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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



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Date: Office: TEXAS SERVICE CENTER

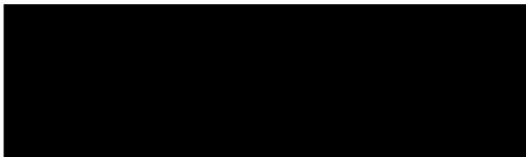
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**APR 15 2011**

IN RE: Petitioner:   
Beneficiary: 

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 petitioner is a landscaping and nursery business. It seeks to employ the beneficiary permanently in the United States as a gardener florist. 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 (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, an 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. 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 (9<sup>th</sup> 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).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 December 20, 2004. The proffered wage as stated on the Form ETA 750 is \$12.48 per hour (\$25,958.40 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.<sup>1</sup>

Accompanying the petition and labor certification, counsel submitted, *inter alia*, the petitioner's federal income tax (Forms 1120S) returns for 2004, 2005 and 2006.

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 1999 and to currently employ 30 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 13, 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, 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 priority date in 2004 or 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v.*

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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 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).

*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 stated net income<sup>2</sup> of \$7,816.00.
- In 2005, the Form 1120S stated net income of <\$3,364.00>.<sup>3</sup>
- In 2006, the Form 1120S stated net income of <\$254,721.00>.

Therefore, for the years 2004, 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.<sup>4</sup> 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.

- In 2004, the Form 1120S stated net current assets of \$22,678.00.
- In 2005, the Form 1120S stated net current assets of \$22,781.00.
- In 2006, the Form 1120S stated net current assets of <\$6,919.00>.

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

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<sup>2</sup> 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 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 5, 2011) (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 and other adjustments shown on its Schedule K for 2004, 2005, and 2006, the petitioner's net income is found on Schedule K of its tax returns.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>4</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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.

On appeal, counsel asserts that she would submit additional evidence that the petitioner suffered losses due to exceptional circumstances in 2006, but later stabilized its financial situation by additional capital contributions. In support, the petitioner's accountant submitted a letter statement dated February 4, 2009.

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 *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, the petitioner was established in 1999 and has 30 employees. In 2004, 2005 and 2006, it stated gross receipts of \$496,326.00, \$664,018.00, and \$653,378.00 respectively. Despite these increasing business receipts, its net income and net current assets were insufficient to pay the proffered wage. According to the petitioner's accountant, the petitioner experience losses in 2006 and 2007 due to new management that did not generate new business and also experienced losses due to additional expenses. According to the accountant, in 2008 the company is expected to return to profitability. No financial detail was provided by counsel such as a business plan or an audited 2008 earning statement to support this opinion. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). No explanation was given for the petitioner's inability to pay the proffered wage in 2004 or 2005. It does not appear as if the petitioner suffered uncharacteristic losses in any of the years in question. To the contrary, it appears from the evidence submitted, that marginal profitability, or

unprofitability, is characteristic of the petitioner's business, at least for 2004, 2005, 2006, and 2007. 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.

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

An additional issue is whether the petitioner 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 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 Form ETA 750 states that the position requires one month of experience in the job offered.

The beneficiary under penalty of perjury stated in Form ETA 750B that she was self-employed from July 1996, "to date" (i.e. December 13, 2004). Although the beneficiary stated she was self-employed, she stated that she worked fulltime in an un-named "green house" in an un-named location as a gardener florist. She described his duties as "Cultivate and care for ornamental plants and installs floral displays in indoor and/or outdoor settings. Condition and prepare soils and plants seeds, seedlings or bulbs in greenhouse or butdoor [sic] growing area, using spades, trowels, sprinklers. Cultivators and other gardening handtools [sic] and equipment."

Prior to the above experience, the beneficiary stated that she was a gardener florist working fulltime for a greenhouse business named [REDACTED] Guerrero, Mexico from March 1993 to December 1995. While there, according to the beneficiary, she worked as a gardener designing, planting, constructing and maintaining gardens and nurseries.

The Form ETA 750, Part A, Line 13, describes the job duties of gardener florist as follows:

Cultivates and cares for ornamental plants and installs floral displays in indoor or outdoor settings through performance of any combination of [the] following duties as directed by supervisory personnel: conditions and prepares [the] soils and plants seeds, seedlings, or blubs in greenhouse or outdoor growing area, using spades, trowels, sprayers, sprinklers, cultivators and other gardening handtools [sic] and equipment. Fertilizes, waters, weeds, transplants, or thins plants in growing areas. Mixes and applies pesticides to maintain [the] health of plants and prepares plants for installation in greenhouses or outdoor display areas. Lays sod or artificial grass and builds framework for indoor floral displays or prepares outdoor display beds according to work plan. Transplants plants from growing areas to display beds or places potted plants in beds according to work plans. Attends display beds to maintain [the] health of plants and beauty of display. Maintains and repairs gardening handtools [sic] and equipment and structures such as greenhouses and

hotbeds using maintenance and carpentry tools. May mow lawns, prune trees and perform other duties to maintain grounds.

The regulation at 8 C.F.R. § 204.5(l)(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.

Counsel submitted a letter dated October 11, 2004, from [REDACTED] in Guerrero, Mexico, submitted by [REDACTED] who states that the beneficiary worked as a "Gardener," but not a florist, with the company, and the beneficiary's duties were described as designing, planting, constructing and maintaining gardens and nurseries from March 1, 1993, to December 31, 1995.

The beneficiary's duties were described as a gardener, not a gardener florist, and her four duties were not described with the specificity as found in the labor certification which describes many tasks and required skills. For instance, there is no mention of carpentry skills. Further, no corroborating letter statement was submitted for the beneficiary's period of self-employment to verify her duties sufficient to compare them with those duties recited in the labor certification. The sole statement submitted in the record concerning the beneficiary's qualifications received from [REDACTED] is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. There is no other evidence submitted concerning the beneficiary's qualifications to meet the requirements of the labor certification.

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.

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.