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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: **DEC 27 2011**

Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a metal production company.¹ It seeks to employ the beneficiary permanently in the United States as a safety and shipping manager, [REDACTED] (first-line supervisors of helpers, laborers, and material movers, hand). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director denied the petition, finding that the petitioner had failed to establish the continuing ability to pay the proffered wage beginning on the priority date of the visa petition. Further, the director determined that the petitioner had failed to show that the beneficiary had all of the requisite trainings, work experience, and qualifications before the priority date to perform the duties of the position offered.

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 September 30, 2008 decision, the issues in this case are (a) 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, and (b) whether the beneficiary had all of the requisite job requirements before the priority date.

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

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.

With respect to the ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

¹ According to the petitioner's website [REDACTED] manufactures various welded steel tubing products.

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).

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). The petitioner must also 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).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by the DOL on April 30, 2001. The rate of pay or the proffered wage specified on the Form ETA 750 is \$12.93 per hour or \$26,894.40 per year (based on a 40-hour work per week).

To show that the petitioner has the continuing ability to pay \$12.93 per hour or \$26,894.40 per year from April 30, 2001, the petitioner submitted the following evidence:

- A letter dated August 14, 2008 from [REDACTED] stating that the petitioning company [REDACTED] employs over 100 workers and maintains the ability to pay the beneficiary the prevailing wage of \$13 per hour for the full time position.

On the petition, the petitioner claimed to have been established in 1989, to currently employ 95 people, and to have gross annual income and net annual income of \$82.5 million and \$5 million, respectively.

On appeal, the petitioner further submits the following evidence to demonstrate the ability to pay:

- Copies of the beneficiary's Forms W-2, Wage and Tax Statement, for the years 2001 through 2003 and 2005 through 2007; and
- Copies of the beneficiary's individual tax return (filed on Forms 1040, U.S. Individual Tax Return) for the years 2004 and 2007.

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 this case, the beneficiary received the following wages from the petitioner between 2001 and 2007:

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2001	\$29,246.78	\$26,894.40	Exceeds the PW
2002	\$27,607.76	\$26,894.40	Exceeds the PW
2003	\$23,998.47	\$26,894.40	(\$2,895.93)
2004	Not Available ³	\$26,894.40	Not Available
2005	\$31,327.65	\$26,894.40	Exceeds the PW
2006	\$22,082.07	\$26,894.40	(\$4,812.33)
2007	\$28,125.00	\$26,894.40	Exceeds the PW

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay \$2,895.93 in 2003, the full proffered wage of \$12.93 per hour or \$26,894.40 per year in 2004, and \$4,812.33 in 2006. The petitioner can show the ability to pay those amounts through either its net income or net current assets.

If the petitioner chooses to use its net income to demonstrate the ability to pay, USCIS will 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.

³ The petitioner failed to submit the beneficiary's Form W-2 for the year 2004. The record contains a copy of the beneficiary's individual tax return filed jointly with his wife, showing \$31,221 as wages, salaries, tips, etc.; however, no W-2 is submitted to verify what amount of his wages were received from the petitioner, if any.

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).

Alternatively, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets"

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 record contains no evidence showing the petitioner's net income or net current assets. The petitioner failed to submit its federal tax returns for any of the years during the qualifying period. To demonstrate the ability to pay, the petitioner only submitted a letter dated August 14, 2008 stating that the company employed over 100 workers.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

Given the record as a whole and the fact that the petitioner has not submitted any tax return, annual report, or audited financial statement, USCIS need not exercise its discretion to accept the letter dated August 14, 2008 from [REDACTED]. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of the beneficiary it is seeking to employ.

Finally, although not raised by either the petitioner or counsel on appeal, 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

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.

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.

We acknowledge that the petitioner has been in a competitive field since 1989;⁵ however, the record is devoid of evidence regarding the petitioner's reputation. Unlike *Sonegawa*, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, none of the evidence submitted reflects the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage especially in 2003, 2004, and 2006. Thus, the petitioner has not established that it has the ability to pay the beneficiary from the priority date.

Further, the AAO agrees with the director that the beneficiary is not qualified to perform the duties of the position. Based on the evidence in the record, the beneficiary does not appear to have the supervisory or managerial experience as of the priority date.

