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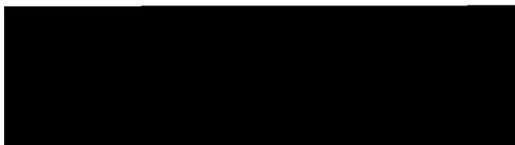
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 29 2010

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(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 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, Texas Service Center. The matter was forwarded to the Administrative Appeals Office (AAO) on appeal. This office then issued a request for evidence (RFE) and the petitioner did not reply to that request. The appeal will be dismissed.

The petitioner is a [REDACTED] It seeks to employ the beneficiary permanently in the United States as a [REDACTED] 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 found that the petitioner had not submitted any initial evidence of having an ability to pay the wage at the time of filing the 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.

As set forth in the director's September 4, 2008 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. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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(1)(2) defines "other worker" as:

a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), 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 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 27, 2005. The proffered wage as stated on the Form ETA 750 is [REDACTED]. The Form ETA 750 indicates that the position requires one year of experience in the proffered job.

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.¹

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 1992. The petitioner did not list its current number of employees on the petition. 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 13, 2005, the beneficiary did not state that he had worked for the petitioner.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in 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 petitioner did not submit any documentary evidence of having paid the beneficiary the full proffered wage or a portion of the wage at any 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 August 20, 2007 with the receipt of the petition. The petitioner did not submit evidence of its ability to pay at that time. On appeal, the petitioner submitted its 2005 and 2006 tax returns. This office issued an RFE on August 13, 2010 which states, among other things, that the petitioner should submit its 2007 and 2008 tax returns, and if available its 2009 tax return. The petitioner did not reply to the RFE. The petitioner’s tax returns demonstrate its net income for 2005 and 2006, as shown in the table below.

- The 2005 Form 1120 states net income of [REDACTED]
- The 2006 Form 1120 states net income of [REDACTED]

In 2005 and 2006, the petitioner had sufficient net income to cover the proffered wage [REDACTED]

The petitioner has not shown that it had sufficient net income to pay the proffered wage in 2007 and 2008.

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.² 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 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 has already shown an ability to pay in 2005 and 2006 and it did not submit its tax returns for any of the remaining years in the relevant period.

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

The petitioner did not provide additional information regarding its ability to pay the wage.

The petitioner also indicated in this proceeding 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 August 20, 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

²According 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.

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 [REDACTED]. 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 [REDACTED]. Her clients included [REDACTED]. The petitioner's clients had been included in the lists of the best-dressed [REDACTED]. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in [REDACTED]. 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 1992. It does not list its current number of workers. The petitioner has not established its historical growth since incorporating. The petitioner submitted information on its gross receipts for only two years during the period of analysis. Thus, the petitioner has not shown that its gross receipts throughout the relevant period consistently increased to the extent sufficient to demonstrate an ability to pay the wage from the priority date onwards. 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 carpenter, assembler and repairer. Item 14 describes the proffered position as requiring six years of grade school and six years of high school. Item 14 also indicates that the applicant must have one years of experience in the job offered. Item 15 of Form ETA 750A does not reflect any special requirements. The duties of the proffered job are listed at Item 13 as:

Overlaps (sic) successive layers of determining distance of overlap, using

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 roof carpenter for 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 and it is signed by the general manager of that It states that the beneficiary worked for the as "the and other areas of the

The regulation at 8 C.F.R. § 204.5(1)(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.

The only employment experience letter in the record does not state whether the beneficiary gained at least one year of experience working full-time carrying out the duties of the proffered position, namely The director did not raise this issue in the denial notice. Instead, this office provided the petitioner the opportunity in its August 13, 2010 RFE to submit a new experience letter that better delineates the duties of the beneficiary at his position in such that this office might

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Page 8

determine whether he gained one year of full-time experience ██████████ before the January 27, 2005 priority date. This office also provided the petitioner an opportunity to submit evidence that the beneficiary had completed the educational requirements listed on the Form ETA 750 as of the priority date. However, the petitioner did not reply to the ██████████

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.