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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B6

FILE: [REDACTED]
SRC 08 049 52291

Office: TEXAS SERVICE CENTER

Date: APR 05 2011

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

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 \$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 petitioner¹ is a commercial shopping center.² It seeks to employ the beneficiary permanently in the United States as an audit clerk. The petition is accompanied by a copy of Form ETA 750, Application for Alien Employment Certification,³ approved by the United States Department of Labor (the 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 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. Furthermore, another issue is whether the petitioner may classify the beneficiary as "Other," unskilled worker

¹ The petitioner is identified in the petition by the federal Employer Identification Number (EIN), [REDACTED]. According to 20 C.F.R. § 656.17 (5)(i), "the term 'Employer' means an entity with the same Federal Employer Identification Number (FEIN or EIN)." The EIN is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. See <http://www.irs.gov/businesses/small/article/0,,id=169067,00.html> accessed February 17, 2011. In this matter, the tax returns in the record indicate that the petitioner's EIN is [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

² According to the tax records in the record, the petitioner's business activity is real estate. It appears to lease commercial space in a commercial shopping center to third parties.

³ The petitioner stated in his letter dated December 11, 2007, that the original labor certificate (a copy of which was submitted in this case) was possibly in the possession of a former retained counsel. As required by statute, the petition is not accompanied by a Form ETA 750 approved by the Department of Labor. The petitioner has the burden to submit the original labor certification by requesting U.S. Citizenship and Immigration Services (USCIS) secure from the DOL a duplicate original. Should the original be in another case file, counsel may identify and request that USCIS secure that case file and consolidate it with the current matter. Accordingly, the petition may not be approved for this additional reason. 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).

when the Form ETA 750 requires more than two years of experience in the job offered. Once again, 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 at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145 9 (noting that the AAO conducts appellate review on a *de novo* basis).

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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor 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).

Here, the Form ETA 750 was accepted on November 29, 2004. The proffered wage as stated on the Form ETA 750 is \$419.60 weekly (\$21,819.20 per year).

Accompanying the petition and copy of the labor certification, counsel submitted approximately 97 pages of the petitioner's and another corporation's nonconsecutive bank checking statements for the period December 1, 2005, to October 31, 2007; the petitioner's compiled financial statements dated December 31, 2005, and December 31, 2006;⁴ the petitioner's federal income

⁴ 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. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported

tax (Form 1120S) return for 2006 and a partial copy for 2005; a partial copy of another corporation's federal income tax return for 2006;⁵ and documentation concerning the appraised valuation, use, realty taxation, and business occupancy of property located in Broward County, Florida.

On appeal, counsel submitted a legal brief dated October 15, 2008, and the following evidence: the petitioner's federal income tax (Forms 1120S) returns for 2004, 2005, 2006 and 2007; "page four" of the petitioner's checking statement for the period "12-Dec." to "31-Dec.;" documentation concerning the appraised valuation of property located in Broward County, Florida, dated September 21, 2006; and approximately 93 pages of the petitioner's bank checking statements for the period December 1, 2005, to January 31, 2008.

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 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the copy of the Form ETA 750B, signed by the beneficiary on November 23, 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 a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁵ This other corporation is Argentex, Inc., EIN [REDACTED]. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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). 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."

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 priority date in 2004 or subsequently as it did not employ the beneficiary. The beneficiary is a resident and citizen of Argentina.

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*, 696 F. Supp. 2d 873 (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*, 696 F. Supp. 2d at 881 (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 petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S, Schedule K stated net rental real estate income⁶ of \$81,115.00.
- In 2005, the Form 1120S, Schedule K stated net rental real estate income of \$11,342.00.
- In 2006, the Form 1120S, Schedule K stated net rental real estate income of \$157,357.00.
- In 2007, the Form 1120S, Schedule K stated net rental real estate income of \$136,919.00.

Therefore, for the year 2005, the petitioner did not have sufficient net rental real estate 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.⁷ 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 as shown in the table below.

