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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:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

SRC 07 261 52833

SEP 01 2010

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.

Thank you,

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 The decision will be withdrawn, and the matter remanded to the Service Center for further consideration.

The petitioner is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a laborer, foreman. 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 (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and the petitioner had not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.<sup>1</sup> The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. 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, issues in this case are 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, and, whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 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).

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<sup>1</sup> The petitioner failed to submit any documentary evidence with the petition and labor certification.

Here, the Form ETA 750 was accepted on August 9, 2004. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour for 40 hours per week, and \$12.00 per hour for five hours per week, which totals \$19,760.00 per year.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>2</sup>

On appeal, counsel submitted, *inter alia*, a support letter from the petitioner dated November 24, 2008; the petitioner's federal income tax returns (Forms 1120S) for years 2004, 2005, 2006, and 2007; and approximately 11 copies of the petitioner's bank statements for the time period January 31, 2008, to October 31, 2008.<sup>3</sup>

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 1995 and to currently employ 22 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 July 19, 2004, the beneficiary did claim to have worked for the petitioner since May 2001.

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, 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently .

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<sup>2</sup> 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 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>3</sup> According to the bank statements, the petitioner maintained high average account balances in 2008.

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). 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.

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).

The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S stated net income<sup>4</sup> of \$33,037.00.
- In 2005, the Form 1120S stated net income of \$68,123.00.
- In 2006, the Form 1120S stated net income of \$113,831.00.
- In 2007, the Form 1120S stated net income of \$120,573.00.

Therefore, for the years 2004, 2005, 2006, and 2007, it appears the petitioner may have had sufficient net income to pay the proffered wage. However, the petition cannot be approved at this time. First, the record does not contain recent evidence pertaining to the petitioner's ability to pay the proffered wage, e.g., 2008 and 2009 tax returns.

Second, USCIS records indicate that there is at least one other Form I-140 petition that was pending simultaneously with the instant petition. As the petitioner must establish that it has the ability to pay the proffered wages of all pending petitions as of their respective priority dates until each beneficiary obtains permanent residence, the instant petition cannot be approved until the petitioner establishes the priority date, proffered wage, and employment status of the other pending beneficiary.

Third, the record is devoid of evidence establishing that the petitioner paid wages to the beneficiary since the priority date even though the record indicates that the beneficiary has been employed by the petitioner since 2001. Accordingly, the director's decision shall be withdrawn, and the matter will be remanded to the Texas Service Center to request further evidence as outlined above.

An additional issue is whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must 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).

The Form ETA 750, Part A, Line 13, describes the job duties as follows:

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<sup>4</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. 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 17e (2004-2005) and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 2, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedules K, the petitioner's net income is found on Schedule K of its tax returns.

General maintenance, excavation with shovel and picks, digging holes, pick up trash, mow grass, installing plants and trees.

The Form ETA 750 states that the position requires a high school education<sup>5</sup> and one month of experience.

On the Form ETA 750B, the beneficiary stated his prior employment experience under penalty of perjury. The beneficiary commenced working for the petitioner on May 2001, as a "laborer foreman landscape construction" performing duties similar to the offered job. Prior to this employment, the beneficiary stated he was employed fulltime by Agricultura, La Venta de Mochitiltic, in agriculture from March 1990, to January 2001.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

(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.

Counsel submitted an employment reference dated November 7, 2008, from [REDACTED] owner of [REDACTED] the Republic of Mexico, along with his telephone contact number. According to [REDACTED] the beneficiary was employed there from March 1, 1996, to December 23, 2001, performing duties described in the labor certification for the offered job. The record does not resolve this inconsistency in dates of employment. The [REDACTED] letter claims the beneficiary began working for him in 1996, while the beneficiary claims in the Form ETA 750 to have commenced employment in 1990.

Accordingly, there is insufficient evidence in the record to demonstrate that the beneficiary has the job experience to satisfy the offered job requirements as stated above according to the regulation at 8 C.F.R. § 204.5(l)(3). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.

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.

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<sup>5</sup> On appeal, counsel submitted the beneficiary's secondary school completion certificate.

**ORDER:** The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.