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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
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Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services



B6

FILE:



Office: TEXAS SERVICE CENTER

Date:

IN RE:

Petitioner:



Beneficiary:

MAR 16 2011

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, who affirmed that decision on motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a software/computer IT consulting company. It seeks to employ the beneficiary permanently in the United States as a FileNet Administrator. 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 January 30, 2009, and May 13, 2009, decisions, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 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 priority date for this case is August 31, 2006. 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).

The proffered wage as stated on the Form ETA 9089 is \$36.49 per hour (\$75,899.20 per year). The Form ETA 9089 states that the position requires a bachelor's degree in computer science, engineering, information systems, or electrical engineering. The position also requires 36 months experience in the proffered position or, in the alternate occupations of systems analyst or support engineer.¹

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.²

The evidence in the record of proceeding shows that the petitioner was structured as an S corporation for part of 2006 and subsequently restructured³ as a C corporation. On the petition, the petitioner claimed to have been established in 1991, to have a gross annual income of \$25.5 million, and to currently employ over 1,000 workers.

On the Form ETA 9089, signed by the beneficiary on July 11, 2007, the beneficiary claimed to have worked for the petitioner since September 2005 as a FileNet Administrator. The beneficiary also claimed to have worked for [REDACTED] in Mumbai, India, from January 2003 to August 2005 as a FileNet Administrator.

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 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

¹ The petitioner indicated it will accept alternatives to degree requirement including a combination of work experience, education and training. We find the beneficiary is qualified for the position based on his Master of Science degree in Computer Science from the University of Mumbai and his work experience.

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 The record reflects that on December 13, 2007, the petitioner officially changed its name from [REDACTED]

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 employed the beneficiary, but did not pay the beneficiary the full proffered wage of \$75,899.20 per year subsequent to the priority date of August 31, 2006. Financial records provided by the petitioner reflect the beneficiary was paid \$48,757.49 in 2006, \$54,445.98 in 2007 and \$84,437.08 in 2008.⁴

The petitioner has established that it paid partial wages in 2006 and 2007. Since the proffered wage is \$75,899.20 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, that is \$27,141.41 in 2006, and \$21,453.22 in 2007. The petitioner established its ability to pay the proffered wage in 2008 because it paid wages to the beneficiary in excess of 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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the

⁴ Incomplete records were provided for 2009; by June 5, 2009, the petitioner had paid the beneficiary \$39,250.32

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).

The petitioner did not provide copies of its tax records with the petition or in response to the Request for Evidence because they were not available at that time. It is noted that the petitioner did provide 2004 and 2005 Forms 1120S, Income Tax Returns, for [REDACTED]. These records precede the priority date, but may be considered generally. On appeal, the petitioner provided copies of its 2006⁵ and 2007⁶ tax returns.⁷ The petitioner’s income tax returns reflect its net income as shown below:

⁵ For [REDACTED], and covering the period from January 1, 2006, to April 5, 2006. The petitioner also provided an audited financial statement for [REDACTED] for the year ending December 31, 2006. [REDACTED] assumed control of the petitioning company on April 7, 2006, although the consolidated financial statement reflects the results of [REDACTED] and its subsidiaries as of January 1, 2006. [REDACTED] and its subsidiaries posted pre-tax net income of \$5,182,166 in 2006.

⁶ For [REDACTED], formerly [REDACTED], and covering the period from January 1, 2007, to December 31, 2007. It is noted that [REDACTED], and [REDACTED], use the same Federal Employer Identification Number (FEIN).

⁷ The petitioner also submitted copies of statements of deposit accounts at Bank of America. However, 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 will be considered below in determining the petitioner’s net current assets.

- 2006 = \$4,007,727⁸
- 2007 = \$14,834,477⁹

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 *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 has been in business since 1991 and employs over 1,000 employees.¹⁰ The earliest financial records provided show the petitioner posted gross receipts of over \$118 million, paid total wages and salaries of over \$5 million, and compensated its officers over \$1.5 million in 2004. The petitioner posted gross receipts of over \$172 million, paid total wages and salaries of over \$7 million, and compensated its officers over \$1.6 million in 2005. The

⁸ 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. 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. Accordingly, the petitioner's net income reflected on Form 1120S, Schedule K, will be used.

⁹ For a C corporation, the ordinary income (loss) from trade or business activities as reported on Line 28 of Form 1120, [REDACTED] Tax Return.

¹⁰ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In this case, the petitioner has provided a letter dated March 2, 2009, from its director, [REDACTED] who attests to the petitioner's employment of over 1,300 workers and to the petitioner's ability to pay the proffered wage.

petitioner posted gross receipts of over \$46 million, paid total wages and salaries of over \$2.8 million, and compensated its officers over \$2.7 million in 2006. The petitioner posted gross receipts of over \$300 million, paid total wages and salaries of over \$14 million, and compensated its officers over \$2.5 million in 2007. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained, the petition is approved.