⁶ 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 net rental real estate income, (here a shopping center located in Ft. Lauderdale, Florida), the instructions to Form 1120S state in pertinent part "Enter each shareholder's pro rata share of ordinary business income (loss) in box 1 of Schedule K-1 ... Enter the net income (loss) from rental real estate activities of the corporation from Form 8825 ... Attach ... Form 1120S [Forms 8825 were submitted in the record of proceeding] ... Enter each shareholder's pro rata share of net rental real estate income (loss) in box 2 of Schedule K-1 ... [there is only one shareholder here]." See Instructions for Form 1120S, 2010, at <http://www.irs.gov/instructions/i1120s/ch02.html> (accessed February 28, 2011.) Because the petitioner had additional ordinary business income loss, deductions and/or other adjustments, its net rental real estate income (loss) is found on Schedule K of its tax returns on line 17e (2004-2005), and line 18 (2006-2007) of Schedule K.

⁷ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2004, the Form 1120S stated net current assets of <\$20,191.00>.
- In 2005, the Form 1120S stated net current assets of <\$10,872.00>.
- In 2006, the Form 1120S stated net current assets of <\$4,077.00>.
- In 2007, the Form 1120S stated net current assets of \$87,560.00.

Therefore, for the years 2004, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 its net income or net current assets for the year 2005.

On appeal, counsel asserts that the amounts stated in the petitioner's bank checking account from 2005 through 2008 are evidence of the petitioner's ability to pay the proffered wage. Counsel's reliance on the monthly closing balances in the petitioner's bank account 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 returns.

Counsel provides that the petitioner's principal asset is a shopping plaza which has a valuation between \$6.9 million and \$7.2 million, which should be considered. Counsel additionally provided a property appraisal to further confirm the property valuation. The petitioner has made no statement in the record to sell, encumber or otherwise pledge the business property to pay the proffered wage. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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.

In the instant case, the petitioner claims that it was established in 1978 and employs seven workers. Otherwise, there is no evidence of the gross receipts, officer compensation, the petitioner's reputation, or total wages paid to all employees, for any year. Counsel has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. The petitioner has not provided evidence of a turn-around of the petitioner's business fortunes, or expectations of increased profitability. 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must 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).

The regulation at 8 C.F.R. § 204.5(1)(3) provides in pertinent part:

(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 or the experience of the alien.

* * *

(D) Other workers. 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.

The job qualifications for the certified position of an audit clerk are found on the Form ETA 750 Part A, Item 13, which describes the job duties to be performed as follows:

Compute classify and record numerical data to keep financial records complete. Perform combination of routine calculating, posting and verifying duties to obtain financial data to maintain accounting records.

The Form ETA 750 states that the position requires four years of experience.

According to the Form ETA 750B, the beneficiary stated under penalty of perjury that she has been employed by Gambaro Motos Srl., (a motorcycle dealership), Colon 495, Parna, Entrerios, Argentina as an audit clerk/bookkeeper from August 2000 [sic] to present (i.e. November 23, 2004).

While there, the beneficiary stated her duties as:

Verify accuracy of figures, calculations, and posting pertaining to business transactions recorded by other workers; examine expense account, commissions paid to employees, loans made on insurance policies, interest and account payments, correct errors or lists discrepancies for adjustment. Computes percentage and totals using software (Quickbooks) for bookkeeper.

Included in the record of proceeding is a translated employment reference from Gambaro Motos Srl. dated July 27, 2007, stating that the beneficiary was employed there as an auditor clerk and bookkeeper since 2000. The translation was submitted without a translator's certificate according to regulation, nor does it comply with the regulation at 8 C.F.R. § 204.5(1)(3). There is no description of the job, training or experience of the beneficiary or an indication when that employment terminated. Further, there is no evidence submitted or alleged that the beneficiary's prior employment experience is the functional equivalent of the duties of the offered position. There is no breakdown concerning the beneficiary's work experience between the two occupations, audit clerk and bookkeeper. No other employment experience is stated by the beneficiary. The beneficiary does not meet the terms of the labor certification. The petition will be denied on this basis as well.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the appeal will be dismissed because the beneficiary is not properly classified as an unskilled worker.

On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for an unskilled worker. The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the proffered position requires 4 years of experience. However, the petitioner requested the unskilled worker classification on the Form I-140. The position in question may not be classified as an unskilled position because it requires 2 or more years of experience. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). Therefore, as the beneficiary may not be found to be an unskilled worker, the petition must be denied for this additional reason.

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.