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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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Date: Office: NEBRASKA SERVICE CENTER

FILE:

MAY 05 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,

*Elizabeth McCormack*

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 The decision of the director will be withdrawn, and the matter will be remanded to the Nebraska Service Center for further action, consideration, and the entry of a new decision.

The petitioner is a mortgage broker firm. It seeks to employ the beneficiary permanently in the United States as a trilingual mortgage representative, 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).<sup>1</sup> Citing 8 C.F.R. § 204.5(a), the director denied the petition and determined that the petition was not properly filed, as it was not accompanied by a proper application for alien employment certification (Form ETA 750 labor certification).

On appeal, counsel for the petitioner, contrary to the director's finding, contends that the petition was accompanied by a proper Form ETA 750. Counsel also submits additional evidence to show that the Form ETA 750 submitted along with the petition has all of the information, including the rate of pay or the proffered wage information, approved by the United States Department of Labor (DOL).

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.<sup>2</sup>

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 facts of this case can be summarized as follows. On February 27, 2007, the petitioner filed an Immigrant Petition for Alien Worker (Form I-140). As required by statute, the petition was accompanied by a certified Form ETA 750. However, the certified Form ETA 750 did not list, under section 12, the rate of pay or the prevailing wage information.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> Under section 12(a) and (b), the petitioner typed the following words: "prevailing wage per hour."

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

A petition is considered properly filed if it is: (1) accepted for processing under the provisions of part 103; (2) accompanied by any required individual labor certification; and (3) accompanied by any other required supporting documentation.

Further, the regulation at 20 C.F.R. § 656.40(a) (2010), in pertinent part, states:

*Application process.* The employer must request a PWD [Prevailing Wage Determination] from the NPC [National Processing Center], on a form or in a manner prescribed by OFLC [Office of Foreign Labor Certification]. Prior to January 1, 2010, the SWA [State Workforce Agency] having jurisdiction over the area of intended employment shall continue to receive and process prevailing wage determination requests in accordance with the regulatory provisions and Department guidance in effect prior to January 1, 2009.

Thus, since the approved Form ETA 750 did not state the rate of pay or the proffered wage, the director determined that the petitioner had failed to obtain a PWD from a local SWA, and as a result, the labor certification was defective, and the petition was not accompanied by a proper labor certification, as required by statute.

On appeal, the petitioner submits copies of the following evidence:

- The original Form ETA 750 submitted by the petitioner to the DOL for processing on September 29, 2003;
- A letter dated February 9, 2006 from the DOL advising the petitioner to state, under section 12, the rate of pay – basic and overtime;
- The petitioner's response to the DOL's February 9, 2006 letter;<sup>4</sup> and
- The amended Form ETA 750 with the rate of pay (basic and overtime), approved by the DOL on October 20, 2006.

Upon *de novo* review, the director's decision dated August 8, 2007 denying the petition shall be withdrawn. The evidence submitted above on appeal cured the defective Form ETA 750 originally submitted by the petitioner prior to the filing date of the petition. The director did not request the amended Form ETA 750 before entering a decision. As the amendment is properly submitted on appeal, the director should accept the Form ETA 750 as proper and adjudicate the petition based on its merits.

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<sup>4</sup> In its response, the petitioner submitted another copy of a Form ETA 750 with \$17.47 per hour and \$26.21 per hour as the basic rate of pay and overtime, respectively.

The regulation at 8 C.F.R. § 204.5(g)(2) explicitly requires a petitioner to establish an ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>5</sup> Thus, 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, as noted above, the petitioner submitted and the DOL accepted for processing the Form ETA 750 labor certification on September 29, 2003. The rate of pay or the proffered wage stated on that form, as amended, is \$17.47 per hour or \$36,337.60 per year.

To show that the petitioner has the ability to pay \$17.47 per hour or \$36,337.60 per year beginning on September 29, 2003, the petitioner submitted copies of the following evidence:

- Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2003 through 2006;
- The beneficiary's Forms W-2 for 2003-2005;
- A list of the petitioner's employees in 2004; and
- Bank statements for 2004.

