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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

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER

Date: SEP 16 2010

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

[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.

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,

[REDACTED]

**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 construction company. It seeks to employ the beneficiary permanently in the United States as a brick layer. 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 beginning on the priority date of the visa 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 November 15, 2007 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.

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. [REDACTED] (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 28, 2001. The proffered wage as stated on the Form ETA 750 is \$24.92 per hour (\$51,833.60 per year). The Form ETA 750 indicates that the position requires two years 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.<sup>1</sup>

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 1997 and it currently employs 4 workers. 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 an unspecified date, the beneficiary did not claim to have 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 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. [REDACTED]. 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. [REDACTED] 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing* [REDACTED], 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

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<sup>1</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 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).

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 [REDACTED] 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 [REDACTED] 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.

[REDACTED] "[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." [REDACTED] 537 (emphasis added).

At the outset, the AAO would note that any suggestion that this office should view information from any of the tax returns of various companies other than the petitioner submitted into the record as representing the petitioner's financial information is misplaced. These other companies are separate entities with separate Employer Identification Numbers (EINs). They file tax returns separate from the petitioner. Therefore, their financial information is not that of the petitioner. The petitioner asserted through counsel that it "comingles" its funds with these other companies. Counsel indicated that these companies all have the same sole shareholder and suggested that this lends support to the idea that all these companies "function as one unit." This is not persuasive. Again, the record reflects that these various corporations function as separate legal entities, each having a separate EIN, separate tax returns, etc. A corporation is a separate and distinct legal entity from its owners and shareholders; therefore, the various assets of its shareholders or of other enterprises or corporations

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, "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."

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, or Line 24 of the Form 1120-A, U.S. Corporation Short Form Income Tax Return. The record before the director closed on October 1, 2007 with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny. As of that date, the petitioner's 2007 federal income tax return was not yet available. The petitioner's tax returns demonstrate its net income for 2001 through 2006, as shown in the table below.

- The 2001 Form 1120 states net income (loss) of -\$17,875.
- The 2002 Form 1120-A states net income of \$4,639.<sup>2</sup>
- The 2003 Form 1120 states net income of \$17,136.
- The 2004 Form 1120 states net income (loss) of -\$30,947.
- The 2005 Form 1120 states net income of \$30,566.
- The 2006 Form 1120 states net income of \$2,004.

In 2001 and 2004, the petitioner suffered a net loss. In 2002, 2003, 2005 and 2006, the petitioner's net income was less than the proffered wage of \$51,833.60. Therefore, during 2001-2006, the petitioner did not have sufficient net income to cover the proffered wage.

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.<sup>3</sup> A corporation's year-end current assets are shown on Form 1120 Schedule L, lines 1(d) through 6(d) or Form 1120-A, page 2, part III, Lines 1(b)-6(b). Its year-end current liabilities are shown on Form 1120, Schedule L, lines 16(d) through 18(d) or Form 1120-A, page 2, part III, lines 13(b)-14(b). 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.

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<sup>2</sup> The director used information from a 2002 Form 1065 in the record for an entity with a different EIN and different title than the petitioner when analyzing the petitioner's 2002 financial information. The fact that this entity files separate tax returns, has a separate EIN, has a different title, etc. demonstrates that this is not the petitioner. Thus, this office has not used information from that tax return in this analysis. Instead, the AAO has listed here the information from the petitioner's 2002 Form 1120-A in the record.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

The petitioner's tax returns demonstrate its end-of-year net current assets for 2001-2006, as shown in the table below.

- The 2001 Form 1120 states net current assets (liabilities) of -\$165,564.
- The 2002 Form 1120-A does not list any of the petitioner's information regarding its net current assets in that year.
- The 2003 Form 1120 states net current assets of \$311.
- The 2004 Form 1120 states net current assets (liabilities) of -\$87,911.
- The 2005 Form 1120 states net current assets (liabilities) of -\$509,905.
- The 2006 Form 1120 states net current assets (liabilities) of -\$496,785.

In the years 2001 and 2004 through 2006, the petitioner had negative net current assets. In 2003, its net current assets were less than the proffered wage. The petitioner did not provide information regarding its 2002 net current assets. Thus, the petitioner has not shown that it had sufficient net current assets to cover the proffered wage during any year in the relevant period.

In sum, the petitioner has not shown an ability to pay the wage in 2001 through 2006 through an examination of wages paid to the beneficiary, its net income or net current assets.

On appeal, the petitioner indicated through counsel that the letter from its bank dated December 13, 2007 which states that the petitioner had an average daily balance of \$13,651.26 in its account from January 1, 2001 through December 13, 2007 supports the finding that the petitioner had an ability to pay the wage because the proffered wage is only \$199 per day. This assertion is misplaced. First, information from bank accounts are not among the three types of evidence, enumerated at 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional evidentiary material "in appropriate cases," here counsel and the petitioner have not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

This office would add that it was suggested in these proceedings that language in the May 4, 2004 USCIS Interoffice Memorandum written by [REDACTED] supports the finding that information from the petitioner's bank account is at times sufficient to demonstrate that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. *See* Interoffice Memo. from [REDACTED] Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* (May 4, 2004). Regarding this, the AAO would underscore that USCIS memoranda merely articulate internal guidelines for USCIS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (quoting *Fano*

*v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Further, as noted above, the petitioner has failed to establish why documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner.

Counsel also indicated that the beneficiary's work product as a brick layer will generate income sufficient to pay the wage. He suggested that because the Regional Commissioner in *Sonegawa* allowed the reasonable expectations of an increase in profits based on the petitioner's past strong financial performance, its strong reputation within its industry, etc. to show an ability to pay the wage, that the AAO should consider revenue that the beneficiary may generate in the future as a reasonable expectation and evidence of its ability to pay the wage. This is not correct. The facts in *Sonegawa* are not parallel to the facts in the instant case. Counsel is not relying on the financial strength of the petitioner during the relevant period (just prior to an uncharacteristic business expenditure or loss) and its strong reputation within its industry, before and during the relevant period, to help show an ability to pay the wage, as the Regional Commissioner did in *Sonegawa*. Instead, counsel suggested that the AAO consider an increase in revenue that may be generated after the beneficiary begins working for the petitioner. However, as noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Further, any suggestion that the petitioner's total salaries paid and total officer's compensation paid may be used to establish that the petitioner had sufficient funds to pay the wage is misplaced. First, the petitioner's tax returns show that the petitioner did not pay out any officer's compensation in 2001 through 2004, and it did not list any salaries paid or cost of labor in 2001 through 2004. It only listed salaries paid and officer's compensation in 2005 and 2006. Further, simply showing that the petitioner paid total wages or total officer's compensation in excess of the proffered wage is not sufficient to show an ability to pay the beneficiary the proffered wage from the priority date onwards.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in [REDACTED] 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 1997 and that it currently employs 4 workers. The petitioner has not established its historical growth since incorporating. Its gross receipts have fluctuated during 2001 through 2006 as follows: \$3,284,500 in 2001; none reported in 2002; none reported in 2003; none reported in 2004; \$400,400 in 2005; and \$489,461 in 2006. Also, the petitioner paid no officer compensation or salaries during 2001 through 2004. Finally, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former 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 April 28, 2001 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 not met that burden.

**ORDER:** The appeal is dismissed.