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

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U.S. Citizenship
and Immigration
Services

B6

FILE:



Office: NEBRASKA SERVICE CENTER

MAR 31 2011
Date:

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. § 203 (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 your 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 parochial school. It seeks to employ the beneficiary permanently in the United States as an elementary teacher. As required by statute, the petition is accompanied by 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 priority date of the visa petition. The director denied the petition accordingly.¹

On appeal, counsel submits additional evidence and asserts that the petitioner has the ability to pay the proffered wage.

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. 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.²

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. 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

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 petitioner's overall 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).

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the labor certification application was accepted on October 25, 2002, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is \$44,510 per year. Part 14 of the Form ETA 750 states that the position requires two years of experience in the job offered as an elementary teacher or two years of experience in a related occupation defined as teaching experience in "elementary, secondary or collegiate."³

³ As noted above, the petitioner is sponsoring the beneficiary in the certified position as an elementary school teacher. Thus, it falls under section 101(a)(32) of the Act and is statutorily prescribed as a professional occupation. Additionally, Part A of the Form ETA 750 indicates that DOL assigned the occupational code of 25-2021 with accompanying job title elementary school teachers, except special education, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at [REDACTED] (accessed March 8, 2011) and its description of the position and requirements for the certified job, the position falls within [REDACTED] requiring "considerable preparation needed" for the occupation, with a standard vocational preparation (SVP) range of 7.0 < 8.0 to the occupation. Additionally, DOL states that "most elementary school teachers require a four-year bachelor's degree, but some do not." Further, it reports that 75% of responding elementary school teachers had bachelor's degrees and 25% had master's degrees. Although it is unclear why DOL approved the elimination of a four-year bachelor degree in English/Education as the educational requirements for this position as was initially required and its deletion indicated on the Form ETA 750, it is noted that the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C),

The evidence in the record of proceeding shows that the petitioner is a parochial school, first established in 1891. On Part 5 of the preference petition, it states that it currently employs 25 workers. On Part B of the Form ETA 750, signed by the beneficiary on August 2, 2002, she has been working for the petitioner since April 2001. According to an undated letter from the petitioner's accountant, the petitioner is not required to file any income tax returns, including a Form 990, Return of Organization Exempt from Income Tax. He additionally states that the school's income combined with a subsidy from the Church is capable of meeting all salaries, including the beneficiary's. In response to the director's request for evidence of its ability to pay the proffered wage of \$44,510 per year, the petitioner submitted only submitted copies of

combined with the statutory definition of an elementary school teacher as a professional occupation, requires that the petition for the beneficiary only be considered for eligibility in the professional visa classification. As the labor certification does not state a degree requirement, the labor certification does not support a petition for a professional worker. Additionally, we note that the petitioner represents that the beneficiary is "working with the petitioner on H-1B status as an elementary teacher since 2001 to the present." This status places the occupation as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires: (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. Similarly, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following: Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Thus, the stated minimum requirements for the position offered on the approved labor certification, which appear to be the same position as the beneficiary has held as a nonimmigrant, are in conflict because a bachelor's (or higher) degree is the minimum for entry into the occupation. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Wage and Tax Statements (W-2s) that it issued to the beneficiary for the following years and amounts:

Year	Wages	Difference from Proffered Wage of \$44,510 per year
2002	\$23,562	\$20,948 less
2003	\$24,643.08	\$19,866.92 less
2004	\$25,830.80	\$18,679.20 less
2005	\$27,060.40	\$17,449.60 less
2006	\$27,873	\$16,637 less
2007	\$28,596.40	\$15,913.60 less

Noting the absence of the submission of any evidence of net income or net assets,⁴ the director concluded that the petitioner had failed to establish its continuing ability to pay the full proffered wage of \$44,510 per year. The director observed that the petitioner had paid the beneficiary at a rate far below the proffered wage during the years represented by the beneficiary's W-2s.

