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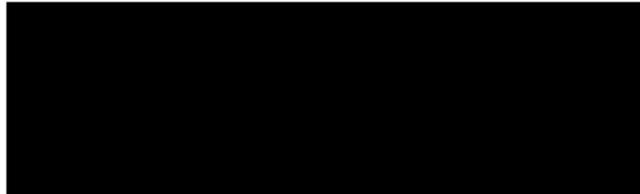
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
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FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 04 2010

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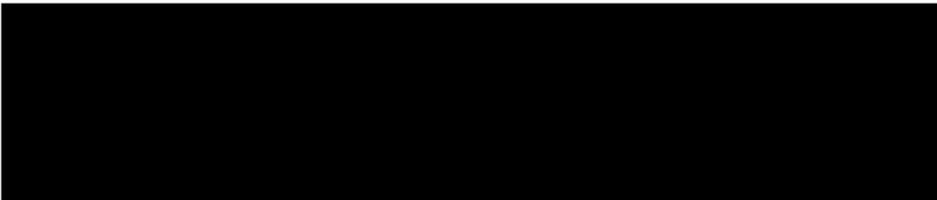
Petitioner:



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, 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, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a telephone and data systems business.¹ It seeks to employ the beneficiary permanently in the United States as a telecommunications line installer. 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.

Counsel indicated on the Form I-290B, Notice of Appeal or Motion, received on June 29, 2009, that she would be submitting a brief or additional evidence to the AAO within 30 days. *See* 8 C.F.R. § 103.3(a)(2)(viii)(which states that where counsel is granted additional time to submit a brief after the filing of the appeal, the appeal brief must be sent directly to the AAO.) The record indicates that, as of the date of this decision, no brief or additional evidence has been submitted. The AAO will consider the record complete.

As set forth in the director's May 29, 2009 denial, at issue in this case is whether the petitioner has had the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

¹ Information available at the [REDACTED] online database, [REDACTED] accessed September 24, 2010, the petitioner's tax returns and other evidence in the record reflect that the petitioner also goes by the title [REDACTED].

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 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 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 20, 2004. The proffered wage as stated on the Form ETA 750 is \$20.31 per hour (\$42,244.80 per year). The Form ETA 750 indicates that the position requires two years of experience in the proffered job or the related position of cable installation worker.

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 appeal.²

The evidence in the record shows that the petitioner is structured as a C corporation. According to information provided on the petition, the petitioner was established in 2003 and it currently employs 11 workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on January 14, 2004, the beneficiary stated that he worked for the petitioner from March 2003 through the date that he signed that form.

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, 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

² 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 this 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).

petitioner's ability to pay the proffered wage. Here, the 2004 Form W-2, Wage and Tax Statement, in the record reflects that the petitioner paid the beneficiary \$33,308 in 2004, or \$8,936.80 less than the proffered wage. The 2005 Form W-2, Wage and Tax Statement, reflects that the petitioner paid the beneficiary \$20,980 in 2005, or \$21,264.80 less than the proffered wage. The petitioner did not submit any other documentary evidence of having paid the beneficiary the full proffered wage or a portion of the wage at any other time during the relevant period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the relevant 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 not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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).

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 October 17, 2007 with the receipt of the petition and supporting documents. As of that date, the petitioner’s 2007 federal income tax return was not yet available. With its appeal submitted during June 2009, the petitioner submitted additional financial information, including the 2007 Form 1120. The petitioner’s tax returns demonstrate its net income for 2004 through 2007, as shown in the table below.

- The 2004 Form 1120 states net income (loss) of -\$3,113.
- The 2005 Form 1120 states net income of \$10,820.
- The 2006 Form 1120 states net income of \$1,237.
- The 2007 Form 1120 states net income of \$14,705.

In 2004, the petitioner suffered a loss. Thus, the petitioner has not shown that it had sufficient net income to cover the difference between the proffered wage and the actual wage paid the beneficiary that year, or \$8,936.80.

In 2005, the petitioner did not have sufficient net income to cover the difference between the proffered wage and the actual wage paid the beneficiary that year, or \$21,264.80.

In 2006 and 2007, the petitioner’s net income was less than the proffered wage. There is no documentation in the record that the petitioner paid the beneficiary in those years. As such, the petitioner did not have sufficient net income to cover the proffered wage in 2006 and 2007.

Thus, the petitioner has not shown that it had sufficient net income to pay the wage or the difference between the actual wage paid and the proffered wage, if any, in 2004 through 2007.

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.³ A corporation’s year-end current assets are shown on Form 1120 Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on Form 1120, Schedule L, lines 16(d) through 18(d). If the total of a corporation’s end-of-year net current

³According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

- The 2004 Form 1120 states net current assets of \$682.
- The 2005 Form 1120 states net current assets of \$4,453.
- The 2006 Form 1120 states net current assets (liabilities) of -\$23,670.
- The 2007 Form 1120 states net current assets (liabilities) of -\$7,144.

In 2004 and 2005, the petitioner's net current assets were less than the difference between the proffered wage and the wage actually paid the beneficiary in those years. In 2006 and 2007, the petitioner had negative net current assets. Thus, the petitioner has not shown that it had sufficient net current assets to cover the proffered wage or the difference between the proffered wage and the actual wage paid, if any, in 2004 through 2007.

