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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



FILE:



Office: NEBRASKA SERVICE CENTER

Date:

FEB 17 2011

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

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 The director's decision will be withdrawn in part and affirmed in part.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as an HOD carrier, which was given the occupational title of laborers and freight, stock, and material movers by the United States Department of Labor (DOL). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by DOL. The director determined that the petitioner had provided no evidence to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or of the beneficiary's qualifications. 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 13, 2009 denial, the issues in this case are 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 whether or not the beneficiary possesses the requisite three months of experience in the job offered as required on the certified labor certification application.

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 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 Form ETA 750, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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 May 7, 2003. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$27,300.00 per year) based on a 35 hour work week. The Form ETA 750 states that the position requires three months of 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 an S corporation. On the petition, the petitioner claimed to have been established in 1968 and to currently employ 40 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 30, 2003, 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 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has provided IRS W-2, Wage and Tax Statements, as evidence that it employed and paid the beneficiary \$12,240 in 2005 and \$3,153 in 2006. The petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in May 2003 to the present. Since the proffered wage is \$27,300, the petitioner must establish that it can pay the beneficiary the difference between wages

¹ 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).

actually paid and the proffered wage, which is \$15,060 in 2005 and \$24,147 in 2006, and the full proffered wage from 2001 through 2004 and 2007 and 2008.

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. 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 February 8, 2008, the date on which the I-140 immigrant petition was received by the director. On appeal, petitioner provides corporate tax returns from tax years 2003 through 2008. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate net income as shown in the table below.

- In 2003, the Form 1120S stated net income² of \$9,336.
- In 2004, the Form 1120S stated net income of (303,893).
- In 2005, the Form 1120S stated net income of \$89,215.
- In 2006, the Form 1120S stated net income of (16,235).
- In 2007, the Form 1120S stated net income of \$184,149.
- In 2008, the Form 1120S stated net income of \$246,521.

Therefore, for 2005, the petitioner has demonstrated the ability to pay the difference between wages paid to the beneficiary and the proffered wage of \$15,060.00. In addition, the petitioner has demonstrated the ability to pay the full proffered wage of \$27,300 for 2007 and 2008. The petitioner did not have sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage of \$24,147.00 in 2006 or the full proffered wage in 2003 or 2004.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ A corporation’s year-end current assets are shown

² Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006 - 2008) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 20, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, and other adjustments shown on its Schedule K for 2003 - 2008, the petitioner’s net income is found on Schedule K of its tax returns.

³According 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.

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 and 2006, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of (68,421).
- In 2004, the Form 1120S stated net current assets of (491,045).
- In 2006, the Form 1120S stated net current assets of (101,371).

Therefore, for the years 2003, 2004 and 2006, 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, petitioner asserts that the service center should have issued a request for information to obtain the required initial evidence that was not provided with the I-140 immigrant petition filing. The petitioner also asserts that required financial information was sent to the Nebraska Service Center on October 29, 2008. The petitioner has submitted no proof to verify that this information was submitted. The AAO notes that the I-140 immigrant petition was received by the Nebraska Service Center on February 8, 2008 and that the record of proceedings does not reflect any submission by the petitioner on October 29, 2008 providing required initial evidence of ability to pay. Thus, the petition was initially filed without the required initial evidence. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The director did not abuse discretion by not requesting additional evidence after determining that all required evidence was not submitted with the initial petition. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states in pertinent part:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

In the instant case, the petitioner failed to submit initial evidence of its continuing ability to pay the proffered wage with the petition, and therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility.

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 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 (BIA 1967). 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.

The petitioner's argument concerning the petitioner's size, longevity, and number of employees, however, cannot be overlooked. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1968 and employs approximately 40 employees. Their gross income has been between \$4 - \$10 million and they pay salaries and wages and costs of labor each year of over \$1 - 2 million. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The director's decision regarding the petitioner's continuing ability to pay the proffered wage from the priority date forward is withdrawn.

The director also denied the petition because no evidence was provided with respect to the beneficiary's eligibility for the certified position. 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 May 7, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the

instant case, the certified Form ETA 750 requires three months of experience in the job offered; however there is no regulatory-prescribed evidence in the record of proceeding demonstrating that the beneficiary possesses the requisite experience. The beneficiary lists employment with [REDACTED] from July 2001 until April 30, 2003 (the date on which he signed the ETA-750, Part B) on the labor certification application; however, there is no independent evidence corroborating this employment or the experience gained during the stated time frame. In order to meet the regulatory requirements set forth in 8 C.F.R. §204.5(l)(3)(iii)(A), any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer and a description of the training received or the experience of the alien. The petitioner's statement does not conform to this requirement. 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, *Mandany v. Smith*, 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).

The petitioner must demonstrate that on the priority date of May 7, 2003, the beneficiary had the qualifications stated on its certified Form ETA 750. *Matter of Wing's Tea House*, 16 I&N Dec. 158. The record of proceeding contains a letter from the petitioner stating that the beneficiary meets the terms of the labor certification application as evidenced by the IRS Forms W-2s, Wage and Tax Statements from 2005 and 2006. This letter does not meet the regulatory requirements set forth in 8 C.F.R. §204.5(l)(3)(iii)(A). Moreover, as the petitioner's statement fails to specify the specific timeframe in which this experience was obtained, and considering the priority date of May 7, 2003, the majority of the beneficiary's experience working for the petitioner was obtained after the priority date and could therefore not be considered in assessing whether the beneficiary possesses the requisite experience for the proffered position prior to the priority date.

In order to meet the regulatory requirements set forth in 8 C.F.R. § 204.5(l)(3)(ii)(A), any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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.