

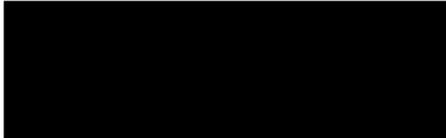
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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FILE:

Office: NEBRASKA SERVICE CENTER

Date:

JAN 26 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 employment based visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed the appeal. The petitioner filed a motion to reopen, which the director determined failed to overcome the grounds for denial. The director's decision will be withdrawn. The petitioner's motion will be granted and the petition will remain denied.

The petitioner is a stone fabrication firm. It seeks to employ the beneficiary permanently in the United States as a stone cutter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director denied the petition on January 22, 2009.

On appeal, the petitioner, asserts that the designation of the wrong visa classification was a simple error and requested reconsideration.

The AAO dismissed the appeal on October 2, 2009.

On October 29, 2009, the petitioner filed a motion to reopen the AAO's decision. The director erroneously took jurisdiction of this motion and issued a decision on January 22, 2010.

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

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In this case, as the petitioner submitted new evidence relating to its continuing ability to pay the proffered wage, the AAO will consider its filing as a motion to reopen. The official having jurisdiction over a motion is the official who made the last decision in the proceeding. In this case, it was the AAO's decision of October 2, 2009, which the petitioner sought to reopen. *See* 8 C.F.R. § 103.5(a)(1)(ii). Because the director responded to the motion rather than the AAO, the AAO will withdraw the director's decision and render its own decision on the petitioner's motion to reopen.

For the reasons explained below, the AAO finds that the petitioner's evidence fails to overcome the reasons for the AAO's dismissal of the appeal. The petition will remain denied for the same reasons that the AAO dismissed the appeal. The petitioner failed to: 1) request a visa classification consistent with the requirements of the approved labor certification requirements;

2) establish its continuing ability to pay the proffered wage and; 3) establish that the beneficiary possessed the training and work experience as required by the approved labor certification.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides in relevant part:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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

(ii) *Other documentation*—

(A) *General.* 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that a beneficiary has the necessary education, training and experience specified on the labor certification as of the priority date. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 27, 2001.¹ The proffered wage is stated as \$13.23 per hour, which amounts to \$27,518.40 per year.

The visa preference petition was filed on December 17, 2007. Part 5 of the petition indicates that the petitioner was established on May 31, 1991, claims a gross annual income of \$300,000, a net annual income of \$100,000 and currently employs five workers.

Form ETA 750B signed by the beneficiary on April 21, 2001, does not indicate that he worked for the petitioner. The only employment listed is given as a self-employed in tile installation from April 1989 to the present (date of signing).

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that the alien must have a minimum of five years of training, with the type of training described as "field work." Additionally, the certified position of stone cutter requires five years of work experience in the job offered as stone cutter or eight years of work experience in a related occupation specified as "construction with stone installation."

The regulation at 8 C.F.R. § 204.5(l) states 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.

As shown in the record, the petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act.

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Citing 8 C.F.R. § 204.5(l), the director determined that in order to classify the alien as an unskilled worker under section 203(b)(3)(A)(iii) of the Act, the certified position as set forth on the Form ETA 750 must require less than two years of training or experience. As Item 14 of the labor certification establishes that the position's minimum requirements are five years of training (field work), as well as five years of experience in the job offered or eight years of experience in a related occupation described as construction with stone installation, the beneficiary could only be classified as a "skilled worker" under section 203(b)(3)(A)(i). The director denied the petition on this basis because the petitioner did not demonstrate that the position required less than two years training or experience.

The petitioner asserted on appeal that the designation of the visa classification as an unskilled worker on paragraph g of the I-140 rather than paragraph e for a skilled worker was a simple error and requests reconsideration. Accompanying the appeal is a letter from [REDACTED] of [REDACTED] Services who assumes responsibility for preparing the I-140 and also requests reconsideration.² This contention has been reiterated on motion. It remains that the regulations at 8 C.F.R. § 103.2(b)(1) and 8 C.F.R. § 103.2(b)(8)(ii) clearly permit the denial of an application or petition where the required initial evidence is not submitted with the application or petition or where eligibility for the requested benefit is not established. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. As before, we do not find that the director committed reversible error by adjudicating the petition under the classification of an unskilled worker as requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification. When or if future filings are made with the instant labor certification under these same requirements for experience and training, the proper remedy would be to request the proper visa classification for a skilled worker, under paragraph g of the Form I-140 submitted with the required fee and necessary documentation.