In sum, the petitioner has not shown an ability to pay the wage in 2004 through 2007 through an examination of actual wages paid to the beneficiary, its net income or net current assets.

The petitioner's owner submitted a letter dated June 18, 2009 that suggests that officers' compensation in this matter demonstrates an ability to pay the wage and that he would forego his salary in order to cover the proffered wage. Regarding this, the petitioner's tax returns reflect officers' compensation of \$230,204 in 2004; \$211,600 in 2005; \$0 in 2006; and \$303,000 in 2007. The petitioner did not submit evidence into the record to establish that each of the petitioner's officers are willing and able to forego officer's compensation to pay the proffered wage or the balance of the wage from the priority date onwards, if the petitioner is not able to do so out of its own funds. Namely, each officer has not provided a sworn statement which attests that he or she is able and willing to pay the wage from the priority date onwards. Also each officer has not provided statements which list the officer's recurring monthly household expenses throughout the relevant period. The officers have not each provided their personal tax returns and Forms W-2 from 2004 onwards to demonstrate that they could afford to give up officer's compensation sufficient to cover the wage. Thus, the petitioner has not shown that the officers are willing and that they could afford to forego officer compensation to cover the proffered wage or the balance of the wage, from 2004 onward, if the petitioner is not able to do so out of its own funds. Therefore, the petitioner has not established its ability to pay the wage through officers' compensation from 2004 onwards. Also, the AAO would underscore that the petitioner did not pay any officers' compensation in 2006.

The petitioner's owner also suggested that its total wages paid during the relevant period is sufficient to overcome the information on the tax returns and find that the petitioner had funds available to pay the wage from 2004 onwards. This is not correct. As stated previously, it is not sufficient to demonstrate that the petitioner paid total salaries in excess of the proffered wage. The petitioner must show that it had funds available to pay the instant wage from the priority date onwards.

The petitioner also indicated through counsel that the director had an obligation to issue a notice of intent to deny or a request for evidence in this matter. This is not correct. The instant petition was filed on October 17, 2007. The regulation regarding requests for evidence and notices of intent to deny, as in place from June 18, 2007 onward, at 8 C.F.R. § 103.2(b)(8)(iii) sets forth that USCIS may, in its discretion, deny a petition which is not filed with all the required initial evidence or is filed with evidence that does not demonstrate eligibility.

USCIS will also consider the overall magnitude and circumstances 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.

Here, the petitioner states on the petition that it was established in 2003 and that it currently employs 11 workers. The petitioner has not established its historical growth since incorporating. Its gross receipts have remained relatively consistent during the period of analysis and have not increased to the extent sufficient to overcome the information on the tax returns which indicates that the petitioner did not have funds sufficient to cover the wage. The petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or that the beneficiary will be replacing a current employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it has had the continuing ability to pay the proffered wage from the priority date onwards.

The petitioner has not established that it had the ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on this basis.

Beyond the decision of the director, the petitioner has not shown that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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).

Here, the Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of telecommunications line installer. Item 14 describes the proffered position as having no educational requirements. Item 14 also indicates that the applicant must have two years of experience in the job offered or two years of experience in the related position of cable installation worker. Item 15 of Form ETA 750A does not reflect any special requirements. The duties of the proffered job are listed at Item 13 as:

Installs network cable in interior buildouts of businesses for computer systems, speakers, security systems and all telephone systems; string and repair cables, including fiber optics and other equipment for transmitting messages; test, terminate and label fiber optics and cable equipment; reads blueprints and supervises a team of one to three employees depending on the size of the installation job.

The beneficiary set forth his credentials on the Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Item 15, eliciting information of the beneficiary's work experience, he stated that he worked as a data communications technician for the petitioner for 10 months from March 2003 through the date that he signed the Form ETA-750B, January 14, 2004. He also stated that he worked as a project manager at [REDACTED] for 18 months from April 2001 through October 2002. Finally, he worked as a day laborer, handling various jobs, from October 2002 through March 2003. The beneficiary did not provide any additional information concerning his employment background on that form.

The petitioner provided only one work experience letter to support its claim that the beneficiary was qualified to perform the duties of the proffered job as of the priority date. This letter is written on [REDACTED] letterhead stationery, it is dated August 9, 2007 and it is signed by the president of that firm. It states that the beneficiary worked for the firm as a Telecommunications Project Manager from April 2001 through October 2002. The letter states that the beneficiary's duties at this firm included:

[A]ssisting the general manager in coordinating activities of designated telecommunication projects by applying company marketing and strategic management plans; prepare project reports for management and third party clients of

the company; confer with technical customer service on clients' needs, project feasibility, time and funding parameters.

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 only evidence that the petitioner submitted to support the claim that the beneficiary had the required two years of experience in the proffered job of telecommunications line installer or in the related job of cable installation worker indicates that the beneficiary worked 18 months as a telecommunications project manager who coordinated and provided administrative assistance and technical customer service support for the workers at this firm who installed telecommunications systems. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The appeal must also be dismissed on this basis as well.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.