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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

**PUBLIC COPY**

[Redacted]

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FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

OCT 15 2010  
Date:

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a restaurant/truck stop. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not provided sufficient evidence of the beneficiary's training or experience as required by the labor certification, and therefore, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. 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 denial, an issue in this case whether the petitioner has provided sufficient evidence of the beneficiary's training or experience as required by the labor certification, and, whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, an additional issue is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. 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'*, 345 F.3d 683 (9th 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).

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 unavailable.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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 ETA Form 9089 states that the position requires 3 months of training in restaurant operations and 18 months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.<sup>1</sup>

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

The ETA Form 9089, Section H, Item 11, describes the job duties of cook as follows:

Duties include preparing specific regional recipes from Mexico, setting up the kitchen line every night, making grocery lists, cleaning up [the] kitchen and restaurant after closing and monitoring kitchen equipment to ensure that [it] is in good working order.

The ETA Form 9089, Section H, Item 14, describes the specific skills of cook as follows:

Must have the ability to operate a deep fryer and other kitchen equipment. Must be able to coordinate with other cooks to prepare orders so they come out in a timely manner. The cook will need to know and understand the regional foods of Mexico and their preparation in order to cook specific kind of dishes and recipes that are offered at this restaurant.

No restaurant menu, or listing of the regional recipes from Mexico, were submitted by the petitioner.

The regulation at 8 C.F.R. § 204.5(1)(3) provides in pertinent part:

(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.

\* \* \*

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

According to the labor certification, the beneficiary listed only one prior employment position before commencing to work for the petitioner on December 15, 1999.<sup>2</sup> According to the labor certification, the beneficiary was employed fulltime at the [REDACTED] the [REDACTED] [REDACTED] from June 1, 1970, to February 1, 1980. While there, the beneficiary stated her job duties were as follows: “[REDACTED] [REDACTED] [REDACTED] at family-owned restaurant.” There is no information whether the beneficiary was employed between February 1, 1980, to December 15, 1999.

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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).

<sup>2</sup> According to the petitioner’s letter accompanying the petition, dated August 16, 2007, it employs the beneficiary as a line head cook at \$11.00 per hour.

The director sent a request for evidence (RFE) dated July 17, 2008, to the petitioner and requested, *inter alia*, evidence that the beneficiary obtained the required three months of training in restaurant operation before July 17, 2007, the priority date, according to the regulation at 8 C.F.R. § 204.5(l)(3)(A).

Counsel submitted a statement from [REDACTED] of the petitioner, dated August 13, 2008 claiming that the beneficiary attended restaurant operation training in January of 2000, May of 2003, and September of 2006, with each training session lasting one month. According to the statement, the training curriculum concerned restaurant maintenance, proper operation of kitchen equipment, and “keeping our restaurant competitive in the restaurant industry.”

The director noted in his decision that the beneficiary undertook training after she commenced employment in 1999, and, if prior training is a prerequisite to the offered job, the petitioner did not, in fact, require three months of training, (or, conversely, the beneficiary did not have the training required by the labor certification) in 1999.

In the same RFE, the director requested evidence that the beneficiary had obtained 18 months experience in the job offered according to the regulation at 8 C.F.R. § 204.5(l)(3)(A) and (D). Counsel submitted a statement from [REDACTED] (without stating his title in the restaurant) of the [REDACTED] that the beneficiary was employed in the restaurant from June of 1970, to February of 1980 performing duties similar to those stated in the labor certification.

According to the ETA Form 9089, Section J, Items 11 through 16, the beneficiary has a [REDACTED]. According to the record, the beneficiary was born in [REDACTED]. Therefore, between 1970 and 1980, the beneficiary was approximately 8 to 18 years old, but reputedly worked fulltime at the [REDACTED] while attending grade and high school. On the above issue, counsel states that in Mexico it is common for “a child to start working in the family business as soon as that child is able to do so” but does not explain, under the circumstances of this case, how this could occur. If U.S. Citizenship and Immigration Services (USCIS) fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The sole statement submitted in the record concerning the beneficiary’s qualifications received from [REDACTED] is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. There is no other evidence submitted concerning the beneficiary’s qualifications to meet the requirements of the labor certification.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the

proffered position.

