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



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: NOV 10 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:

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 filed by the petitioner in this case was denied by the Director, Texas Service Center. The subsequent appeal was rejected by the Administrative Appeals Office (AAO) and alternatively dismissed on the petition's merits. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is an IT consulting firm. It seeks to employ the beneficiary permanently in the United States as a business consultant. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the proffered wage, and denied the petition accordingly.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). On the instant motion to reopen, counsel submits a U.S. Postal Service delivery record for the package submitting the petition and the underlying labor certification, the petitioner's 2009 tax return transcripts, 2010 Employer's Quarterly Report, 2010 Profit and Loss statement, and bank statements for May-June 2010 as new evidence, which it asserts establishes the petitioner's continuing ability to pay the proffered wage. The instant motion to reopen meets the requirements of a motion to reopen and is therefore granted. 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 on motion.

In the May 26, 2010 decision, the AAO rejected the appeal on the ground that the I-140 petition was filed after the labor certification application's validity expired on October 18, 2009. On motion, counsel asserts that the labor certification was submitted with the package [REDACTED] before it expired. The submitted U.S. Postal Services Track & Confirm record shows that the package was delivered to the Texas Service Center mail box at 10:40 am on Friday, October 16, 2009, however, the service center did not officially record its receipt until 5:23 am on Monday, October 19, 2009. Therefore, the AAO concurs with counsel's assertion that the underlying labor certification in this case was properly and timely filed with the petition before it expired. The portion of the AAO's May 26, 2010 decision rejecting the appeal as improperly filed because the petition was filed without a valid labor certification is hereby withdrawn.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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 ETA Form 9089 was accepted on September 8, 2008. The proffered wage as stated on the ETA Form 9089 is \$50,000 per year. The petitioner must demonstrate the ability to pay the proffered wage beginning on the priority date and continuing until the present.

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. On motion, counsel did not submit any additional evidence showing that the petitioner paid the beneficiary the proffered wage during the relevant years. The newly submitted Form 941 Employer's Quarterly Report for the first quarter of 2010 shows that the petitioner paid four employees other than the instant beneficiary in that quarter. Wages paid to others by the petitioner 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 established that it employed and paid the beneficiary the full proffered wage or any wages from the priority date.

As the AAO's May 26, 2010 decision states, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage for 2008 with its net income of (\$353) reflected on Form 1120, Line 28. On motion, counsel submitted another copy of the petitioner's 2008 tax return transcript. The extra copy of the petitioner's 2008 tax return transcript does not provide any additional net income or net current assets¹ for the petitioner to establish its ability to pay the proffered wage in 2008. Counsel also submitted the petitioner's 2009 tax return transcript. The petitioner's 2009 tax return transcript indicates that the petitioner had net income of (\$2,486), which is also insufficient to pay the proffered wage. The 2009 tax return transcript does not provide detailed information required to calculate the petitioner's net current assets. Therefore, the petitioner failed to demonstrate that it had sufficient net income or net current assets to pay the proffered wage in 2009 and thus, failed to establish its ability to pay the proffered wage in 2008 and 2009.²

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL in 2008, the petitioner has not established that it had the continuing ability to pay the instant beneficiary the

¹ 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.

² The AAO's May 26, 2010 decision discussed the petitioner's prior tax returns 2005 through 2007, which are all before the priority date and would not demonstrate the petitioner's ability to pay the proffered wage from 2008 onward.

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 submitted the petitioner's Profit & Loss statement for January through December 2010, Trial Balance statement as of December 31, 2010, and Balance Sheet as of June 17, 2010. Counsel's reliance on these 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.

The record also contains bank statements for the petitioner's business checking account for a period from May 11, 2010 to June 17, 2010 submitted by counsel on motion as new evidence to establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balance in the petitioner's bank account 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 returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

As this office discussed in our May 26, 2010 decision, the petitioner has filed an additional Immigrant Petition for Alien Worker (Form I-140) for one more worker for which the petitioner was obligated to demonstrate its ability to pay the beneficiary of the approved petition the proffered wage in the years 2006 through 2008; and the record contains no evidence showing that the petitioner paid the beneficiary of the approved petition [REDACTED] the proffered wage in 2008. Counsel did not submit any evidence on motion that the petitioner paid the approved beneficiary the proffered wage in 2008. Therefore, the petitioner failed to establish its ability to pay all proffered wages in 2008 through an examination of wages paid to the beneficiaries, or its net income or net current assets.

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 for 2008 and 2009 show negative net income, and the record contains no evidence of the petitioner's net current assets for these years. Thus, the petitioner has not shown that 2008 and 2009 were uncharacteristically unprofitable years for the petitioner. Given the record as a whole, the petitioner never had sufficient net income to pay a single proffered wage during the relevant years. Its business is not profitable. The petitioner claims one employee on the petition while the record shows that it filed five H-1B petitions further increasing its wage obligations. Its tax returns show that the petitioner paid nominal salaries and wages of \$12,480 in 2005, \$64,080 in 2006, \$16,120 in 2007 and \$54,990 in 2008. Given the history of filing petitions, the AAO must also take into account the petitioner's ability to pay the beneficiary's wage in the context of its overall recruitment efforts. 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 beneficiary of this petition the proffered wage.

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 motion is granted. The portion of the AAO's May 26, 2010 decision regarding the validity of the labor certification is withdrawn; the portion of the decision regarding the petitioner's ability to pay the proffered wage is affirmed. The petition remains denied.