



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B6

Date: JUN 15 2011 Office: TEXAS SERVICE CENTER

FILE:

IN RE: 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,

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 car maintenance business. It seeks to employ the beneficiary permanently in the United States as a lube tech¹ car wash mechanic. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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. 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 denial, an 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.

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.

¹ Lubrication technician.

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).

Here, the ETA Form 9089 was accepted on October 24, 2005. The proffered wage as stated on the ETA Form 9089 is \$10.75 per hour (\$22,360.00 per year).

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Accompanying the petition, the petitioner submitted its 2005 federal income tax (Form 1120) return.

On August 6, 2007, issued request for evidence to the petitioner. The director requested evidence according to the regulation at 8 C.F.R. § 204.5(g)(2), in this case the petitioner's federal income tax (Form 1120S) return, or annual report, or audited financial statement for 2006. Additionally, the director requested a Wage and Tax (W-2) Statement issued to the beneficiary by the petitioner for 2005.

On September 17, 2007, counsel submitted, *inter alia*, a letter dated September 11, 2007, the petitioner's federal income tax (Form 1120S) return for 2006; approximately 12 copies of the beneficiary's bank statements for the time period July 20, 2006, to May 17, 2007; approximately 12 copies of checks written by the petitioner to the beneficiary in equal amounts of \$2,000.00 for the time period August 31, 2006, to July 31, 2007;³ and a statement from the petitioner's accountant dated July 7, 2006.

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 2003 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on December 18, 2005, the beneficiary claimed to have worked for the petitioner since March 1, 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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

² 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). 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).

³ There is no indication on the copies that the checks were transacted (i.e. cancelled).

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.

Twelve copies of checks written by the petitioner to the beneficiary in equal amounts of \$2,000.00 for the time period August 31, 2006, to July 31, 2007 were introduced into evidence. These amounts are set forth in the following table:

Years	Proffered Wage	Wages Paid	Difference between the Proffered Wage and the Wage Paid in Each Year:
2005	\$22,360.00	None submitted	\$22,360.00
2006	\$22,360.00	\$10,000.00	\$12,360.00
2007	\$22,360.00	\$14,000.00	\$8,360.00

On appeal, counsel asserts the twelve copies of checks submitted into evidence are 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 during any relevant timeframe including the period from the priority date in 2005 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

Counsel contends that a statement from the petitioner's accountant dated July 7, 2006 describing the depreciation and amortization amounts stated on the petitioner's tax returns is evidence of the petitioner's ability to pay the proffered wage.

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). Accordingly, the AAO will not add back the depreciation amounts to net income.

The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2005, the Form 1120S stated a net income loss⁴ of <\$50,709.00>.⁵

⁴ 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

- In 2006, the Form 1120S stated a net income of \$27,028.00.
- In 2007, no tax return was submitted.

Therefore, for the years 2005 and 2007⁶ the petitioner did not have sufficient net income to pay the proffered wage. In 2006 from an examination of the petitioner's net income and wages paid, the petitioner had the ability to pay the proffered wage.

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.⁷ 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 petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2005, the Form 1120S stated net current assets of <\$76,513.00>.
- In 2006, the Form 1120S stated net current assets of <\$76,439.00>.
- In 2007, no tax return was submitted.

Therefore, for years 2005, 2006, and 2007 the petitioner through an examination of its net current assets or wages paid to the beneficiary could not pay the proffered wage.

Therefore, from the date the ETA Form 9089 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

on line 17e (2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its tax return.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁶ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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)).

⁷ 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.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets for years 2005 and 2007. In 2006 the petitioner could pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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 was established in 2003 and employs ten workers but there is no evidence if these individuals are full time workers., Although the director requested the beneficiary's W-2 statement for 2006, it was not submitted. In 2005 and 2006, the petitioner's gross receipts were \$419,737.00 and \$752,068.00 respectively. Despite the increase in gross receipts, the petitioner's net incomes in 2005 and 2006 were <\$50,709.00> and \$27,028.00 respectively. There is a paucity of information concerning the business, its financial prospects or the occurrence of any uncharacteristic business expenditures or losses. 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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).

As re-stated here, Section 203(b)(3)(A)(i) of 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. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

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 job qualifications for the certified position of a lube tech\car wash mechanic are found on the ETA Form 9089, Part H, Item 11, which describes the job duties to be performed as follows:

Repair/adjust machine-operated equipment used to lubricate car wash equipment, parts and machinery; use hand tools and basic repair equipment; dismantle and reassemble all car wash equipment, such as grease guns, air lines, and lubricating pumps. Examine parts for breaks, wear, and dirt. Conduct regular inspections and replace/repair defective/non-functioning parts. Clean and assemble all car wash equipment. Change car oil and other lubricants on passenger vehicles.

The ETA Form 9089 states that the position requires two years of experience in the job offered.

According to the ETA Form 9089, the beneficiary stated under penalty of perjury that he has been employed by the petitioner as a lube tech\car wash mechanic from March 1, 2003.

While there, the beneficiary stated his duties exactly as stated above on the labor certification. Prior to this, the beneficiary stated he was employed fulltime as a sales/purchasing manager by Last [REDACTED] from March 1, 1997, to March 1, 2003. According to the beneficiary, he was employed fulltime by [REDACTED] as a "auto/car wash mechanic" from October 1, 1991, to December 31, 1996.

According to a USCIS Form G-325, prepared and signed by the beneficiary under penalty of perjury, he was employed by the petitioner from March 2004, to "present" (i.e. October 20, 2007); and by [REDACTED] from March 1997, to March 2004. Additionally, the beneficiary stated on that application that he resided in Elizabeth, New Jersey, from January 1997, to March 2004. These statements are inconsistent with the statement in the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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

(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.

(B) Skilled workers. 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 petitioner submitted a statement from [REDACTED], dated August 2, 2005, that the beneficiary was employed there from October 1, 1991, to December 31, 1996, as an "auto mechanic (oil and lube Tech.) and car wash mechanic changing oil, lube job and minor repair work on auto vehicles and also maintenance and repair of car wash equipment." The beneficiary failed to list this overseas work experience on his Form G-325A in the block titled "Show below last occupation abroad if not shown above."

The sole statement submitted in the record concerning the beneficiary's qualifications and prior job experience approximately 10 years ago is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position since the beneficiary was employed as a an auto/car wash mechanic, not a lube tech/car wash mechanic. Further, there is no description from Pal Motor Workshop of the beneficiary's specific job duties there. No other letters or statements according to the regulation at 8 C.F.R. § 204.5(l)(3) were submitted by the petitioner. Finally, this claimed job experience conflicts with the Form G-325A in the record. *See Matter of Ho.*

The beneficiary does not meet the terms of the labor certification. The petition will be denied on this basis as well. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring sufficient evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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

Page 10

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.