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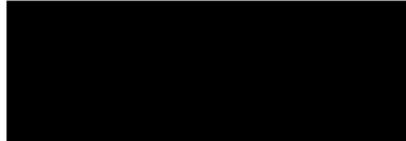
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

Bz



FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 07 2011

IN RE:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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,

Elizabeth H. 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 care home for the elderly and for those with mental retardation. It seeks to employ the beneficiary permanently in the United States as a caregiver and cook. 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 February 27, 2009 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)(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 or seasonal 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 labor certificate application 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800.00 per year). The Form ETA 750 states that the position requires 1 year experience in the job offered.

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.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on February 5, 1986 and to currently employ 2 workers. According to the tax returns in the record, the petitioner's fiscal year is from February 1 through January 31. On the Form ETA 750, 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 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 \$20,800.00. The record of proceeding contains copies of Internal Revenue Service (IRS) Forms W-2 that were issued by the petitioner to the beneficiary as shown in the table below.

¹ 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).

- In 2001, the Form W-2 stated total wages of \$4,372.75 (a deficiency of \$16,427.25).
- In 2002, the Form W-2 stated total wages of \$4,060.00 (a deficiency of \$16,740.00).
- In 2003, the Form W-2 stated total wages of \$24,000.00 (a deficiency of \$18,400.00).
- In 2004, the Form W-2 stated total wages of \$4,435.11 (a deficiency of \$16,364.89).
- In 2005, the total wages could not be determined.²
- In 2006, the total wages could not be determined.³
- In 2007, the Form W-2 stated total wages of \$1,100.00 (a deficiency of \$19,700.00).⁴
- In 2008, payroll records reflect a year-to-date payment of \$3,650.00 to the beneficiary as of December 15, 2008 (a deficiency of \$17,150.00).

The petitioner is obligated to show that it can pay the difference between the proffered wage and wages already paid in each year. In subtracting the total wage amounts from the proffered wage, it cannot be established that the petitioner has established its ability to pay the proffered wage in total in 2005 and 2006; or in conjunction with amounts paid in wages for 2001, 2002, 2003, 2004, and 2007.

² The petitioner submitted a copy of the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return and Form W-2, Wage and Tax Statement for 2005. The Form W-2 was provided by a business entity other than the petitioner, [REDACTED] and the beneficiary's tax return reflects the amount reported on this Form W-2. Therefore, the beneficiary's Form 1040 will not be considered as evidence of the petitioner's ability to pay the proffered wage in 2005.

³ The petitioner submitted a copy of the beneficiary's IRS Form 1040 for 2006. On the Form 1040 the beneficiary reported business income from Schedule C of the tax return. However, the petitioner did not provide a copy of a 1099-MISC tax form for 2006, and there is no other proof that the business income was derived from working for the petitioner. Furthermore, the beneficiary listed her home address on her 2006 IRS Form 1040, individual tax return, on page one as [REDACTED] and that same address was used on the 2005 Form W-2 as the business address of the beneficiary's employer, [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. 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). Therefore, the AAO will not consider the documentation as evidence of the petitioner's ability to pay the proffered wage in 2006.

⁴ The director determined that the beneficiary's wages received from the petitioner for 2007 was \$1,150.00; however, that amount is attributed to the income of another employee, and the wage figure for 2007 noted above is the wage actually received by the beneficiary from the petitioner for 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 23, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. The petitioner’s income tax return for 2007 is the most recent return available to the director. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2001 (February 1, 2001 through January 31, 2002), the Form 1120 stated net income of \$41,478.00.
- In 2002 (February 1, 2002 through January 31, 2003), the Form 1120 stated net income of \$32,486.00.
- In 2003 (February 1, 2003 through January 31, 2004), the Form 1120 stated net income of \$27,330.00.
- In 2004 (February 1, 2004 through January 31, 2005), the Form 1120 stated net income of \$2,819.00.
- In 2005 (February 1, 2005 through January 31, 2006), the Form 1120 stated net income of (\$65,908.00).
- In 2006 (February 1, 2006 through January 31, 2007), the form 1120 stated net income of \$50,936.00.
- In 2007 (February 1, 2007 through January 31, 2008), the form 1120 stated net income of \$38,944.00.

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

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. We reject, however, petitioner’s idea that the petitioner’s total assets, including real estate, should have been considered in the determination of the ability to pay the proffered wage. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1120 net current assets cannot be determined.⁶
- In 2005, the Form 1120 stated net current assets of \$48,246.00.

The evidence in the record demonstrates that for the year 2004, 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 wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that director denied the petition in error and that petitioner has provided sufficient evidence to demonstrate its ability to pay the proffered wage. The petitioner submits as evidence copies of its business' tax returns on appeal.

Counsel's assertions on appeal do not outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage every year 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

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶The copy of Schedule L of the petitioner's corporate tax return submitted along with its 2004 tax return is identical to that which the petitioner submitted for 2005. In addition, the bottom of the tax form indicates that it is to be used for the 2005 tax return. Therefore, the AAO is unable to determine the net current asset amount for the petitioner for 2004.

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 this matter, the totality of the circumstances does not establish that the petitioner had the ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant case to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. The petitioner has failed to demonstrate the occurrence of any uncharacteristic business expenditures or losses in 2004 to justify its inability 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.

Beyond the decision of the director, USCIS records show that the petitioner has filed multiple immigrant petitions subsequent to the priority date of the instant petition; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

Beyond the decision of the director, the petitioner will also be denied because it has not been established that the beneficiary is qualified for the proffered position with one year of experience

in the job offered. The record contains inconsistencies surrounding the beneficiary's work experience. The Form ETA 750 and the employment letter written by [REDACTED] are inconsistent. On the Form ETA 750 that was signed by the beneficiary, the beneficiary did not indicate that he had ever been employed by [REDACTED]. However, [REDACTED] stated in an affidavit dated April 20, 2001 that she employed the beneficiary from February 1984 through December 1989 as a cook and housekeeper. 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. *Matter of Ho, supra*. Accordingly, the petition will be denied for this additional reason. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 30, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). For this additional reason, the petition will be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.