. Thus, it cannot be determined that Mr. ██████████ was in a position to observe the beneficiary's work and duties performed for the entire requisite two year experience period. No additional independent objective evidence was presented to establish or confirm the beneficiary's employment with this organization.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, or that the beneficiary meets the experience requirements set forth on the Form ETA 750.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.