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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

DATE: Office: TEXAS SERVICE CENTER
APR 15 2011

FILE:
SRC 07 218 53242

IN RE: 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 \$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 non-profit religious synagogue and Jewish school. It seeks to employ the beneficiary permanently in the United States as an early childhood teacher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 14, 2008 denial, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C.S. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 labor certificate 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 labor certificate 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 December 24, 2003. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour, at 35 hours per week (\$25,480.00 per year).¹ The Form ETA 750 states that the position requires two years experience in Jewish early childhood teaching or a bachelor's degree in early childhood education in lieu of experience.

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

The evidence in the record of proceeding shows that the petitioner is structured as a non-profit corporation. On the petition, the petitioner claimed to have been established since 1912 and to currently employ 65 workers. On the Form ETA 750, signed by the beneficiary on July 6, 2007, the beneficiary did not claim to have worked for the petitioner.

We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. The DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, the DOL processed substitution requests pursuant to a May 4, 1995 the DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). The DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). The DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

¹ The director determined that the beneficiary's wages were based upon a 40 hour work week. However, as is noted in the Form ETA 750, the petitioner indicated that the beneficiary would work a total of 35 hours per week. Therefore, the director's decision with respect to this issue will be withdrawn.

² 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 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 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 proffered wage is \$25,480.00. The petitioner submitted on appeal a copy of Internal Revenue Service (IRS) Forms W-2 issued by the petitioner to the beneficiary in 2006 and 2007. The W-2 amounts are reflected in the table below. The petitioner did not provide any evidence to demonstrate that it paid the beneficiary wages in 2003, 2004, or 2005.

- In 2006, the IRS Form W-2 stated total wages of \$780.00, a difference of \$24,700.00.
- In 2007, the IRS Form W-2 stated total wages of \$756.00, a difference of \$24,724.00.

The petitioner is obligated to show that it can pay the difference between the proffered wage and wages already paid in each year. Therefore, the petitioner has failed to show that it can pay the proffered wage through wages paid in 2003, 2004, 2005, 2006, and 2007.

If, as in this matter, 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly insufficient is showing that the petitioner paid wages in excess of the proffered wage.

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. 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 record before the director closed on March 3, 2008, with the receipt by the director of the petitioner's submission of evidence in response to the director's request for evidence. The proffered rate is \$25,480.00.

The petitioner submitted unaudited financial statements as evidence of its ability to pay the proffered wage in 2003 through 2007.³ 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 accountant's report that

³ It appears more likely than not that, as a place of worship, the petitioner is not obligated to file an IRS Form 990 or other tax return.

accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Although counsel asserts that according to the USCIS adjudicator's manual reviewed financial statements are considered the equivalent to audited financial statements, as noted above, the regulations at 8 C.F.R. § 204.5(g)(2) require the financial statements to be audited. As is noted by the director, the petitioner's own financial statements indicate that reviewed financial statements are not equivalent to audited financial statements, but are "substantially less in scope." Therefore, the unaudited financial statements will not be considered in determining the petitioner's ability to pay the proffered wage.⁴

The petitioner has not established that it has sufficient net income to pay the proffered wage.

On appeal, counsel submits copies of the petitioner's commercial bank statements issued by City National Bank from 2004 through 2007. Counsel asserts on appeal that the bank statements show a consistent flow of funds each month, after deducting expenses, sufficient to pay the proffered wage. Counsel's reliance on the 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) would be inapplicable or would otherwise paint 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 would not have been reflected on its audited financial statements if it had submitted such.

