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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



B6

DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE: 

JUN 24 2011

IN RE: Petitioner:
Beneficiary:



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

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a restaurant that seeks to permanently employ the beneficiary as a cook specializing in northern Italian dishes. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petition is accompanied by a ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), which specified that two years of experience in the “job offered” was required for the position.

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 Director denied the petition on the ground that the petitioner failed to establish its ability to pay the beneficiary the proffered wage over the requisite time period. In his decision, dated June 27, 2008, the Director found that the petitioner had established its ability to pay the proffered wage for the years 2001 and 2004-2006, but not for the years 2002, 2003, and 2007.

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.

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 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 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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

In this case, the labor certification application (Form ETA 750) was received by the DOL on April 23, 2001. The form states that the “rate of pay” is \$10.00 per hour for a 40-hour week (which amounts to total annual compensation of \$20,800), and that the position requires two years of experience in the “job offered.”

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, 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, U.S. 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 his decision denying the petition on June 27, 2008, the Director found that the petitioner had not established its continuing ability to pay the proffered wage from the priority date up to the present. The Director noted that the petitioner may establish its ability to pay in one of three ways: (1) if it already employs the beneficiary and has been paying him or her at a rate equal to or above the proffered wage; (2) if its net income is equal to or greater than the proffered wage; or (3) if its net current assets (defined as current assets minus current liabilities) are equal to or greater than the proffered wage. With respect to alternative (1), the petitioner did not establish its continuing ability to pay because there was no evidence that the petitioner employed the beneficiary before August 2007. With respect to alternative (2), the Director indicated that the petitioner’s federal income tax returns in the record showed net income above the annualized proffered wage of \$20,800 for the years 2001, 2005, and 2006, but under the annualized proffered wage in the years 2002, 2003, and 2004. With respect to alternative (3), the petitioner’s federal income tax returns showed net current assets above the annualized proffered wage for only one year – 2004 – and negative net assets in all the other years – 2001, 2002, 2003, 2005, and 2006. On the basis of these figures on the income tax returns, the Director determined that the petitioner had established its ability to pay the proffered wage in the years 2001, 2004, 2005, and 2006, but not in the years 2002 and 2003 (when both its net income and its net current assets were below the annualized proffered wage). The Director’s discussion of 2007 was more oblique, but the petitioner’s failure to submit its federal tax return for that year (despite a request from the Director) means that it also failed to establish its ability to pay the proffered wage during that year.

On appeal counsel states that the petitioner hired the beneficiary in August 2007, right after the beneficiary received his Employment Authorization Document, and submits additional documentary evidence of the beneficiary’s compensation over the next year. Earnings statements in 2007 show that the beneficiary’s pay rate was \$15/hour, and his Form W-2, Wage and Tax Statement, for 2007 records total compensation for the year (August to December) of \$11,752.44. Subsequent earnings statements

in 2008 show that the beneficiary continued to be paid at a rate of \$15/hour, and that his total compensation up to the beginning of August 2008 was \$18,600. Based on the foregoing documentation – which shows that the petitioner paid the beneficiary over \$30,000 during the one-year period from August 2007 to August 2008 – counsel contends that the petitioner has established its ability to pay the proffered wage, in accordance with alternative (1), because it has been paying the beneficiary in excess of that figure since hiring him.

The AAO agrees with counsel that the documentation submitted on appeal establishes the petitioner's ability to pay the proffered wage during the period between the last quarter of 2007 and August 2008. However, counsel has submitted no further evidence of the petitioner's ability to pay the proffered wage during the first three quarters of 2007 or the years 2002 and 2003. As previously explained by the Director, the petitioner must establish its continuing ability to pay the proffered wage not just from the date it hired the beneficiary, but from the priority date of April 23, 2001, when its labor certification application was received by the DOL, all the way up to the present.

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines 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 this case, the record indicates that the beneficiary was not employed by the petitioner until August 2007. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage through compensation actually paid to the beneficiary from the priority date up to August 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. See *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. See *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 wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary 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 [sic] 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).

Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner’s net income. The petitioner’s federal income tax returns (Form 1120 for the years 2001-2002, and Form 1120S for the years 2003-2006) show net income above the annualized proffered wage of \$20,800 for the years 2001 (\$46,622)² and 2006 (\$141,051),³ but under the annualized proffered wage in the years 2002 (-\$7,163), 2003 (\$18,870), 2004 (-\$16,788), and 2005 (-\$338,566). Since four of these figures – for the years 2002 to 2005 – are below the proffered wage, the petitioner cannot establish its continuing ability to pay based on its net income.

² Net income is recorded on line 28 of Form 1120.

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 (2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedule K for 2003-2006, the petitioner’s net income is found on Schedule K of its tax returns for those years.

As yet another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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.

In this case, however, the petitioner's federal income tax returns show net current assets above the annualized proffered wage of \$20,800 for only one year – 2004 (\$108,248) – and negative net assets in all the other years – 2001 (-\$129,211), 2002 (-\$137,036), 2003 (-\$113,257), 2005 (-\$309,793), and 2006 (-\$176,216). Accordingly, the petitioner cannot establish its ability to pay the proffered wage based on its net current assets.

Thus, the petitioner has not established its ability to pay the beneficiary the proffered wage in 2002, 2003, 2005, or the bulk of 2007 by means of wages actually paid to the beneficiary, its net income, or its net current assets during those years.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business

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.

expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner is a restaurant that was incorporated in 1998 and claimed to have 40 employees at the time the instant petition was filed in 2007. While the petitioner has demonstrated its ability to pay the proffered wage in the last quarter of 2007 and much of 2008, during the first year of the beneficiary's actual employment at the restaurant, it has not presented persuasive evidence of its consistent ability to do so in earlier years. Gross annual receipts ranged between \$2 million and \$2.7 million in the years 2001-2006, except for a huge one-year dropoff in 2003 to \$347,000. Net income fluctuated wildly between 2001 and 2006, was often in the negative, and did not establish any sort of steady upward trend. Net current assets were negative in five years out of six between 2001 and 2006. For the three years when neither net income nor net current assets exceeded the proffered wage (2002, 2003, and 2005), the petitioner's federal income tax returns recorded "compensation of officers" as a deduction in two of those years – 2002, in the amount of \$22,484 (Form 1120, line 12), and 2005, in the amount of \$83,400 (Form 1120S, line 7). It is conceivable that some or all of those funds could have been reallocated in 2002 and 2005 to pay the proffered wage of the cook. It is noteworthy, however, that in the other year – 2003 – when the petitioner's business incurred the steep dropoff in gross receipts down to \$347,000 (from \$2,127,000 in 2002) – there was no deduction entered on the Form 1120S, line 7, for "compensation of officers."

Based on the foregoing analysis, the AAO concludes that the petitioner has not established that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage for the subject position from the priority date (April 23, 2001) up to the present.

Conclusion

For all of the reasons discussed above, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage from the priority date up to the present. Accordingly, the petition cannot be approved.

Beyond the decision of the Director, the letter from [REDACTED], dated November 6, 2002, stating that the beneficiary was employed "as a cook of [REDACTED] from April 1998 to November 2000, does not comply with the substantive requirements set forth at 8 C.F.R. § 204.5(g)(1) and 8 C.F.R. § 204.5(l)(3)(ii)(A). Those regulations prescribe that letters from employers attesting to an alien's job experience must include the name, address, and title of the writer, and a specific description of the duties performed. With regard to the [REDACTED] letter, the name of the writer is unclear since his signature is illegible and he is not otherwise identified on the document. Nor is his title at the restaurant identified. Finally, the duties of the position are not described with much specificity. The writer simply claims that the beneficiary was a cook [REDACTED] with no details as to the individual tasks he performed, the scope of his daily activities, or the types of food he cooked. Due to these evidentiary shortcomings, the AAO concludes that the letter from [REDACTED] does not establish the beneficiary's qualification for the proffered position in this case. The petitioner has failed to show that the beneficiary has two years of experience in the "job offered," in conformance with the labor certification. As such, the beneficiary does not qualify for classification as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. For this reason as well, the instant petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.