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, 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 – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Here, as previously noted, the Form ETA 750 was filed and accepted for processing by the DOL on April 30, 2001. The original name of the job title or the position for which the petitioner initially sought to hire was "Safety and Shipping Manager." Under box 13, job description, the petitioner wrote:

⁵ A search of the website of the California's Department of State, Corporations Divisions, [REDACTED] shows that [REDACTED] was incorporated on October 26, 1970. The Form I-140 petition, however, shows that the petitioner was established in 1989.

Supervised [sic] and manage safty [sic] and shipping department, manage company shipping production and quality control supervised employees' safety and working conditions.

Further, the petitioner set the following requirements under box 14 (the minimum education, training, and experience for a worker to perform satisfactory the job duties described in box 13 above):

Education: 4 years of high school
Training: 6 years of training in CO Depts Special Areas
Experience: 10 years of experience in the job offered or in Main Steel

Under box 15, Other Special Requirements, the petitioner wrote:

1. Health and Safety
2. Crani [sic] Operator
3. Forklift Operator
4. Management and Supervision
5. Main Steel Specialist

On appeal, counsel claims that the DOL required that the petitioner change the job description, education, training, experience, and the special requirements of the position. Counsel asserts that the petitioner tested the labor market with lowered minimum requirements than those stated on the Form ETA 750. As evidence of the assertions, counsel submits all of the recruitment documents received from and sent to the DOL before the Form ETA 750 was approved.⁶

In reviewing these documents, the AAO notes that the petitioner conducted a supervised or traditional recruitment process. During recruitment, the DOL advised the petitioner to make several changes in the minimum education, training, and experience (box 14) and other special requirements (box 15). Prior to the approval of the Form ETA 750 by the DOL, the petitioner advertised the position offered as follows:

First Line Supervisors/Managers of Helpers, Laborers 3:30-4:00pm @ \$12.93 p/hr. Plan work schedules & assign duties. Transmit & explain work orders. Evaluate employee performance. Prepare & maintain work records & reports. 2yrs.exp.

The DOL determined that the job description above was consistent with the [redacted] and approved the Form ETA 750.

⁶ The recruiting documents include copies of the in-house posting, copies of the advertisements in the local newspapers, various correspondence received from the DOL, and various letters or facsimiles sent to the DOL.

Upon review of the evidence submitted on appeal, the AAO finds that the petitioner seeks to hire a first-line supervisor with a minimum of two years of experience in the job offered without any special training requirements. The AAO further determines that some of the responsibilities of the first-line supervisor are as follows: plan work schedules and assign duties, transmit and explain work orders to employees, and evaluate employees' performance.

Under item 15 of the Form ETA 750, part B, signed by the beneficiary on April 27, 2001 the beneficiary listed no recent and relevant work experience. The record contains letters of employment from [REDACTED] and from the petitioner. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board of Immigration Appeals (BIA) notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

In a letter dated November 2, 2008 from [REDACTED] stated that the beneficiary worked for [REDACTED] from February 1982 to December 15, 1989 and that his duties were to collaborate with workers and managers to solve work-related problems.⁷

In a letter dated August 14, 2008 from [REDACTED] Assistant General Manager, stated that the beneficiary worked for [REDACTED] through a temp agency from late 1990 to 1992 as a machine operator.

Finally, in a letter dated August 14, 2008 and in a signed statement dated November 25, 2008 from [REDACTED] stated that the beneficiary had been employed by the petitioner for over 13 years, since April 1995, in the shipping department as a crane and forklift operator.⁸

None of the experience noted by [REDACTED] or [REDACTED] involves a supervisor or managerial position. It does not appear from the job description that [REDACTED]

⁷ Regarding the beneficiary's duties, [REDACTED] also stated:

Reviewed work throughout the work process and at completion in order to ensure that the work was performed properly. Transmitted and explained work orders to laborers. Checked specifications of material loaded or unloaded against information in work orders. Examined freight to determine loading sequences. Prepared and maintained work records, and reports that included information such as employee time and wages, daily receipts, and inspection results.

⁸ Along with his letter dated August 14, 2008 [REDACTED] included copies of various certifications that the beneficiary obtained, such as a certificate of completion for crane operator training, lift truck operators training, crane and hoist safety training, and hazard communications/general awareness.

██████████ and ██████████ each provided in the letters of employment that the beneficiary supervised anyone. Thus, the petitioner has not established that the beneficiary had two years of experience as a first-line supervisor or manager as of the date of filing.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. As noted earlier, 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.