² It is noted that the regulation at 8 C.F.R. § 103.2 provides that by signing the petition, the petitioner certifies under penalty of perjury that the application or petition is true and correct. Further, as noted in the AAO's decision dismissing the appeal, neither [REDACTED] Services nor [REDACTED] appear to be accredited representatives permitted to represent petitioners in these proceedings. The regulations at 8 C.F.R. §§ 292.1 and 1292.1, state that persons entitled to represent individuals in matters before the Department of Homeland Security ("DHS"), and the Immigration Courts and Board of Immigration Appeals ("Board"), or the DHS alone, include, among others, accredited representatives. Any such representatives must be designated by a qualified organization, as recognized by the Board. A recognized organization must apply to the Board for accreditation of such a representative or representatives. The rules respecting qualification of organizations, requests for recognition, withdrawal of recognition, and accreditation of representatives, may be found at 8 C.F.R. § 292.2 and 1292.2. Neither [REDACTED] Services nor [REDACTED] appears on the accreditation roster. See <http://www.usdoj.gov/eoir/statspub/raroster.htm> (accessed 01/24/11).

Based on a review of the underlying record and the argument submitted on motion, it may not be concluded that the petitioner established that the certified position required less than two years training or experience in order to approve the petition for the visa classification sought as an unskilled worker. The petition remains denied on this basis.

Further, as noted above, no evidence has been submitted that complies with the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(B) or 8 C.F.R. § 204.5(l)(3)(ii), which require employment verification from the pertinent past employers that the beneficiary possessed the requisite five years of training and five years of work experience in the position offered, or eight years in the related occupation, as of the priority date. These requirements must be met along with the proper visa designation on the Form I-140. This documentation is also missing from the record.

With respect to the petitioner's continuing ability to pay the proffered wage of \$27,518.40 as of the priority date of April 27, 2001, it is noted that 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 overall 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 the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 27, 2001 onward.

It is noted that on motion, the petitioner has submitted two payroll slips with the beneficiary's name on each. The dates are for the period(s) ending June 13, 2007 and October 7, 2009, respectively. One of the October 7, 2009, submissions appears to be the original record, raising a question as to whether these wages and withholdings were actually made. Further, the hours worked (70) and the gross wages paid of \$840.00 is equal to an hourly wage of \$12.00 per hour, not the proffered wage of \$13.23 per hour. The hourly wage on the 2007 payroll slip cannot be calculated because the number of hours worked is not shown. The petitioner has also provided a copy of a business tax renewal form for 2008, a copy of its 2007 and 2008 W-3, Transmittal of Wages, a copy of its Employer's Annual Federal Unemployment Tax Return (Form 940) for 2008 and an amended copy for 2007, copies of three quarters of its Employer's Quarterly Federal

Tax Return(s) (Form 941) for 2009, and a copy of an unidentified form from 2007 with the name of an individual, which does not match the beneficiary's name. The petitioner has also submitted a letter from its owner [REDACTED], who states that this documentation clearly shows the company's ability to pay the proffered wage.³ We do not find this assertion persuasive, as not one document, other than the two payroll slips contains the beneficiary's name. Nor does any document indicate the petitioner's annual reported net income or net current assets. Further, it is noted that in support of an application to adjust status and become a U.S. permanent resident (Form I-485) copies of the beneficiary's individual income taxes for 2004, 2005, and 2006 have been submitted without any forms W-2 to demonstrate wages that the petitioner has paid to the beneficiary. Additionally, on each of the Schedule C(s), Profit or Loss from Business, the beneficiary has reported gross receipts of \$13,520 in 2004; \$13,580 in 2005; and \$15,983 in 2006, which are all significantly less than the proffered wage of \$27,518.40. 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)).

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.

³ [REDACTED] also mentions the submission of the beneficiary's self-employment taxes, but such evidence is not identified as the beneficiary's self-employment taxes. This would also raise a question as to why the petitioner is showing Medicare, federal and state withholdings on its payroll slips on behalf of the beneficiary if he is self-employed. 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).

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).

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. USCIS will consider net current assets⁴ 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.

⁴According 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.

In this case, as noted above, the petitioner submitted no documentation as required by regulation such as its 2001 through 2009 federal tax returns or annual reports from which its annual net income or net current assets could be calculated from the 2001 priority date onward. The petitioner has not established its ability to pay the proffered wage.

In some cases, 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).⁵ 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, or the petitioner's reputation within its industry. In this case, there is very little evidence to determine the overall magnitude of the petitioner's business because it has not submitted federal income tax returns or audited financial statements upon which a meaningful review may be based. The AAO does not find that this petition would be approvable based on factors present in *Matter of Sonogawa*.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. This is the third reason that the petition may not be approved.

As noted in the AAO's decision of October 2, 2009, the petition is not eligible for approval under the visa classification sought as an unskilled worker. The petition is also denied based on the lack of any evidence supporting the petitioner's ability to pay the proffered wage and the petitioner's failure to provide evidence verifying that the beneficiary possessed the required training and experience set forth in the terms of the labor certification. Each reason is considered as an independent and alternative basis for denial.

⁵ 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 [REDACTED], 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.

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 director's decision on the motion to reopen is withdrawn. The motion to reopen is granted. The prior decision of the AAO, dated October 2, 2009, is affirmed. The petition remains denied.