An additional issue is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

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.

Here, the ETA Form 9089 was accepted on July 17, 2007. The proffered wage as stated on the ETA Form 9089 is \$10.00 per hour (\$20,800.00 per year).

Accompanying the petition and the labor certification, counsel submitted, *inter alia*, the petitioner's federal income tax return (Form 1120S) for 2006; the petitioner's 2006 IRS Form 940 "Employer's Annual Federal Unemployment (FUTA) Tax Return" stating total payments to all employees of [REDACTED] an Employers Quarterly Federal Tax Form (Form-941) with Schedule B for each quarter in 2006; and the petitioner's unaudited financial statements for the period ended December 31, 2006; and the petitioner's Wyoming business license issued on December 3, 1999.

The director sent an RFE dated July 17, 2008 to the petitioner, and requested, *inter alia*, information regarding the petitioner's ability to pay the proffered wage from the priority date onward. According to the regulation at 8 C.F.R. § 204.5(g)(2), the director requested a copy of the petitioner's federal tax returns, annual reports, or audited financial statements. Additionally, the director instructed that the petitioner may submit evidence such as profit/loss statements, bank account records, and similar documentary evidence.

Regarding the beneficiary, the director requested evidence of the beneficiary's Wage and Tax Statement (W-2) for 2007, as well as a recent paystub showing wages "year to date."

In response, on August 22, 2008, counsel submitted, *inter alia*, a W-2 Statement for 2007 purportedly issued by the petitioner to the beneficiary in the amount of [REDACTED]; and paycheck stubs from January 16, to August 1 of an unspecified year.

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 in 1999 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on August 6, 2007, the beneficiary did claim to have worked for the petitioner since December 15, 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 petitioner's ability to pay the proffered wage. Counsel submitted a W-2 Statement for 2007 purportedly issued by the petitioner to the beneficiary in the amount of [REDACTED]. In the instant case, the petitioner would have established that it employed and paid the beneficiary the full proffered wage from the priority date. However, on the Forms I-485 and G-325, both signed on September 28, 2007, the beneficiary said she had no social security number, although the beneficiary stated in the labor certification that she had been employed by the petitioner since 1999. The Form I-140 stated 'N/A' when it requested the petitioner to state the beneficiary's social security number. However, a W-2 Statement for the beneficiary was submitted with her social security number. The record is rife with inconsistencies surrounding the identity of the beneficiary, and the W-2 Statement and pay stubs submitted are not persuasive evidence of wages paid to the beneficiary. The W-2 Statement issued by the petitioner indicates that wages were paid to a person having a social security number when the petition, the Forms I-485 and G-325 prepared and signed by the beneficiary (and/or the petition) under the penalty of perjury indicates that she does not have a social security.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). With a history of the beneficiary's wages/compensation, the petitioner's ability to pay the proffered wage could have been more readily determined.

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 (1<sup>st</sup> 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 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).

The record before the director closed on August 22, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax return demonstrates its net income as shown in the table below.

- In 2006, the Form 1120S stated net income<sup>3</sup> of [REDACTED]

Therefore, for the 2006, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner did not submit 2007 tax returns.

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.<sup>5</sup> 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 2006, the Form 1120S stated net current assets of < [REDACTED] >.

Therefore, for year 2006, the petitioner through an examination of its net current assets could not pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination its net income or net current assets for year 2006.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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<sup>3</sup> 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. The amount stated on Schedule K, line 18, is the same in 2006 as the net income loss stated in the 2006 return Form 1120S, line 21.

<sup>4</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>5</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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. 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, there is insufficient evidence submitted for the AAO to analyze the finances or financial prospects of the petitioner which stated a resounding loss [REDACTED] in 2006, and also negative current net assets. Although the director requested additional financial information according to the regulation at 8 C.F.R. § 204.5(g)(2), to date, none was submitted by the petitioner. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.