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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 23 2010

IN RE:

Petitioner:

Beneficiary:

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

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 \$630. 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner operates a restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager. 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 ability to pay the beneficiary the proffered wage for the years 2003 and 2004. 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 September 15, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage from the date the labor certification was filed and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled 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 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).

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 an S corporation. On the petition, the petitioner claimed to have been established on August 28, 1996 and to currently employ 10 workers. According to the tax returns in the record, the petitioner was incorporated on July 24, 1995 and the petitioner's fiscal year is based on a calendar year. The Form ETA 750 was accepted on February 24, 2003. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour² which equates to \$24,960 per year based on a 40-hour week.

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 provided Forms W-2 showing the wages it paid to the beneficiary during the time periods shown in the table below.

- In 2003, the beneficiary was paid \$17,020 (\$7,940 less than the proffered wage)(\$11,500 of the wage was reported as tip income).
- In 2004, the beneficiary was paid \$15,940 (\$9,020 less than the proffered wage)(\$10,000 of the wage was reported as tip income).
- In 2005, the beneficiary was paid \$22,360 (\$2,600 less than the proffered wage)(\$13,000 of the wage was reported as tip income).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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 states an overtime rate of \$18.00 per hour, but does not state the number of hours that overtime is required.

- In 2006, the beneficiary was paid \$22,660 (\$2,300 less than the proffered wage)(\$13,000 of the wage was reported as tip income).
- In 2007, the beneficiary was paid \$23,400 (\$1,560 less than the proffered wage)(\$13,000 of the wage was reported as tip income).

To the extent that the beneficiary reported partial earnings as tip income to the Internal Revenue Service (IRS), the AAO will not credit the petitioner with paying that amount of salary. Tip income by definition comes from the payment of tips by the petitioner's patrons, and is not reflective of the petitioner's ability to pay. Deducting tip income from the wages received by the beneficiary from 2003 – 2007 results in the following wages paid to the beneficiary:

- In 2003, the beneficiary was paid \$5,520 (\$19,440 less than the proffered wage).
- In 2004, the beneficiary was paid \$5,940 (\$19,020 less than the proffered wage).
- In 2005, the beneficiary was paid \$9,360 (\$15,600 less than the proffered wage).
- In 2006, the beneficiary was paid \$9,660 (\$15,300 less than the proffered wage).
- In 2007, the beneficiary was paid \$10,400 (\$14,560 less than the proffered wage).

Accordingly, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for the years 2003 through 2007. The petitioner must show that it can pay the remaining amounts in wages for the years 2003 through 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); *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 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. 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 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 August 13, 2008 with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Deny (NOID). As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 was the most recent return available before the director. In his NOID, the director stated that the evidence did not establish the petitioner had the ability to pay the proffered wage. The director requested that the petitioner submit additional evidence in support of the petition. In response, counsel submitted federal tax returns and Forms W-2 for the years 2003 through 2007.

The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2003, the petitioner's Form 1120S stated net income of -\$4,076.
- In 2004, the petitioner's Form 1120S stated net income of -\$4,721.
- In 2005, the petitioner's Form 1120S stated net income of \$2,669.³

³ The director erred in stating the petitioner's net income was \$16,799 in 2005. Therefore, this portion of the director's decision is withdrawn. Further, 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

- In 2006, the petitioner's Form 1120S stated net income of \$7,152.
- In 2007, the petitioner's Form 1120S stated net income of \$8,438.⁴

Based on the figures in this table, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage of \$24,960 for the years 2003 through 2007. When the wages paid the beneficiary, not including tip income, are combined with the petitioner's net income, the petitioner has not established its ability to pay the remaining wages for the years 2003 through 2007. The director's finding that the petitioner had the ability to pay in 2005, 2006 and 2007 is withdrawn.

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.⁵ 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 petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2003, the petitioner's Form 1120S stated net current assets of \$2,232.
- In 2004, the petitioner's Form 1120S stated net current assets of -\$4,417.
- In 2005, the petitioner's Form 1120S stated net current assets of \$597.
- In 2006, the petitioner's Form 1120S stated net current assets of \$4,491.
- In 2007, the petitioner's Form 1120S stated net current assets of \$941.

income, credits, deductions or other adjustments, net income is found on line 23* (1997-2003) line 17e* (2004-2005) line 18* (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed as of August 2, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, alternative minimum tax items, deductions, other adjustments shown on its Schedule K for all the relevant years, the petitioner's net income is found on Schedule K of its tax return.

⁴ The director erred in stating the petitioner's net income was \$12,721 in 2007. Therefore, this portion of the director's decision is withdrawn.

⁵ 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.

The petitioner could not have paid the difference between the beneficiary's proffered wage of \$24,960 and the amount already paid to the beneficiary, not including tip income, from its net current assets for the years 2003 through 2007.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns and Forms W-2 as submitted by the petitioner that demonstrates that the petitioner could not pay the difference between the wages paid by the petitioner from 2003 through 2007 and the proffered annual salary. On appeal, the petitioner states that the depreciation and the organization's expenses reflected in the company's 2003 through 2007 federal tax returns are non-cash items which constitute actual available income to pay the proffered salary. However, depreciation and the organization's expenses represent 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, as noted in *River Street Donuts*, 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." See *River Street Donuts* at 116.

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 was incorporated on July 24, 1995 and currently employs 10 other individuals. The petitioner's tax returns show low net income and net current assets for all the years represented. The tax returns also show negative net income for the years 2003 and 2004 and negative net current assets for the year 2004. In the instant case, the petitioner has not provided evidence of its historical growth, its reputation within the industry, a prospectus of its future business ventures or

any other evidence to demonstrate its ability to pay the proffered wage from 2003 through 2007 and onwards.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the ability to pay the proffered wage from 2003 through 2007.

Beyond the decision of the director, the petitioner has not established that the beneficiary met the education requirement of the labor certification at the time of filing, February 24, 2003.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on February 24, 2003.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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). According to the plain terms of the labor certification, the applicant must have one year of college to perform the job duties.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information about the beneficiary, he represented that he attended [REDACTED] from 1988 to 1989.

The petitioner must submit evidence that the beneficiary attended the university for one year. The petitioner did not submit evidence that the beneficiary attended the university for one year. Therefore, the petitioner did not establish that the beneficiary had the required education listed on the Form ETA 750, before the priority date.

Beyond the decision of the director, the evidence does not reflect that the petition is accompanied by a valid labor certification. It appears from the beneficiary's Forms W-2 that she has been working as a waitress for the petitioner, and not as an assistant manager as stated on the Form ETA 750B and as certified by the DOL's approval of the Form ETA 750. If the petitioner intends to hire the beneficiary as a waitress, the approved labor certification for an assistant manager is not valid for the petition. For this additional reason, the petition may not be approved.

In conclusion, the petitioner has not established its continuing ability to pay the proffered wage, has not established that the beneficiary met the education requirement of the labor certification at the

time the labor certification was accepted for processing, February 24, 2003, or that the petition is accompanied by an approved labor certification for the intended position. Therefore, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v United States*, 229 F Supp. 2d 1025, 1043 (E.D. Cal 2001), *aff'd*, 345 F.3d 683 (9 Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Accordingly, 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.