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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

B6

FILE:

Office: NEBRASKA SERVICE CENTER

Date: **OCT 05 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. § 203 (b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen. The director approved the motion but concluded that the grounds for denial had not been overcome and reaffirmed the denial of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an air-conditioning, heating, ventilation and refrigeration firm. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to establish that the petitioner had the continuing ability to pay the proffered wage, and denied the petition accordingly.

On appeal, the petitioner submits additional evidence and contends that the director erred in denying the petition.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

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

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

²The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001.³ The proffered wage is stated as \$23.00 per hour, which amounts to \$47,840 per year. Part B of the Form ETA 750, signed by the beneficiary on April 26, 2001, does not indicate that the petitioner has employed the beneficiary.⁴

On Part 5 of the Immigrant Petition for [REDACTED] (Form I-140), filed on May 14, 2007, it is claimed that the petitioner was established on September 24, 1995, employs eight workers and reports gross annual income of more than \$801,346.

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 overall 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 support of its ability to pay the proffered wage of \$47,840 per year, the petitioner initially provided incomplete copies of its 2002, 2003, 2004, and 2005, Form 1120S, U.S. Corporation Income Tax Return(s). These forms consisted of only page 1 of the respective tax returns and contained only figures for total assets (page 1, part D), gross receipts/sales (page 1, line 1a) and gross profits, (page 1, line 3).⁵ The returns reflect that the petitioner uses a fiscal year running from July 1st to June 30th of the following year to file its tax returns. For example, the 2002 return states that it covers the period from July 2002 to June 30, 2003. The figures appear as follows:

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

⁴On his G-325A biographic form submitted with his Application to Register Permanent Residence or Adjust Status (Form I-485) and signed on April 3, 2007, the beneficiary claims that he has been unemployed since January 1, 2001.

⁵The remainder of the form(s), line(s) 3 through 36 (including income 4 through 11, deductions, 12 through 29; and tax and payments, 30 through 36) was blank.

Year	Total Assets	Gross receipts/sales	Gross Profits
2002	\$ 8,736	\$521,940	\$521,940
2003	\$10,736	\$592,739	\$592,739
2004	\$11,039	\$627,478	\$627,478
2005	\$12,406	\$801,346	\$801,346

As subsequently noted by the director, none of the one-page copies contain any signatures for either the petitioner or the preparer. On three of the copies, the date prepared is stated as “08/24/03” for the 2002 copy; “07/01/04” for the 2003 copy and “07/13/05” for the 2004 copy.

The director issued a request for evidence on February 13, 2008, instructing the petitioner to provide the requisite evidence of its ability to pay the proffered wage pursuant to 8 C.F.R. 204.5(g)(2), including federal tax returns annual reports, or audited financial statements. The director further requested evidence of payment of wages to the beneficiary if the petitioner had employed him during any of the relevant period.

The petitioner never responded to the director’s request for evidence. The director denied the petition on May 3, 2008, based on the petitioner’s failure to demonstrate its continuing ability to pay the proffered wage.

On June 2, 2008, the petitioner filed a motion to reopen and reconsider⁶ the director’s denial, claiming that the request for evidence had never been received at the petitioner’s address.⁷ New copies of the petitioner’s corporate tax returns for 2001, 2002, 2003, 2004, 2005, and 2006, were provided on motion. They purport to cover the period from July 1, 2001 to June 30, 2007. These returns indicate the following:

Year	2001	2002	2003
Net Income ⁸	\$54,874	\$57,723	\$57,928

⁶ The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

⁷The request for evidence indicates that it was sent to the listed address on the I-140, which is the same address the petitioner has used on motion and on appeal.

⁸The petitioner is a C corporation. For the purpose of this review of the petitioner’s Form 1120 corporate tax returns, the petitioner’s net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner’s taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered

Current Assets	\$14,192	\$ 8,736	\$17,762
Current Liabilities	\$ -0-	\$ -0-	\$ 530
Net Current Assets	\$14,192	\$ 8,736	\$17,232

Year	2004	2005	2006
Net Income	\$ 63,728	\$ 67,258	\$98,491
Current Assets	\$ 21,976	\$ 22,786	\$27,149
Current Liabilities	\$ 455	\$ -0-	\$ -0-
Net Current Assets	\$ 21,521	\$ 22,786	\$27,149

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.¹⁰

wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage. Here, it is noted that for the 2005 tax return, the figure used for "taxable income" is on line 30 because the petitioner did not complete line 28.

⁹ 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.

¹⁰ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

The director examined the petitioner's motion and the accompanying federal tax returns and noted significant discrepancies. As shown by these versions of the petitioner's returns, the total assets now reflect different figures, as follows:

Year	Total Assets (part D of page 1)
2002	\$55,036
2003	\$58,846
2004	\$60,870
2005	\$63,256

As noted by the director, none of the returns covered the priority date of April 30, 2001 and the returns state different total assets. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date. Further, the preparation date of "07/13/05" appeared on the 2004 tax return initially provided to the record, but the second version of the 2004 tax return submitted with the petitioner's motion states a preparation date of "07/04/05." Neither version of the 2005 tax returns had any preparation date indicated by the preparer. The AAO would also note that the location of the preparation date on the 2002 tax return as "08/24/03," is different than on the one originally submitted. Finally, as noted by the director, none of the returns bear any notations that they were amended and none indicate if they were actually filed with the Internal Revenue Service. Given these inconsistencies, and the lack of any explanation provided by the petitioner on appeal, the AAO concurs with the director's conclusion that these tax returns cannot be considered as reliable evidence of the petitioner's continuing ability to pay the proffered wage. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

On appeal, the petitioner characterizes the director's denial as based on superficial reasons, but does not offer any clarification why tax returns bearing different figures have been submitted. The petitioner's president also provides copies of bank statements from four different banks held by the corporate petitioner as evidence of its ability to pay the proffered wage. A fifth copy of a savings account does not indicate the identity of the holder. The statements show six-figure amounts as of June 13, 2008 at Capital One, as of April 18, 2007 and April 18, 2006 at North Fork Bank, as of May 16, 2005 and April 15, 2004 at GreenPoint Bank, and as of March 13, 2003 at FleetOne. The petitioner also submits copies of documentation indicating that it owns two Mack trucks.

It is noted that the petitioner's reliance on selected bank statements is misplaced. 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. Bank statements reveal only a portion of a petitioner's financial status and do not reflect other encumbrances that may affect a petitioner's ability to pay a certified wage. For example, an appropriate case might exist where the petitioner has otherwise established the ability to pay the proffered wage through its audited financial statements, annual reports, or federal tax returns and must account for a short period at the end of the relevant period. The regulation at 8 C.F.R. § 204.5(g)(2), however, does not imply or state that bank statements are to be considered a substitution for the required forms of evidence, particularly in this case where the tax returns cannot be considered reliable. Further, 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 corresponding tax return, such as within its net income reported on page 1 of the return or the cash specified on Schedule L which would already be included in the calculation of the petitioner's net current assets, if these returns were otherwise acceptable.

With respect to the petitioner's Mack trucks, we reject the idea these assets, which would be characterized as total assets on its balance sheet, should be considered in the determination of the ability to pay the proffered wage. 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, as indicated above, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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 CIS, 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).

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, in view of the unreliability of the federal tax returns submitted to the record, and no explanation of the discrepancies on appeal, any analysis of factors pertinent to *Sonogawa* is not

appropriate in this case. For the reasons explained above, the petition may not be approved. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay 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 appeal is dismissed.