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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**



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Date: **JUL 27 2011** Office: TEXAS SERVICE CENTER

FILE:

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, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner provides rehabilitation services. It seeks to employ the beneficiary permanently in the United States as a physical therapy aide 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 ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL). The director determined that the petitioner failed to provide required initial evidence to establish eligibility for the classification sought. The director denied the petition accordingly. The AAO affirmed this determination on appeal.

On November 17, 2010, the AAO dismissed the subsequent appeal and affirmed the director's denial. The AAO specifically reviewed the petitioner's 2006 federal income tax return and the totality of circumstances to determine whether the petitioner had established its ability to pay the proffered wage.¹ The AAO determined that the petitioner failed to demonstrate its ability to pay the proffered wage. The AAO also determined that the record of proceeding did not demonstrate that the beneficiary possessed the requisite three months of training as a physical therapy aide.

The record shows that the motion is properly filed and timely. On motion, the petitioner submits a brief, copies of its federal income tax returns for 2007 through 2009, and a letter from [REDACTED] dated August 6, 2007 indicating the beneficiary's attendance at a physical therapy aide training course held from April 2, 2007 through July 31, 2007. The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The instant motion is granted and the AAO will consider it as the motion to reopen. 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.

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

¹ It is noted that the petitioner only provided its federal tax returns for 2006. As the priority date in the instant matter is November 29, 2007, the petitioner's federal tax returns for 2006 did not cover the priority date and thus were insufficient to demonstrate ability to pay the proffered wage.

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.

As noted in the AAO's prior decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 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 ETA Form 9089 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 ETA Form 9089 was accepted on November 29, 2007. The proffered wage as stated on the ETA Form 9089 is \$9.75 per hour (\$20,280.00 per year). The ETA Form 9089 states that the position requires 3 months of training as a physical therapist aide.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. The AAO's prior analysis of the petitioner's net income, net current assets, and wages paid to the beneficiary for 2006 is affirmed. On motion, the issue is whether the petitioner's tax returns for 2007 through 2009 demonstrate an ability to pay the proffered wage from the priority date to the present.

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 the instant case, the petitioner has not provided evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage.

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, the 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).

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

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,

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.

On motion, the petitioner submitted its tax returns for 2007 through 2009. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income and net current assets for 2007, 2008 and 2009, as shown in the table below.

- In 2007, the Form 1120 stated net income of \$25,085 and net current assets of \$33,844.
- In 2008, the Form 1120 stated net income of \$52,174 and net current assets of \$49,184.
- In 2009, the Form 1120 stated net income of \$38,679 and net current assets of \$127,499.

Therefore, for the years 2007 through 2009, it appears that the petitioner had sufficient net income and net current assets to pay the instant beneficiary the proffered wage.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

USCIS records indicate that the petitioner had at least 12 additional Immigrant Petitions for Alien Worker (Form I-140) pending with USCIS from 2007 to 2010.³ For these additional pending petitions, the petitioner is obligated to demonstrate its ability to pay the beneficiaries the full proffered wages from the priority date until they obtain lawful permanent residence. The record does not contain any evidence showing that the petitioner paid these beneficiaries their full proffered wages. For 2007, it is more likely than not that the petitioner did not have sufficient net income or net current assets to pay the instant beneficiary and five additional beneficiaries the full proffered wage. For 2008, it is more likely than not that the petitioner did not have sufficient net income or net current assets to pay the instant beneficiary and ten additional beneficiaries the full proffered

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.

³ The petitioner filed six immigrant petitions (including the instant petition) in 2007, five in 2008, one in 2009, and one in 2010.

wage. For 2009, it is more likely than not that the petitioner did not have sufficient net income or net current assets to pay the beneficiary and 11 additional beneficiaries the full proffered wage.

Therefore, from the date the Form ETA 9089 was accepted for processing by the DOL in 2007 to the present, the petitioner has not established that it had the continuing ability to pay the beneficiaries the proffered wages through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, the petitioner implies that the AAO should consider its bank statements in assessing its ability to pay the proffered wage; however, the petitioner fails to provide copies of the actual bank statements in support of this motion. The petitioner's reliance on the balances in its bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets. Thus, even if the petitioner provided copies of the bank statements, they would not be sufficient to prove its ability to pay the proffered wage.

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.

In the instant case, the petitioner claims that it has been in business since 2004 and its gross receipts increased from 2007 through 2009. Though the petitioner has consistently paid officer compensation, no evidence that the officers would be willing to forego this compensation in order to pay the proffered wage has been provided. The petitioner has not established consistent growth since 2004, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Moreover, the petitioner has not established that it has the ability to pay the full proffered wage to any beneficiaries of the simultaneously pending immigrant petitions it has filed. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Another issue on motion is whether or not the petitioner has demonstrated that the beneficiary possessed the required qualifications for the proffered position prior to the priority date. The key to determining the job qualifications is found on ETA Form 9089, Part H., Job Opportunity Information. This section of the application for permanent employment certification describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. 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. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H Line 5 of the labor certification reflects that the proffered position requires 3 months of training in the field of physical therapy aide. On the ETA Form 9089, the beneficiary lists employment with Congressman Vargas in the Philippine House of Congress from May 2004 through November 2007. The beneficiary states that he worked 40 hours per week as a member of the Congressional staff. No additional employment experience is listed. The petitioner responded "yes" to question J.17 on ETA Form 9089, which asks whether the alien completed the training required for the requested job opportunity; however, the ETA Form 9089 does not otherwise reflect that the beneficiary possesses three months of training as a physical therapy aide prior to November 29, 2007. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's portion of the labor certification lessens the credibility of the evidence and facts asserted.

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). 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.

On motion, the petitioner provides a letter from [REDACTED] indicating the beneficiary's attendance at a physical therapy aide training course held from [REDACTED]. While this letter indicates that the beneficiary completed the course and has been "certified with 100% marks," the letter provides no detail regarding the type of training the beneficiary received. The regulation at 8 C.F.R. §103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. The immigrant petition in this matter was filed on March 18, 2008, well after the letter was signed on August 6, 2007. This evidence was previously available and could have been discovered or presented in the previous proceeding. It is further noted that evidence of the beneficiary's qualifications for the proffered position constitutes required initial evidence pursuant to 8 C.F.R. §204.5(l)(3)(ii) and therefore should have been submitted with the immigrant petition on March 18, 2008. This evidence submitted on motion will not be considered "new."

In addition, the dates of this training program overlap with the dates of the beneficiary's employment with [REDACTED]. Thus, the AAO does not accept this letter as evidence that the beneficiary possesses the required three months of training as a physical therapy aide prior to November 29, 2007. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Therefore, the petitioner failed to demonstrate that the beneficiary met the minimum level of training required for the proffered position on the ETA Form 9089.

The applicable regulations at 8 C.F.R. §103.5(a)(1)(iii)(C) provide that a motion to reopen or reconsider must be "accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date and status or result of the proceeding." This instant motion was not accompanied by this required statement and was thus improperly filed.

The petitioner's assertions and evidence submitted on motion cannot overcome the grounds of denial in the director's December 10, 2008 decision and the AAO's November 17, 2010 decision. The petitioner failed to establish its continuing ability to pay the proffered wage as well as the beneficiary's qualifications for the proffered position in this matter. Therefore, the petition cannot be approved.

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 motion to reopen is granted and the decision of the AAO dated November 17, 2010 is affirmed. The petition is denied.