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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 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, with a fee of \$585. 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the business of printing labels. It seeks to employ the beneficiary permanently in the United States as a flexographic press-operator. 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 deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and denied the petition accordingly. The director also found that the beneficiary did not meet the minimum educational requirement for the proffered position.

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.

The issues before the AAO are whether or not the petitioner has the continuing ability to pay the proffered wage from the priority date and whether or not the beneficiary is qualified to perform the duties of the proffered position.

As for the ability to pay, 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 Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The rate of pay or the proffered wage stated on that form is \$10.96 per hour or \$22,796.80 per year. The

Form ETA 750 also states that the position requires a minimum of 5 years of grade school and 2 years of high school.

To qualify for the preference visa under section 203(b)(3) of the Act, the petitioner must show that it can pay \$10.96 per hour or \$22,796.80 per year beginning on April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. The petitioner originally submitted the following evidence to show that ability:

- Photocopy of a Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001 and
- Photocopies of the petitioner's balance sheets for 2001-2007 (unaudited).

The director deemed the evidence submitted insufficient to adjudicate the petition and specifically instructed the petitioner to submit its tax returns for 2002-2007 and any payroll records or other documents showing payments to the beneficiary during the qualifying period. In response, the petitioner submitted copies of its unaudited balance sheets for 2001-2007. The director denied the petition, finding that the petition had failed to demonstrate that it had the ability to pay the proffered wage from the priority date.

On appeal, counsel for the petitioner asserts that the petitioner is a multi-million dollar business and can afford to pay the prevailing wage. The petitioner also submits the following evidence:

- Photocopies of Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2001-2006 and
- Photocopies of the petitioner's Financial Reports for 2002-2007 (audited).

The petitioner in this case was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency. As noted above, the director previously requested the petitioner to submit, among other things, copies of the petitioner's federal tax returns, audited financial statements, or annual reports for 2002-2007. No such evidence was submitted. The AAO, therefore, will not accept the additional evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence (RFE). *Id.* The appeal will be adjudicated based on the record of proceeding before the director.

The AAO will review this matter on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 1978,¹ to currently employ 139

¹ A search of the [REDACTED] Department of Assessments and Taxation's website reveals that [REDACTED] or the petitioner was incorporated on April 3, 1978.

workers, and to have gross annual income and net annual income of \$26,331,137 and \$4,791, respectively.

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. No evidence showing the beneficiary's employment with the petitioner from or before the priority date has been submitted.

When the petitioner fails to 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). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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 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).

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 Schedule L, lines 1 through 6 and include cash-on-hand. 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.

For the reasons discussed above, the AAO will not accept the petitioner’s tax returns and audited financial statements for 2002-2007 as evidence of the petitioner’s ability to pay. No finding, consequently, can be entered as to whether the petitioner has sufficient net income or net current assets to pay the beneficiary’s wage from the priority date.

² 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.

Further, the AAO cannot accept the balance sheets for 2001-2007 as evidence of the petitioner's ability to pay since they were not audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. In the instant case, none of the balance sheets submitted is accompanied by a statement indicating that the financial or income statement has been audited. Therefore, they are insufficient to demonstrate the ability to pay the proffered wage.

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 was incorporated in 1978 and is a viable business. Nevertheless, the evidence submitted does not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from 2001 to 2007. In addition, no argument has been presented or evidence provided to show that the petitioner has a sound and outstanding business reputation as in *Sonogawa*. Unlike *Sonogawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 1978. 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

evidence before the director, the petitioner has not established that it has the ability to pay the salary offered as of the priority date and continuing to present.

The director also found that the beneficiary did not have the minimum educational requirement to qualify for the job.

As noted above, the law requires the beneficiary to have all the necessary qualifications stated on the Form ETA 750 as of the priority date, which in this case is 7 years of schooling – 5 years grade school and 2 years high school. *See Matter of Wing's Tea House, supra.* To show that the beneficiary possessed the minimum educational requirement as of the priority date, the petitioner submitted copies of the following evidence:

- An affidavit stating that the beneficiary attended elementary school for 5 years from 1961 to 1965 and high school for 2 years from 1968 to 1969 and
- Photocopies of the beneficiary's translated school transcripts showing that she finished fifth grade in 1966.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(D) states, "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." In this case, the Form ETA 750 individual labor certification requires that the petitioner has a total of 7 years of schooling – 5 years grade school and 2 years high school. No other requirements are listed. Hence, based on the evidence submitted, the AAO is persuaded that the beneficiary meets the minimum education requirement for the proffered position and is capable of performing the duties described on the Form ETA 750.

The director also found that the petitioner did not intend to pay the beneficiary the proffered wage, as the job offer letter from the petitioner to the beneficiary was for \$10/hour, not \$10.96/hour as specified on the ETA Form 750 labor certification. On appeal, the petitioner submits a revised job offer letter indicating an employment offer to the beneficiary at the rate of \$10.96/hour. The petitioner has overcome the decision of the director on this point.

Nevertheless, 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 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.