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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

FEB 09 2011

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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:

SELF-REPRESENTED

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is an agriculture business. It seeks to employ the beneficiary² permanently in the United States as a farm laborer. 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, and the petitioner had not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. No evidence was submitted with the petition and labor certification. 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, issues in this case are 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, and whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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).

¹ The petitioner's FEIN is [REDACTED]

² The beneficiary is also known as [REDACTED]

Here, the Form ETA 750 was accepted on July 7, 2003. The proffered wage as stated on the Form ETA 750 is \$11.00 per hour or \$25,740.00 per year calculated on the 45 hour work week claimed on the form ETA 750.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).³

The petitioner did not submit evidence of the petitioner's ability to pay the proffered wage or the beneficiary's qualifications to perform the duties of the proffered position with the petition.

The petitioner stated that documentary evidence presented on appeal demonstrates the petitioner's ability to pay the proffered wage, including the beneficiary's "current pay voucher." There is no pay voucher in the record.

On appeal, the petitioner submitted two Wage and Tax Statements (W-2) from the petitioner to the beneficiary for 2003-\$20,095.35 and 2004-\$20,007.33; four 1099-MISC Statements from the petitioner to the beneficiary for 2005 stating non-employee compensation-\$18,405.02; 2006 stating non-employee compensation-\$18,962.00; 2007 stating non-employment compensation-\$18,180.25;⁴ and 2008 stating non-employee compensation-\$42,717.75; and the petitioner's federal income tax (Forms 1120) returns for 2003 through 2008.

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 in 1982, to have a gross annual income of \$173,309.00, and to currently employ one worker. 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 June 1, 2003, the beneficiary did not claim to have worked for the petitioner.⁵

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

³ 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).

⁴ The 1099-MISC statement also stated compensation to the beneficiary as "Rents-\$15,380.00." However, it is unclear whether this can be considered wages paid to the beneficiary, or even what this payment represents. Accordingly, the AAO will consider only compensation in Box 7 of the 2007 1099-MISC Statement. The employer must establish the value of its fringe benefits and show that they are not common to the comparable jobs upon which the prevailing wage is based.

⁵ According to the petition, the beneficiary entered the United States on November 7, 2006, and resides at [REDACTED]

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.

The petitioner submitted W-2 and 1099-MISC Statements evidencing wages/compensation paid to the beneficiary by the petitioner for the following years:

Petitioner's Tax Return for Year:	Proffered Wage	Wage and/or Rent Paid	Difference between the Proffered Wage and the Wage/Rent Paid in Each Year:
2003	\$25,750.00	\$20,095.35	\$5,654.65
2004	\$25,750.00	\$20,007.33	\$5,742.67
2005	\$25,750.00	\$18,405.02	\$7,344.98
2006	\$25,750.00	\$18,962.00	\$6,788.00
2007	\$25,750.00	\$18,180.25	\$7,569.75
2008	\$25,750.00	\$42,717.75	\$-0-

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 through 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitan*, 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 petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2003, the Form 1120 stated net income of \$29,215.00.
- In 2004, the Form 1120 stated net income of <\$62,162.00>.
- In 2005, the Form 1120 stated net income of <\$23,688.00>.
- In 2006, the Form 1120 stated net income of <\$43,293.00>.
- In 2007, the Form 1120 stated net income of \$98,361.00.

- In 2008, the Form 1120 stated net income of <\$107,928.00>.

Therefore, for the years 2004, 2005, and 2006, from an examination of wages/compensation paid to the beneficiary and net income, the petitioner could not 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. 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.⁶ 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 as shown in the table below.

- In 2003, the Form 1120 stated net current assets of \$39,995.00.
- In 2004, the Form 1120 stated net current assets of <\$51,935.00>.
- In 2005, the Form 1120 stated net current assets of <\$89,658.00>.
- In 2006, the Form 1120 stated net current assets of \$94,424.00.
- In 2007, the Form 1120 stated net current assets of \$136,308.00.
- In 2008, the Form 1120 stated net current assets of \$71,971.00.

Therefore, for the years 2004 and 2005, from an examination of wages/compensation paid to the beneficiary net income and net current assets, the petitioner could not pay the proffered wage.

On appeal, the petitioner asserts that "a request for evidence was never received on this case which could have put the employer on [sic] notice to submit such evidence." The petition was filed on February 7, 2008. The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the

⁶According 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.

evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. In the present case, the evidence indicated 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, and the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. Accordingly the denial was appropriate, even though the petitioner might have had evidence or argument to rebut the finding. Regardless, as the petitioner had an opportunity to present evidence to the AAO, which it has been fully considered, any error has been cured.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in 2004 and 2005.

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 1982, employs one worker and its gross receipts were in 2003-\$329,090.00; 2004-\$190,147.00; not stated for 2005 and 2006; 2007-\$384,021; and in 2008-\$246,371.00. Based upon what is known, the petitioner has employed the beneficiary, but did not pay the proffered wage to the beneficiary from 2003 to 2007. The petitioner has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures or losses in 2005 and 2006, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. In four out of six years for which tax returns

were submitted, the petitioner suffered net income losses. The petitioner has not provided evidence of a turn-around of the petitioner's business fortunes, or expectations of increased profitability. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

An additional issue is whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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). The Form ETA 750 states that the position requires three years experience or six months experience in an un-named related occupation. No evidence was submitted in the record concerning the beneficiary's qualifications to perform the offered job.

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

General farm laborer including but limited to: planting, cultivation, maintantce [sic], irrigation, welding, engine, trader mechanics, livestock, pivot repair, building repair, crop spraying, fertilizing, most work in all.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

(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.

On April 13, 2009, the director denied the preference visa petition and, *inter alia*, found that the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position, meaning that the petitioner failed to submit information regarding the beneficiary's work experience before the priority date.

Although the petitioner appealed the director's decision, the petitioner again failed to submit evidence concerning the beneficiary's qualifications to perform the offered job of farm laborer.

There is insufficient in the record to demonstrate that the beneficiary has the job experience to satisfy the offered job requirements under the regulation at 8 C.F.R. § 204.5(l)(3). Other than the beneficiary's statement in the Form ETA 750, Part B, of his work experience at [REDACTED] a ranch located in [REDACTED] in which he stated he worked as a farmer from February 1999, to present (i.e. June 1, 2003), there is no substantiation of the beneficiary's job experience according to the regulation at 8 C.F.R. § 204.5(l)(3).

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.