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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



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FILE:



Office: TEXAS SERVICE CENTER

Date: **OCT 20 2010**

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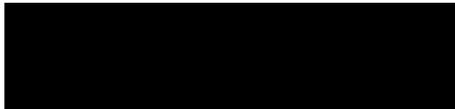
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

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 is a [REDACTED] It seeks to employ the beneficiary permanently in the United States as a store 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's wage.

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 July 22, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date 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 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the petitioner submitted and the DOL accepted for processing the Form ETA 750 labor certification on April 30, 2001. The rate of pay or the proffered wage stated on that form is \$26.06

per hour or [REDACTED] per year.¹ The Form ETA 750 also states that the position requires a minimum of five years work experience in the job offered as a manager.

To show that it has the ability to pay [REDACTED] per year beginning on April 30, 2001, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for 2001;
- IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2002- 2007;
- Form 1120S of [REDACTED] LLC (“[REDACTED]”) for the years 2001 and 2003 through 2007;
- Individual tax returns of [REDACTED] and [REDACTED] filed on IRS Forms 1040, U.S. Individual Tax Return, for 2001-2007; and
- A statement dated August 16, 2007 from [REDACTED] stating that [REDACTED] owns both [REDACTED] and the petitioning corporation ([REDACTED], Inc.) and that the funds from one corporation are always available to the other corporation.

The evidence in the record of proceeding shows that the petitioner was a C Corporation in 2001 and is an S Corporation from 2002 onwards with [REDACTED] as the sole shareholder and officer of the corporation. On the petition, the petitioner claimed to have been established in 1997,² to currently employ one worker, and to have a gross annual income and net annual income of [REDACTED] and \$0, respectively.

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.³

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.

¹ On the Form I-140, the petitioner states it will pay the beneficiary [REDACTED] year.

² A search of the New York Department of State’s website reveals that [REDACTED] or the petitioner was incorporated on December 22, 1997.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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).

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. Here, no evidence of the beneficiary's employment with the petitioner has been submitted.

When 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 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 July 17, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). 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 is the most recent return available. The petitioner’s tax returns demonstrate its net income for the years 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income (loss) of
- In 2002, the Form 1120S stated net income (loss)⁴ of
- In 2003, the Form 1120S stated net income (loss) of
- In 2004, the Form 1120S stated net income (loss) of
- In 2005, the Form 1120S stated net income (loss) of
- In 2006, the Form 1120S stated net income (loss) of
- In 2007, the Form 1120S stated net income (loss) of

Based on the table above, the petitioner did not have sufficient net income to pay the proffered wage of _____ per year in any of the years from 2001 to 2007.

⁴ 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 income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In this case, there is no additional income, credit, or deduction on the petitioner’s schedule K and thus, the petitioner’s net income is found on line 21.

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 (liabilities) for 2001-2007, as shown in the table below.

- In 2001, the Form 1120 stated net current assets (liabilities) of [REDACTED]
- In 2002, the Form 1120S stated net current assets (liabilities) of [REDACTED]
- In 2003, the Form 1120S stated net current assets (liabilities) of [REDACTED]
- In 2004, the Form 1120S stated net current assets (liabilities) of [REDACTED]
- In 2005, the Form 1120S stated net current assets (liabilities) of [REDACTED]
- In 2006, the Form 1120S stated net current assets (liabilities) of [REDACTED]
- In 2007, the Form 1120S stated net current assets (liabilities) of [REDACTED]

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary's wage in any of the years above.

Based on the net income and net current asset analysis above, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date.

On appeal, counsel for the petitioner refers to [REDACTED] individual tax returns and the tax returns of another company [REDACTED] and asserts that USCIS should consider these tax returns as evidence of the petitioner's ability to pay. [REDACTED] in his August 16, 2007 statement claims that the funds from He and [REDACTED] are always available to the other corporation (the petitioner), and *vice versa*. He also states in an August 15, 2008 statement that he personally has sufficient income and can help the corporation pay the proffered wage.

[REDACTED] essentially wants the AAO to pierce the corporate veil and look into his personal income and his other business venture. However, because a corporation such as the one in this case is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated,

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.

“nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” Therefore, the AAO cannot accept and consider any tax returns from [REDACTED] determining whether the petitioner – [REDACTED] – has the continuing ability to pay the proffered wage from the priority date.

On appeal, counsel also cites several unpublished and non-precedent decisions in which the AAO excluded depreciation expenses in determining the net income of the petitioning employer.

Counsel’s implication that USCIS should, in this case, also exclude the annual depreciation expense to the petitioner’s net income is without basis. The law is clear concerning depreciation. As stated above, the court in *River Street Donuts, supra* has held that a depreciation expense is a real expense, and thus, it should not be added back to boost or reduce the company’s net income or loss. By the same token, annual depreciation expense should not be added back to net assets.

Though not raised on appeal, 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.

The AAO acknowledges that the petitioner has been in a competitive field since 1997. However, the record includes no evidence of unusual circumstances that would explain the petitioner’s inability to pay the proffered wage in any of the years from the priority date. The company also does not reflect a large compensation package for its sole shareholder that could have been dedicated to paying the proffered wage. Between 2001 and 2007, the highest compensation that [REDACTED] received from the corporation was [REDACTED] (in 2004).

Further, the tax returns in the record do not reflect a pattern of historic growth. In addition, the petitioner, unlike *Sonegawa*, has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1997. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

Beyond the decision of the director, the AAO finds that this petition cannot be approved because the petitioner has not established that the petition is for an unskilled worker, especially when the evidence submitted (the approved Form ETA 750) shows that the petitioner required the beneficiary to have at least five years experience in the job offered as of April 30, 2001.

Section 203(b)(3)(A)(i) of 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.

Further, the regulation at 8 C.F.R. § 204.5(l)(4), in pertinent part, provides:

Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the petitioner requested the unskilled worker classification (**less than two years of experience**) on the Form I-140 petition. However, the Form ETA 750 labor certification indicates that the beneficiary must have at least five years experience in the job offered as of April 30, 2001. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to accept a petition under a different visa classification. In addition, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

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 (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).

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.