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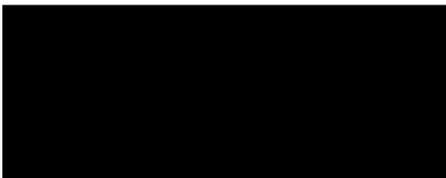
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date **MAR 04 2011**

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a produce wholesale/retail company. It seeks to employ the beneficiary permanently in the United States as a produce sales representative. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2001 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 February 2, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$16 per hour (\$33,280 per year). The Form ETA 750 states that the position requires eight years of grade school, four years of high schools and two years of experience in the proffered position. Special requirements include "must speak/read/write English/Cantonese/Mandarin."

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation for tax years 2001 to 2006. In tax year 2007, the petitioner is structured as an S corporation. On the petition, the petitioner did not provide a date of establishment. It claimed to have gross annual income of \$3,313,706, net annual income of \$403, and to currently employ one worker. According to the C corporation tax returns in the record, the petitioner's fiscal year is from October 1 to September 30 of the next year.² The petitioner's S Corporation tax year is a calendar year. On the Form ETA 750B, signed by the beneficiary on April 15, 2001, the beneficiary claimed to have worked for the petitioner since February 2001.³

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel resubmits the petitioner's 2001 tax return, and for the first time, submits the petitioner's tax returns for tax years 2002 to 2006. The petitioner had submitted the petitioner's 2007

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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).

² The AAO notes that the petitioner's tax return for 2000, covering a period of time from October 1, 2000 to September 30, 2001, would have to be examined to establish the petitioner's ability to pay the proffered wage as of the April 25, 2001 priority date.

³ The AAO notes that Part B of the certified ETA Form 750 indicates the beneficiary worked for [REDACTED], a, prior to working for the petitioner, located in Brooklyn, New York. The record contains further verification of this prior employment. Therefore the beneficiary's work experience will not be examined further in these proceedings.

tax return in response to the director's RFE dated November 25, 2008. The AAO notes that the director in his RFE requested that the petitioner establish that it had the ability to pay the proffered wage as of the 2001 priority date and continues to have that ability. The director then requested the petitioner's *latest* annual report, tax return, or audited financial statement. (Emphasis added). The petitioner resubmitted its 2001 tax return and its tax return for tax year 2007.

On appeal, counsel states that the petitioner's tax returns for the years 2002 to 2006 were not submitted earlier because they could not be located. The AAO notes that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). However, in the present matter, the petitioner appears to have responded to the director's explicit request for the petitioner's latest tax return with the submission of its 2007 tax return. Therefore the AAO will accept the submission of the petitioner's tax returns for tax years 2002 to 2006 on appeal.

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's owner in a letter dated December 8, 2008 that the beneficiary started working for him, but that he asked the beneficiary to stop working until he received work authorization and a social security card. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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. Contrary to counsel's assertion on appeal, 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.

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 [REDACTED] 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.

[REDACTED] 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).

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 record before the director closed on January 12, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available.

As noted previously, to examine the petitioner's ability to pay the proffered wage as of April 20, 2001, the petitioner's tax return for tax year 2000 would have to be submitted to the record and examined. Without this evidence, the petitioner can not establish its ability to pay the proffered wage as of the April 25, 2001 date based on either its net income or net current assets. With regard to the tax returns found in the record, the petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120 stated net income of \$403.
- In 2002, the Form 1120 stated net income of \$821.

- In 2003, the Form 1120 stated net income of \$6,922.
- In 2004, the Form 1120 stated net income of -\$11,910.
- In 2005, the Form 1120 stated net income of \$6,524.
- In 2006, the Form 1120 stated net income of -\$1,657.
- In 2007, the Form 1120S⁴ stated net income of \$51,098.

Therefore, for the years 2001 to 2006, the petitioner did not have sufficient net income to pay the proffered wage. In tax year 2007, the petitioner's net income was sufficient to pay the proffered wage of \$33,280.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 for tax years 2001 to 2006, as shown in the table below.

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 on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, shown on its Schedule K for 2007, the petitioner's net income is found on Schedule K, line 18 of its 2007 tax return.

⁵ 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.

- In 2001, the Form 1120 stated net current assets of -\$67,706.
- In 2002, the Form 1120 stated net current assets of -\$82,715.
- In 2003, the Form 1120 stated net current assets of -\$68,715.
- In 2004, the Form 1120 stated net current assets of -\$150,877.
- In 2005, the Form 1120 stated net current assets of -\$286,243.
- In 2006, the Form 1120 stated net current assets of -\$379,051.

The AAO notes that the director in his decision determined that the petitioner had a positive net current assets of \$67,706; however, this is incorrect. The AAO will withdraw the director's decision with regard to the petitioner's ability to pay the proffered wage in 2001 based on its net current assets. Therefore, for the years 2001 to 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. As discussed previously, the record also does not contain the petitioner's tax return for 2000, the tax year in which the priority date was established.

On appeal, counsel asserts that in tax year 2001, the petitioner's salaries and wages paid were \$50,950. She also states that the director in his decision appeared to state that the petitioner's net current assets were sufficient to pay the proffered wages. While counsel is correct that a petitioner's net current assets can be utilized to establish the petitioner's ability to pay the proffered wage, as discussed previously, the director incorrectly determined the petitioner's net current assets for tax year 2001. The petitioner did not establish its ability to pay the proffered wage of \$33,280 in tax year 2001. Further, the amount of wages paid in tax year 2001 to another worker or workers would not necessarily support the petitioner's ability to add an additional salary to its payroll. Wages and salaries during the relevant period of time in question, however, can be considered in the following analysis of the petitioner's totality of circumstances.

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 Form ETA 750 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 (BIA 1967). 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 *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 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 I-140 petition contains the number "13-3976932" in section 2, under the item "Date Established." The petitioner's tax returns indicate this number is the petitioner's Employer Identification Number (EIN). The petitioner's tax returns indicate an incorporation date of October 29, 1997. The record contains no further evidence of the petitioner's longevity or reputation within the grocery produce industry. While the record indicates that the petitioner's owner operated a similar business in North Carolina, this fact is not sufficient to establish the petitioner's longevity or business operation.

With regard to salaries and wages paid, the I-140 petition filed in 2008 indicates that the petitioner has only one employee. The petitioner's number of employees during the 2001 to 2007 tax years is unknown. The AAO notes that the wages and salaries paid during the relevant period of time in question have fluctuated. While wages and salaries increased from 2001 to 2005, they plummeted with a significant decrease in tax year 2006. The AAO also notes that the proffered wage of \$33,280 is greater than all salaries and wages paid in tax year 2006. The record does not support the petitioner's salaries and wages as a significant factor in the petitioner's overall circumstances.

With regard to gross receipts, the petitioner's gross receipts from tax years 2001 to 2007 have fluctuated widely, with receipts of over \$1 million dollars in 2006 to almost \$6 million dollars in 2007. However, the petitioner's cost of goods in every year in question is significant, with gross profits fluctuating between a high of \$608,281 in 2005 to a low of \$127,018 in 2006. The petitioner's officer compensation has been modest in all years in which the petitioner's tax returns indicate it was paid. Compensation to either one officer or two has always been less than the proffered wage of \$33,280. 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. In visa petition proceedings, the burden of proving eligibility for the 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.