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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: SEP 01 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. § 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.

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 appeal will be sustained. The petition will be approved.

The petitioner is an industrial products designer. It seeks to employ the beneficiary permanently in the United States as an industrial designer. 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 determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date of the visa petition onwards. Therefore, the director denied the petition.

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 December 12, 2007 denial, at issue in this case 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.

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), 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 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 April 19, 2004. The proffered wage as stated on the Form ETA 750 is \$49,000 per year. The Form ETA 750 states that the position requires a Bachelor of Arts degree in industrial design and one year of experience in the proffered position.

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 an S corporation. On the petition, the petitioner claimed to have been established in 1980 and to currently employ 6 workers. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on April 14, 2004, the beneficiary claimed to have worked for the petitioner from 1999 until the date that he signed that form.

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 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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage throughout the relevant period of analysis. The Forms W-2, Wage and Tax Statement, in the record do show that the petitioner paid the beneficiary the following amounts during the relevant period: \$37,200 in 2004, or \$11,800 less than the proffered wage; \$41,250 in 2005, or \$7,750 less than the proffered wage; and \$42,900 in 2006, or \$6,100 less than the proffered wage. The 2007, 2008 and 2009 Forms W-2 in the record indicate that in those years, the petitioner paid the beneficiary more than the proffered wage. Thus, the petitioner has shown its ability to pay the wage in 2007, 2008 and 2009.

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 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).

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. Showing that the petitioner paid wages in excess of the proffered wage is also 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). Thus, the AAO rejects the petitioner's suggestion made through counsel in response to the request for evidence (RFE) that its depreciation deductions should be viewed as funds available to pay the wage.

The record before the director closed on December 3, 2007 with the receipt of the petitioner's submissions in response to the director's RFE. On June 2, 2010 and July 26, 2010, the AAO issued RFEs in this matter and the petitioner submitted its replies on July 1, 2010 and August 5, 2010, respectively. As of August 5, 2010, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner has already shown its ability to pay the wage in 2007, 2008 and 2009 through the actual wages that it paid the beneficiary; thus, information on those returns will not be analyzed in this section. The 2003 through 2006 tax returns reflect the following:²

- The 2003 Form 1120S states net income³ of \$59,867.
- The 2004 Form 1120S states net income (loss) of -\$26,544.
- The 2005 Form 1120S states net income of \$8,548.
- The 2006 Form 1120S states net income of \$1,746.

Thus, in 2003, the petitioner has shown that it had sufficient net income to pay the wage. In 2004, the petitioner did not have sufficient net income to pay the difference between the actual wages that it paid the beneficiary in 2004 and the proffered wage, or \$11,800. In 2005, the petitioner did have sufficient net income to pay the difference between the actual wages paid the beneficiary in 2005 and the proffered wage, or \$7,750. In 2006, the petitioner did not have sufficient net income to pay the difference between the actual wages paid the beneficiary in 2006 and the proffered wage, or \$6,100.

Therefore, the petitioner has shown the ability to pay the wage during 2003 and 2005 through its net income and the actual wages paid the beneficiary, combined. In 2007, 2008 and 2009, the petitioner demonstrated an ability to pay the wage through its actual wages paid to the beneficiary. The only years still in question are 2004 and 2006.

² The petitioner's fiscal year runs from October 1 through September 30 and the priority date is April 14, 2004. Therefore, the period from the priority date through September 30, 2004 is covered by the 2003 tax return.

³ 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 (2003) line 17e (2004-2005) and line 18 (2006) of the Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 1, 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 income and other adjustments shown on its Schedule K for 2003, 2004, 2005 and 2006, the petitioner's net income is found on Schedule K of its tax return in each of those years.

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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on 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's tax returns reflect its end-of-year net current assets for 2004 and 2006 as:

- The 2004 Form 1120S states net current assets (liabilities) of -\$83,023.
- The 2006 Form 1120S states net current assets (liabilities) of -\$67,395.

Thus, in 2004, the petitioner did not have sufficient net current assets to pay the difference between the actual wages paid in 2004 and the proffered wage, or \$11,800. In 2006, the petitioner did not have sufficient net current assets to pay the difference between the actual wages paid in 2006 and the proffered wage, or \$6,100.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the April 19, 2004 priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets. It has shown an ability to pay in 2003, 2005, 2007, 2008 and 2009.

The petitioner has asserted that its officers' compensation is sufficient to cover the proffered wage. For example, the petitioner's tax returns reflect officers' compensation of \$213,920 in tax year 2003; \$333,054 in tax year 2004; \$320,475 in tax year 2005; \$340,554 in tax year 2006; \$371,561 in tax year 2007; and \$428,987 in tax year 2008. In addition, the petitioner submitted evidence into the record to indicate that the petitioner's officers are willing and able to forego officers' compensation to pay the proffered wage or the balance of the wage from the priority date onwards, if the petitioner is not able to do so out of its own funds. Namely, all three officers provided a sworn statement which attests that the officers are able and willing to pay the wage from the priority date onwards. Also each officer provided statements which list the officer's recurring monthly household expenses. They each provided their personal tax returns from 2004 onward, except for one officer who failed to submit his 2004 tax return. However, this officer did submit his Form W-2 for 2004. The record indicates that the officers could afford to forego officer compensation to cover the balance of the wage: \$11,800 in 2004 and \$6,100 in 2006, if the petitioner is not able to do so out of its own funds. Therefore, the petitioner has established its ability to pay the wage through officers' compensation during 2004 and 2006, the two years in the relevant period for which it had not already shown an ability to pay the wage.

⁴According 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.

Thus, the petitioner has shown an ability to pay the wage from the April 19, 2004 priority date onwards, through its officers' compensation, or an examination of actual wages paid the beneficiary, its net income or net current assets.

USCIS will also examine 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 (BIA 1967). 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.

Here, the petitioner has stated that it incorporated in 1980 and has 6 employees. The petitioner has established that its gross receipts have remained relatively consistent or have increased during the relevant tax years. The company has paid out significant amounts in officer compensation. Moreover, officers' compensation has also either remained relatively consistent or has increased during the relevant tax years, as follows: \$213,920 in 2003; \$333,054 in 2004; \$320,475 in 2005; \$340,554 in 2006; \$371,561 in 2007; and \$428,987 in 2008. Thus, the financial data demonstrates that the petitioner is a viable business with consistent and solid profits and sales and discretionary funds from significant officers' compensation. Therefore, the AAO finds that the totality of the circumstances in this particular case also establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.