On appeal, the petitioner, through counsel, submits two undated letters from the petitioner's principal, [REDACTED]. The first letter indicates that the beneficiary's salary includes benefits such as insurance, dental, medicare, etc. and that with the continued subsidy of [REDACTED] and Tuition collection, they are willing to pay the prevailing wage in "the coming academic year."⁵ A second letter reiterates that the school and the parish are not required to file tax returns and is accompanied by a copy of the petitioner's 2009 annual budget report in support of the petitioner's ability to pay the proffered wage.

We do not find this evidence to be persuasive of the petitioner's continuing financial ability to pay the proffered wage as of the priority date of October 25, 2002. First, it is noted that counsel cites no legal authority obliging USCIS to add back deductions taken from or claimed benefits paid as part of the beneficiary's stated wages.⁶ Nothing in the record documents that DOL

⁴ 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.

⁵ A petitioner must establish its continuing ability to pay the proffered wage from the priority date onward. 8 C.F.R. § 204.5(g)(2).

⁶ It is noted that certain nontaxable benefits are referred to as "cafeteria plans," and generally permit employees to receive such benefits on a pretax basis. Cafeteria plans are separate written plans that meet specific requirements. [REDACTED]

[REDACTED]. The beneficiary's W-2 statements

considered such benefits as part of the specified proffered wage set forth on the labor certification. Second, even the total amount of \$38,127 claimed as the total salary paid to the beneficiary does not equal the proffered wage. Further, USCIS will not consider such amounts as part of the beneficiary's compensation paid by the petitioner. The proposed salary on an approved labor certification is expressed as U.S. currency and not as a formula including the value of other expenses paid on behalf of a beneficiary. It is based on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40 (2002).⁷

Further, it is noted that the copy of the petitioner's projected 2009 budget does not suggest that it has the ability to pay the beneficiary's proffered wage of \$44,510. The budget summary set forth on the first page (line 600) indicates that total expenses of \$1,537,276 were expected to exceed total revenue of \$1,481,950 by (\$55,326). Moreover, this document is a projection and does not represent an audited financial statement⁸ or annual report (supported by audited financial statements) in accordance with 8 C.F.R. § 204.5(g)(2) covering the period beginning in 2002, the year of the priority date. 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)).

Additionally, USCIS records reflect that the petitioner has sponsored an additional worker with a 2003 priority date. Where multiple petitions are filed, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2).

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

do not show any reduction in total wages based on any non-taxable benefits. Further, the AAO will not add back cafeteria plan deductions and other fringe benefits to the wages paid to ascertain compensation.

⁷ Additionally, the regulation at 20 C.F.R. § 656.10 (c)(2) (2010) provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage."

⁸ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements.

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). 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 as claimed by counsel, 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 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets and

current liabilities may be shown on a tax return, *audited* financial statement or an annual report. If a petitioner's net current assets during a given period can cover the difference between actual wages paid to the beneficiary and the full proffered wage, the petitioner's ability to pay the proffered salary will be established for that period of time.

In this case, the petitioner has not submitted any regulatory prescribed evidence of net current assets or net income sufficient to cover the full proffered wage during any of the relevant years from 2002 onward. For example, it is noted that while the petitioner may not be required to file a tax return or Form 990, it also failed to submit any *audited* financial statements as set forth in the regulation at 8 C.F.R. § 204.5(g)(2). The record does not demonstrate that the petitioner has established its continuing ability to pay the proffered wage as of the priority date.

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in Time and Look. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, although the record indicates that the petitioner is a long-established entity, the record also lacks any indication of its financial history from 2002 onwards other than payment of annual wages to the beneficiary that were far less than the proffered wage and a copy of a projected budget for 2009 that suggested it was going to produce a deficit of (\$55,326). These circumstances do not support the petition's eligibility for approval based on the principles set forth in *Matter of Sonogawa*. 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)). Therefore, in the instant case, the petitioner has failed to establish its the *continuing* financial ability to pay the proffered wage beginning on the priority date.

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

ORDER: The appeal is dismissed.