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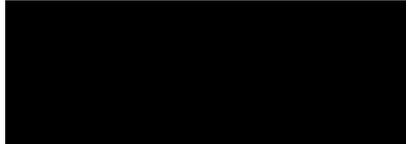
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Office: TEXAS SERVICE CENTER Date:

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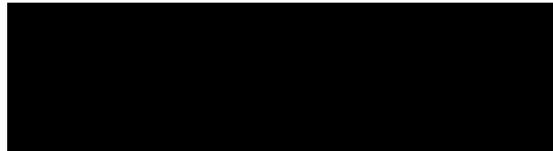
Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as a dental secretary. 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, and that the petitioner had failed to establish the beneficiary's qualifications/training for the job offered. 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 22, 2008 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C.S. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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). 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 \$11.00 per hour (\$22,880.00 per year). The Form ETA 750 states that the position requires 2 years of experience in the job offered, 2 years of secretarial training or 2 years experience as a secretary in any industry.

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 1997 and to currently employ 3 workers. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have been employed by 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, United States Citizenship and Immigration Services (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 not established that it employed and paid the beneficiary any wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

If, as in this case, 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

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).

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). 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, the petitioner showing that it paid wages in excess of the proffered wage is insufficient.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record before the director closed on March 10, 2008, with the receipt by the director of the petitioner's submission in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 should be the most recent return available.

In the instant case, the petitioner failed to provide copies of its tax returns complete with all schedules and therefore, the AAO is unable to determine the petitioner's net income or net current assets for the relevant tax years.

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.

The director, in his request for evidence to the petitioner, requested the petitioner submit a copy of its annual federal tax returns, including copies of all schedules, for the 2001, 2002, 2003, 2004, 2005, and 2006 tax years. In response, the petitioner submitted a copy of page 1 and page 2 of its Internal Revenue Service (IRS) Form 1120S for the 2005 tax year. Although the director concluded that such evidence was sufficient to demonstrate the petitioner's ability to pay the

²According 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.

proffered wage for 2005, the director's decision with respect to this issue will be withdrawn, as the tax document was incomplete.³ The petitioner stated in a letter dated March 7, 2008 that it had requested copies of its tax documents for the relevant years from the IRS, and would provide the documents as soon as they were received. To date, the petitioner has not provided copies of its' business tax documents for 2001, 2002, 2003, 2004, 2005, and 2006.⁴ 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 copies of its corporate tax returns for the relevant tax years. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. 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).

The petitioner submitted copies of its IRS Forms 941 for 2001, 2002, 2003, 2004, 2005, and 2006 in response to the director's request for evidence to establish its ability to pay. As noted by the director, the petitioner submitted altered Forms 941 for all relevant years, with the year handwritten on the Forms 941. The petitioner explains that it could not find its original returns in storage, and copied the Forms 941 from historical data. On appeal, the petitioner submitted IRS transcripts of its Forms 941, Employer's Quarterly Federal Tax for the 2001, 2002, 2003, 2004, 2005, and 2006 tax years. There are discrepancies between the figures that appear on the IRS transcripts submitted on appeal and the recreated Forms 941 submitted in response to the director's request for evidence. On appeal, the petitioner explains that the discrepancies are either minor, or reflect figures in the recreated Forms 941 that are less advantageous to the petitioner's position. Wage transcripts are insufficient to demonstrate the petitioner's ability to pay the proffered wage for the years at issue. As noted above, evidence of ability to pay shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner's ability to pay payroll taxes for other workers is insufficient to demonstrate the business entity's overall financial status and its ability to pay the beneficiary. The petitioner has not submitted evidence that the beneficiary will be replacing another worker. Thus, wages paid to the other workers are not proof of the petitioner's ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Further, the 2005 tax return does not contain all the information necessary to determine the petitioner's financial status for that tax year. The petitioner did not submit tax returns for other relevant years.

³ 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), and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). As the petitioner failed to submit the tax return with its schedules, the AAO cannot determine the petitioner's net income for 2005.

⁴ The petitioner has also failed to provide, in the alternative, audited financial statements or annual corporate financial reports, as requested by the director.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial 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 has not established the existence of any facts paralleling those in *Sonogawa*. The petitioner has not established that 2001, 2002, 2003, 2004, 2005, and 2006 were uncharacteristically unprofitable or difficult years for its business. The petitioner has also not established its reputation within the industry or whether the beneficiary is replacing an employee or outsourced services. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

A second issue in this case is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had 2 years experience as a dental secretary or a secretary in any industry, or 2 years secretarial training. In determining whether the beneficiary is qualified to perform the duties of the proffered position, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

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); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's educational qualifications, she represented that she attended the [REDACTED] from September 1978 to June 1983. The beneficiary also indicated that she attended [REDACTED] for secretarial studies but, she failed to list the dates of her attendance. The director requested that the petitioner provide evidence of the beneficiary's qualifications on the priority date as required on the labor certification application. The director requested that the petitioner include copies of the beneficiary's degree or certificate(s), school transcripts, and an evaluation of the beneficiary's education or letters of employment from former employers.

In response, the petitioner submitted an affidavit from [REDACTED] who stated that she attended classes with the beneficiary at the [REDACTED] from September 1984 through August 1987, and that they attended classes for 30 hours each week. She also stated that she and the beneficiary both graduated from the college at the same time. [REDACTED] further stated that the college has since closed and that the college principal has died. The petitioner also submitted a copy of [REDACTED] diploma from [REDACTED] dated August 24, 1987. The petitioner also submitted a letter from [REDACTED] who states that she has known the beneficiary for over 30 years and that the beneficiary completed a three year course in secretarial studies. The petitioner submitted letter from the beneficiary in which she states that she attended the [REDACTED] from September 1984 to August 1987. Although the declarants all state that the beneficiary attended the [REDACTED] there has been no evidence submitted to demonstrate her attendance i.e. copies of the beneficiary's transcripts and diploma. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established that primary evidence is unavailable and that secondary evidence in the form of letters and affidavits may prove her secretarial education. See 8 CFR §103.2(b)(2).

With respect to the requirement of two years of employment experience as a dental secretary or as a secretary in any industry, the beneficiary indicated on the Form ETA 750 that she was employed by [REDACTED] as a secretary from June 1983 through July 1984. The petitioner did not submit any evidence to corroborate the beneficiary's employment with [REDACTED]. The petitioner submitted a letter from [REDACTED] the beneficiary's father, who stated that he employed the beneficiary to work as a full-time (40 hours per week) secretary, at his electrical contractor company, from 1985 through 1987. After being questioned by the director concerning the beneficiary's ability to attend school 30 hours per week, study for 30 hours a week, and maintain full-time employment for 40 hours per week, the petitioner submitted a second letter from [REDACTED] in which he stated that the beneficiary worked after school and on Saturdays during the school year. The petitioner also submitted a letter from [REDACTED] who stated that the beneficiary worked for her father [REDACTED] in the afternoons and on weekends

while attending secretarial school. The statements are insufficient to demonstrate two years of employment experience. Furthermore, the beneficiary failed to list her employment with [REDACTED] on the ETA 750. 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). There has been no independent documentation submitted to substantiate the claimed employment. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

In 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 or that the beneficiary is qualified to perform the duties of the proffered position.

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.