

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: FEB 17 2011

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

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:

[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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a plating and coating machine company. It seeks to employ the beneficiary permanently in the United States as a plater pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and that the petitioner failed to demonstrate that the beneficiary possessed the required experience for the proffered position prior to the priority date with the regulatory-prescribed evidence. Accordingly, the director denied the petition.

The record shows that the appeal is properly filed and 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.

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

As set forth in the director's April 16, 2009 denial, the first issue in this case is 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.

Section 203(b)(3)(A)(iii) of 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 not available in the United States.

The regulation 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

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).

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour (\$24,960 per year). On the petition, the petitioner claims that it was established in June 1952², has a gross annual income of \$1,300,000, and currently employs 18 workers. On the Form ETA 750B signed by the beneficiary on February 2, 2006, he 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 response to the director's request for evidence (RFE) issued on February 9, 2009, the petitioner claimed that the beneficiary was on its payroll in April 2008 and submitted the beneficiary's W-2 form for 2008. The beneficiary's W-2 form for 2008 shows that the petitioner paid the beneficiary \$17,232 in 2008. Counsel did not submit any documentary evidence such as paystubs for any period in 2009 on appeal which was filed on May 4, 2009. The petitioner failed to demonstrate that it paid the full proffered wage from the priority date to the present, i.e. 2009, and thus, the petitioner must demonstrate that it could pay the beneficiary the full proffered wage in 2001 through 2007 and 2009, and the difference of \$7,728 in 2008

² The petitioner's corporate income tax returns in the record also indicate that the petitioner was incorporated on June 9, 1981.

between wages actually paid to the beneficiary and the proffered wage with its net income or net current assets.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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).

As alternate method, USCIS also reviews the petitioner's 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 on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax return in the record, the petitioner's fiscal year runs from June 1 to May 31. The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years 2001 through 2007. The petitioner's tax returns demonstrate its net income and net current assets as set forth below.

- In the fiscal year of 2001 (6/1/01-5/31/02), the Form 1120 stated net income⁴ of (\$14,795) and net current assets of \$77,818.
- In the fiscal year of 2002 (6/1/02-5/31/03), the Form 1120 stated net income of (\$26,241) and net current assets of \$68,512.
- In the fiscal year of 2003 (6/1/03-5/31/04), the Form 1120 stated net income of (\$33,808) and net current assets of (\$26,445).
- In the fiscal year of 2004 (6/1/04-5/31/05), the Form 1120 stated net income of \$11,030 and net current assets of \$65,411.
- In the fiscal year of 2005 (6/1/05-5/31/06), the Form 1120 stated net income of \$17,332 and net current assets of \$95,960.
- In the fiscal year of 2006 (6/1/06-5/31/07), the Form 1120 stated net income of \$2,421 and net current assets of \$110,421.
- In the fiscal year of 2007 (6/1/07-5/31/08), the Form 1120 stated net income of (\$44,162) and unknown net current assets.⁵

³ According 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.

⁴ 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.

⁵ The petitioner only submitted the first page of its tax return for the fiscal year 2007 in response to the director's request for evidence. Counsel did not submit the complete copy of the petitioner's 2007 tax return on appeal despite the director's decision clearly indicating that the petitioner failed to provide the information about its net current assets.

For the fiscal years 2001 through 2007, the petitioner did not have sufficient net income to pay the beneficiary the full proffered wage. For the fiscal years 2001 to 2006, the tax returns reflect that the petitioner's net current assets for each year were sufficient to pay the beneficiary the full proffered wage. However, the priority date in this matter falls on April 30, 2001. The petitioner must establish its ability to pay the proffered wage from the priority date to the present. The petitioner's fiscal year runs from June 1 to May 31 every year and the petitioner's tax return for its fiscal year 2001 covers June 1, 2001 to May 31, 2002. The record does not contain any regulatory-prescribed evidence to cover the priority date in this matter. Therefore, the petitioner failed to establish its ability to pay the proffered wage as of the priority date, i.e. April 30, 2001. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide a complete copy of its tax return for the fiscal year 2007. The schedule L of the tax return would have demonstrated the amount of net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). 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). Although the director clearly indicated on his denial that the petitioner failed to provide a complete copy of its 2007 tax return including the information about its net current assets, counsel did not submit the complete copy of the petitioner's tax return for 2007. Therefore, the petitioner failed to establish its ability to pay the beneficiary the proffered wage in 2007 because it failed to submit regulatory-prescribed evidence.

On appeal, counsel asserts that the petitioner was not previously represented by counsel but by a "Notario" who failed to advise the petitioner how to properly reply to the RFE and failed to mail the appropriate documents with the response. Although current counsel claims that the previous unqualified representative was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel. Furthermore, the current counsel has been given an opportunity to provide appropriate documents on appeal to establish the petitioner's ability to pay the proffered wage but she failed to do so.

USCIS may also 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 *Sonegawa* 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 *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 the instant case, the record contains the petitioner's tax returns for seven years from 2001 to 2007. In the seven years, the petitioner did not have sufficient profits to pay a new employee for a single year. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that those seven years were uncharacteristically unprofitable years for the petitioner. 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.

The second issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite experience for the proffered position prior to the priority date with regulatory-prescribed evidence.

The petitioner must 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, *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 key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirement: two years of experience in the related occupation of electroplating. The beneficiary set forth his credentials on Form ETA-750B and signed his name on February 2, 2006 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he was self-employed as a plator from January 1999 to the present. He did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

In response to the director's RFE, the petitioner submitted a letter from [REDACTED] of the petitioner. [REDACTED] states in pertinent part that:

As far as his work experience is concerned all I know is what he told me that he had worked in the field for a couple of years and he proved to me that he knew what to do.

[REDACTED] is not and has never been in the position to provide an experience letter for the beneficiary about work experience he has no actual knowledge about. The letter does not include the name and address of the beneficiary's former employer, and title or position the beneficiary served, and a specific description of the duties performed by the beneficiary. Therefore, Mr. [REDACTED] letter does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(1). The record does

not contain any other letters or documents to demonstrate that the beneficiary possessed the required two years of experience in electroplating prior to the priority date. Counsel did not submit such evidence on appeal and even did not express his disagreement with the director on this ground. Therefore, the petitioner failed to establish the beneficiary's qualifications for the proffered position.

Counsel's assertions on appeal cannot overcome the ground of denial in the director's April 16, 2009 decision. The petitioner failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continues to the present and failed to demonstrate with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience in a related occupation prior to the priority date. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

Beyond the director's decision, the AAO has identified an additional ground of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. 204.5(i) provides in pertinent part:

(4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the Form 750 indicates that the proffered position requires two years of experience in the related occupation. It is also noted that the employer-petitioner prefers a candidate with a college degree in chemistry. Therefore, it is necessarily concluded that the Form 750 in the instant case is filed and certified for a plator position as a skilled worker.⁶ However, the petitioner requested the unskilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to re-adjudicate a petition under a different visa classification without the petitioner's request. The record does not contain a properly approved labor certification to support the benefit sought by the petitioner on the petition. The petitioner failed to file the petition with a statutorily required labor certification and therefore, cannot be approved. In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

⁶ Section 203(b)(3)(A)(i) of the Act 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.

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.