Counsel asserts on appeal that the petitioner maintains several "rainy day" funds that are separate from its commercial bank account. Counsel submits as evidence an account summary from the City

⁴ Even if the AAO were to consider the unaudited financial statements, the statements do not establish that the petitioner had the ability to pay the proffered wage in the relevant years. The statements do not sufficiently describe the petitioner's net current assets in that it cannot be ascertained how much money, if any, could have been made available to pay the beneficiary's wages. For example, the unaudited statements do not explain which liabilities are "current" liabilities (those expected to be paid within 1 year). The statements also indicate that much of the petitioner's liquid assets are "restricted" in some way. In fact, in both the June 30, 2007 and June 30, 2006 "statement of activities," the petitioner shows expenses exceeding "total support and revenue." Accordingly, to the extent these unaudited financial statements are not vague, they tend to show an inability to pay the proffered wage.

National Bank dated May 12, 2008, that lists a separate merchant account, commercial checking account, commercial savings account, and certificate of deposit. Although the balances are constant in each account, there is no evidence in the record of proceeding to demonstrate when the accounts were opened or their balances during the requisite period (2003 through 2007). It also has not been established that these are not "restricted" in some way.

The petitioner submitted a copy of its IRS Forms 941, Employer's Quarterly Federal Tax Return, for 2003 through 2008, which lists wages, tips, and other compensation and the total income tax amounts withheld from wages, tips, and other compensation of the petitioner's employees. The record does not, however, provide evidence that the petitioner has replaced or will replace an employee with the beneficiary. 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. As noted above, reliance on the petitioner's wage expense is misplaced. The petitioner showing that it paid wages in excess of the proffered wage is insufficient.

Counsel asserts that the petitioner owns its land at [REDACTED] free and clear of debt, except for a mortgage with a principal balance of \$685,000, and a line of credit in the amount of \$99,000.00 that is secured by the property which is valued at \$15,000,000.00 to \$16,000,000.00. Counsel submits as evidence a bank statement from the City National Bank which indicates an outstanding mortgage on the petitioner's property in the amount of \$685,197.85 as of May 12, 2008. Counsel also submits an appraisal report for the real property dated August 8, 2005. Contrary to counsel's claim, real estate is not a readily liquefiable asset. Further, it is unlikely that the petitioner would sell such a significant asset to pay the beneficiary's wage. Moreover, any funds which may be generated from the sale of any of the property would only be available at some point in the future. A petitioner must establish its ability to pay from the date of the priority date, which in this case is December 24, 2003.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that

the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax return 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. 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 this matter, assessing the totality of the circumstances, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonogawa*. The petitioner has not established that 2003, 2004, 2005, 2006, and 2007 were uncharacteristically unprofitable or difficult periods for the petitioner's business. Crucially, the petitioner has not established why it is unable to produce any of the evidence required by the regulations, i.e., audited financial statements. Although counsel claims that it is some how unfair to place this burden on the petitioner, and to reject the vague, reviewed financial statements, counsel has not substantiated this argument with authority. As the petitioner claims to have millions of dollars in assets and an ability to pay the beneficiary the proffered wage, counsel's argument that the petitioner should

be excused from complying with the unambiguous evidentiary demands of 8 C.F.R. § 204.5(g)(2) by obtaining audited financial statements is simply not persuasive. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has two years experience as an early childhood teacher (Jewish) or in lieu, a bachelor's degree in early childhood education as of the priority date. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as an early childhood education teacher. The beneficiary indicated on the Form ETA 750B at part 15-a. that she was employed as a teacher by the [REDACTED] a Jewish school, from September 1987 to July 1998. However, in a letter dated December 17, 2007 from Rabbi Samuel Vianberg and a letter dated December 23, 2007 from Lia de Farache, the declarants stated that the beneficiary was employed as an early childhood teacher at the [REDACTED] school from September 1987 through September 1991. In a translated letter from [REDACTED] he stated that the beneficiary worked on the school staff from September 4, 1987 through September 8, 1991. There has been no explanation given for the inconsistencies. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Furthermore, the beneficiary indicated on the Form ETA 750B at part 11 that she attended Miami Dade College, majoring in Early Childhood Education, from February 2007 to June 2007, and that the degree was "(in process toward CDA)." To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's priority date, which as noted above, is December 24, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). For this additional reason, the petition may not be approved. 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 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.