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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:

DEC 28 2010

IN RE:

Petitioner:

[Redacted]

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:

[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 \$630. 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 a gasoline station with convenience store.¹ It seeks to employ the beneficiary permanently in the United States as a store manager. 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 2004 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 December 10, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2004 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, 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

¹ On the I-140 petition, the petitioner identified itself as a retail store. The lease agreement submitted on appeal describes the petitioner's business operations as a gasoline station/convenience store.

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 July 8, 2004. The proffered wage as stated on the Form ETA 750 is \$36,650 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position or two years of experience in the related occupation of manager, wholesale business with similar duties.

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.²

On appeal, the petitioner submits a copy of a Commercial Net Lease Agreement dated March 1, 2005 that describes the petitioner's leased business operations at [REDACTED]. The petitioner also submits copies of the 2007 W-2 Forms for three claimed employees that indicate the petitioner paid wages of \$55,720 in 2007. Other relevant evidence includes the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2004 to 2006, as well as 2004 W-2 Forms for six employees for a business identified as [REDACTED] located in Duluth, Georgia; 2005 W-2 Forms for three employees for [REDACTED] located in Decatur, Georgia; and 2006 W-2 Forms for four employees for [REDACTED] in Decatur, Georgia. The petitioner also submitted bank account statements³ from January 2005 to July 2007, and states that the average monthly balance during this period was frequently in excess of \$10,000, and thus, exceeds the beneficiary's monthly wage.

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 June 27, 2001, to have a gross annual income of \$1,273,946, a net annual income of \$11,303, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar

² 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).

³ The AAO notes that the petitioner's Summit National Bank statements in 2007 are in the name of [REDACTED] which is an address distinct from the I-140 address. The 2006 Haven Trust Bank statements submitted to the record are identified as [REDACTED] and are two distinct accounts. One account is for the Georgia lottery. The College Avenue address is identical to the petitioner's address identified on the I-140 petition. The 2006 Summit National Bank bank statements again identify the petitioner's address as [REDACTED]. The record is not clear as to why the bank records have two distinct d/b/a names and addresses.

year. On the Form ETA 750B, signed by the beneficiary on May 30, 2004, 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, 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 2004 priority date subsequently.

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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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).

The record before the director closed on November 14, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner’s tax returns demonstrate its net income for tax years 2004 to 2006 as shown in the table below.

- In 2004, the Form 1120S stated net income⁴ of \$142,543.

⁴ 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 (1997-2003) line 17e (2004-2005) line 18* (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (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, or deductions in 2004 and 2005, shown on its Schedule K for 2004 and 2005, the petitioner’s net income is found on Schedule K, line 17c for these two years.

- In 2005, the Form 1120S stated net income of \$11,053.
- In 2006, the Form 1120S stated net income of -\$16,156.

The petitioner, thus, had sufficient net income to pay the proffered wage based on its net income. However, for the years 2005 and 2006, the petitioner did not have sufficient net income to pay 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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. The petitioner's tax returns demonstrate its end-of-year net current assets for *, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$23,919.
- In 2006, the Form 1120S stated net current assets of -\$39,441.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage of \$36,650.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2004.

On appeal, counsel reiterates that the petitioner in its response to the director's request for evidence dated August 27, 2007 indicated that it would utilize the salaries paid to three part-time managers to establish its ability to pay the proffered wage to the beneficiary when he begins to work for the petitioner. Counsel notes that the director indicated in his decision, and AAO has considered in previous decisions, that wages paid to part-time employees whose position will cease to exist once the beneficiary reports to work can be considered when establishing the petitioner's ability to pay and, as such, can be added to the petitioner's net income. Counsel's comment appears to be based on the director's statement with regard to wages paid to other workers. The director stated that wages paid to part-time employees whose positions will cease to exist once the beneficiary reports work can be

⁵According 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.

considered when establishing the ability to pay and added to net income, but that these same wages cannot be added to the petitioner's net current assets to determine a petitioner's ability.

The AAO notes that the director's comments with regard to the use of wages for other employee to establish ability to pay are confused. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The examination of the wages of other employees that the beneficiary will replace can be utilized to bolster the petitioner's ability to pay the proffered wage. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. Moreover, there is no evidence that the position of the part-time workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel advises that the beneficiary will replace three part-time store managers. With the I-140 petition, the petitioner submitted W-2 Forms for 2004 and 2005. The 2004 W-2 documents were issued by the petitioner located at [REDACTED] and identify the following workers and their wages: [REDACTED], \$20,000; [REDACTED], \$10,000; [REDACTED], \$8,000; [REDACTED], \$10,000; [REDACTED], \$10,000, and [REDACTED] \$12,000.

