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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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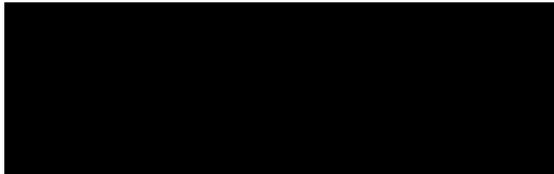
Petitioner:

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.

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto maintenance and repair company. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 demonstrated its ability to pay the proffered wage and that the petitioner failed to demonstrate that the job offer was bona fide as the beneficiary is related to the petitioner. 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 June 2, 2009 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage from the date the labor certification was filed onward and whether the job offer is bona fide.

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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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 accepted on April 10, 2001. The proffered wage as stated on the Form ETA 750 is \$24.31 per hour (\$50,564 per year). The Form ETA 750 states that the position requires two years of experience as an auto mechanic.

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 upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1985 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year runs from September 1 to August 31. On the Form ETA 750B, signed by the beneficiary on April 5, 2001, the beneficiary stated that he began working for the petitioner in August 2000.

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. The petitioner submitted no evidence that it ever employed or paid the beneficiary.²

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 (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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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).

² The record contains copies of canceled checks paid to various parties. Nothing shows payment of wages to the beneficiary. The petitioner also did not submit any Forms W-2 despite the beneficiary's claim to employment.

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, 558 F.3d 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*, 719 F.Supp. 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 or Line 24 of the Form 1120-A U.S. Corporation Short-Form Income Tax Return. The record before the director closed on April 6, 2009 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 the most recently available return.

The petitioner's tax returns demonstrate its net income for 2001³ to 2007, as shown in the table below.

- The 2001 Form 1120-A stated net income of -\$1,122.
- The 2002 Form 1120-A stated net income of \$1,453.
- The 2003 Form 1120-A stated net income of \$1,272.
- The 2004 Form 1120-A stated net income of \$1,575.
- The 2005 Form 1120-A stated net income of -\$7,347.
- The 2006 Form 1120-A stated net income of -\$18,599.
- The 2007 Form 1120 stated net income of -\$11,271.

Therefore, for all of the relevant years, the petitioner's tax returns demonstrated insufficient net income to demonstrate the ability to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ On the Form 1120, 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. On the Form 1120-A, a corporation's year-end current assets are shown on Part III, lines 1 through 6. Its year-end current liabilities are shown on lines 13, 14, and 16. 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 demonstrate its end-of-year net current assets for tax years 2001 to 2007, as shown in the table below.

- The 2001 Form 1120-A stated net current assets of \$7,948.
- The 2002 Form 1120-A stated net current assets of \$5,848.
- The 2003 Form 1120-A stated net current assets of \$11,457.
- The 2004 Form 1120-A stated net current assets of \$10,828.
- The 2005 Form 1120-A stated net current assets of \$13,488.
- The 2006 Form 1120-A stated net current assets of \$1,748.
- The 2007 Form 1120 stated net current assets of -\$1,051.

³ The petitioner's 2001 tax returns cover the period of September 1, 2001 to August 31, 2002. The petitioner did not submit its 2000 tax return which would cover the period of the priority date of April 10, 2001 to August 31, 2001.

⁴ 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.

The petitioner's net current assets were insufficient to demonstrate its ability to pay the proffered wage in any of the years from the date of the labor certification onward.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner did not establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income, or net current assets.

On appeal, counsel asserts that "Current assets minus current liabilities is not the only means nor the only formula to determine that an employer has the ability to pay an employee's salary." The AAO has examined the petitioner's net income and any documented wages paid to the beneficiary (here, none). As stated above, the federal courts have upheld our reliance on federal income tax returns and net income as a basis for determining a petitioner's ability to pay the proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054; *see also Chi-Feng Chang*, 719 F. Supp. 532; *K.C.P. Food Co., Inc.*, 623 F. Supp. 1080; *Ubeda v. Palmer*, 539 F. Supp. 647. Counsel suggests no alternate means or formula for determining the petitioner's ability to pay the proffered wage, but suggests consideration of the petitioner's totality, which is addressed below.

The petitioner submitted bank statements covering the period of January 1, 2001 to November 30, 2001, January 1, 2002 to November 2003, and January 2004 to February 2007. Counsel's reliance on the balance in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. On appeal, counsel states that 8 C.F.R. § 204.5(g)(2) allows for the submission of bank statements in "appropriate cases," and that this would be an appropriate case. While the regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable 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. We note that the monthly proffered wage is \$3,889.60, but that many of the monthly balances shown are less than the proffered wage. For example, on the January 2007 bank statement shows that the petitioner had an ending balance of \$1,408.00, and the petitioner incurred four insufficient fund fees that month. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Form 1120-A, Part III Balance Sheet or Schedule L considered in determining the petitioner's net current assets.

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 (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 *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.

The petitioner presented no evidence that it had one off year or that the financial picture presented by its tax returns is inaccurate. The petitioner's gross receipts have regularly declined from a high of \$269,106 in 2001 to \$143,332 in 2007 and the wages paid by the petitioner in 2002, 2003, 2004, 2005, 2006, and 2007 for all employees totaled less than the proffered wage (most years, the total wages paid was around half of the proffered wage). The petitioner submitted no evidence of its reputation or other information to liken its situation to that of *Sonegawa*. Thus, 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 or all its sponsored workers' wages.

Additionally, the director's decision noted that the Notice of Intent to Deny (NOID) specifically requested evidence that the DOL was informed of the relationship between the petitioner and the beneficiary at the time the labor certification was accepted. The petitioner, however, submitted no such evidence in response to the NOID but indicated that the petitioner's owner was the beneficiary's uncle. The petitioner submitted no such evidence on appeal either. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

An occupational preference petition may be filed on behalf of a prospective employee who is related to a shareholder in the corporation. The prospective employee's relationship to the shareholder, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her familial relationship constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 CFR § 656.30(d). See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). In response to the director's NOID, the petitioner submitted a letter stating that its sole shareholder is the beneficiary's uncle.

The petitioner presented no evidence that it made DOL aware of the familial relationship during the labor certification process and has not addressed the issue of the job offer's bona fides on appeal. As a result, the petitioner has not established that the offer of employment is bona fide.

Beyond the director's decision, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

(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

The Form ETA 750 requires two years of experience before the April 10, 2001 priority date as an automobile mechanic. The petitioner submitted a letter from [REDACTED] of Henry Auto Service stating that the beneficiary was employed as a mechanic from June 1997 to August 2000. This letter does not indicate whether the beneficiary was employed in a full-time or part-time capacity. As a result, we are unable to conclude that the petitioner has adequately established that the beneficiary had the necessary two years of prior experience at the time the labor certification was accepted by the DOL.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.