In 2005, the petitioner's address on the W-2 Forms is [REDACTED] and the employees and their wages are identifies as follows: [REDACTED], \$10,500; [REDACTED] \$7,500, and [REDACTED] \$5,120. In his brief, counsel states that these individuals were only employed for ten months in 2005, and that their monthly wages for those ten months of \$2,312 plus the petitioner's monthly net income of \$1,130, or \$3,442 clearly exceeds the proffered wage of \$3,054.17.

In its response to the director's RFE dated August 27, 2007, the petitioner also submitted W-2 Forms for tax year 2006, that indicate the following four employees and their wages: [REDACTED], \$28,720; [REDACTED], \$9,000; [REDACTED], \$3,000, and [REDACTED] \$6,000.

On appeal, counsel also submits the petitioner's 2007 W-2 Forms for [REDACTED], and [REDACTED] that indicate these two employees earned \$39,220 in tax year 2007. Counsel states that these two workers earned more than the proffered wage of \$36,650, and thus, the petitioner has clearly demonstrated that it had the ability to pay the proffered wage in 2007 based on the replacement of these part-time managers. The petitioner also submitted a copy of its Form 941, Employer's Quarterly Federal Tax Return, for the first quarter of 2007 that indicated the beneficiary was paid wages of \$12,180.

While the record contains competent evidence of wages paid to the petitioner's workers in 2004, 2005, 2006, and 2007, the record is less clear with regard to the actual duties performed by these workers and whether they all were part-time managers. Further the replacement of three part-time employees by the beneficiary as a fulltime employee is not sufficiently documented in the record.

The I-140 petition indicates that the petitioner at the time of filing its petition in 2007 had four employees. By attempting to utilize the wages paid to three of the petitioner's employees to pay the beneficiary's proffered wage, the record suggests that the petitioner will function with one manager and one other employee with undefined duties. This contradicts the petitioner's own assertion on the I-140 petition that it has four employees.

In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. However, in the instant matter, the petitioner has not sufficiently documented that the actual duties of the workers whose wages could be utilized to establish the petitioner's ability to pay the proffered wage, and that the beneficiary will actually replace all three workers. Further, the use of wages of other workers to establish a petitioner's ability to pay the proffered wage usually refers to full-time employees, rather than part-time employees.

Counsel also asserts that the balances of the petitioner's bank accounts can be utilized to establish the petitioner's ability to pay the proffered wage. The petitioner in its response to the director's RFE submitted copies of its bank statements from several banks for 2005 to 2007. Counsel's reliance on the balances 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. While this 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. 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 Schedule L.

The AAO also notes that during tax years 2004 to 2006, the petitioner's tax returns reflect varying addresses, although the same document reflects that the Employer Identification Number (EIN) remained the same. As previously discussed, the HavenTrust Bank accounts identify the petitioner as [REDACTED] while another account with United Commercial Bank identifies the petitioner as [REDACTED]

The record is not clear why bank accounts for distinct businesses with fictitious names are submitted to the record to establish the petitioner's ability to pay the proffered wage. The petitioner needs to establish more clearly the identity of these businesses and whether they are businesses distinct from the petitioner. The AAO would view this as an additional reason why the submitted bank account statements cannot be utilized in these proceedings.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 *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.

In the instant case, counsel states on appeal that the petitioner's employees in 2005 were only paid from March to December 2005 because the petitioner sold its only convenience store in Conyers, Georgia in 2004 and did not enter into a new lease agreement for a new business located at [REDACTED] until March 1, 2005. The AAO notes that the petitioner is identified on the ETA Form 750 as located in Conyers, Georgia, while the petitioner's tax returns reflect both Decatur, Georgia, and Duluth, Georgia addresses. Although all tax returns submitted to the record reflect the same EIN number, [REDACTED] and the same incorporation date of June 27, 2001, the record also suggests that the ETA Form 750 business was sold, and the petitioner began a new business in March 2005, two weeks before filing the instant I-140 petition. The successive changes in business locations do not support the petitioner's longevity. The scale of the petitioner's business operations, based on number of employees, is small. The record reflects no discretionary expenses being paid such as officer compensation. Overall the record does not establish the petitioner's long-term viability.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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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.