The evidence submitted shows that the petitioner was initially incorporated on April 4, 1995 and elected to be an S Corporation as of August 1, 1995. On the petition, the petitioner claimed to currently employ 40 workers and to have a gross annual income and net annual income of \$2,473,575 and \$349,168, respectively.

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

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<sup>5</sup> 8 C.F.R. § 204.5(g)(2), in pertinent part, states:

*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.

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 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.

Based on the Forms W-2 submitted, the petitioner establishes that it has employed and paid the beneficiary from the priority date to 2005. However, the petitioner fails to demonstrate that it has consistently paid the full proffered wage of \$17.47 per hour or \$36,337.60 per year throughout the relevant time frame from the priority date. A review of the Forms W-2 submitted shows that the beneficiary received the following wages from the petitioner:

- \$57,500 in 2003 (exceeds the proffered wage).
- \$3,100 in 2004 (\$33,237.60 less than the proffered wage).
- \$3,500 in 2005 (\$32,837.60 less than the proffered wage).

The W-2 for 2003 is *prima facie* evidence of the petitioner's ability to pay in that year. However, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to show that it can pay:

- \$33,237.60 in 2004;
- \$32,837.60 in 2005; and
- The full proffered wage (\$36,337.60 per year) from 2006 thereon until the beneficiary receives permanent residence.

The petitioner can pay these amounts through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will 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 (1<sup>st</sup> 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 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 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's tax returns demonstrate its net income (loss) for 2004-2006, as shown below:

- In 2004 the Form 1120 stated net income (loss)<sup>6</sup> of (\$16,621).
- In 2005 the Form 1120 stated net income (loss) of \$84,332.

<sup>6</sup> For an S corporation, USCIS considers net income (loss) to be the figure shown on Line 21 of the Form 1120S so long as the S corporation has no other income, credits, deductions or other adjustments from sources other than a trade or business.

- In 2006 the Form 1120 stated net income (loss) of \$79,258.

Based on the information above, the petitioner had sufficient net income to pay the beneficiary's wage of \$36,337.60 in 2005 and 2006 but not in 2004.

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.<sup>7</sup> 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 (liabilities) for 2004, as shown in the table below:

- In 2004, the Form 1120S stated net current assets (liabilities) of \$520,128.

Therefore, the petitioner has sufficient net current assets to pay the beneficiary's wage in 2004.

The petition may not be approved, however, as the record contains no evidence of ability to pay in 2007, 2008, and 2009. In addition, the petition may not be approved as the record does not establish that the beneficiary has the requisite two years of work experience in the job offered before the priority date.

Consistent with the *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must also demonstrate that, 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 – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here as noted earlier, the priority date fell on September 29, 2003. The name of the job title or the position for which the petitioner sought to hire is “trilingual mortgage representative.” Under the job description, section 13 of the Form ETA 750, the petitioner wrote:

Attended clients, receive financial information, data entry, use Work and Excel, analyze customers' financial background for loan application, [be able] to speak Portuguese, Spanish, and English.

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<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, the director must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth by the petitioner, the proffered position requires the beneficiary to have a minimum of two (2) years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on September 25, 2003, he represented that he worked for a real estate brokerage firm called [REDACTED] as a trilingual sales representative from June 1999 to November 2000. Submitted along with the approved Form ETA 750 and the Form I-140 petition was a sworn statement from [REDACTED]. In the sworn statement, the author described the beneficiary's position as follows:

His duties [referring to the beneficiary] consisted of retrieving financial information from clients and assisting them in their capability of purchasing a new home. He was required to speak Portuguese, Spanish, and English.

[REDACTED] [the beneficiary] would sell homes as well as use computer programs such as Word and Excel.

Based on the job description above, the beneficiary was a real estate sales person whose primary duties were to retrieve financial information from clients. The position offered in this case, however, is a mortgage officer, whose job duties include analyzing customers' financial backgrounds for loan application eligibility. These duties are different from the work experience that the beneficiary had with [REDACTED] in that the [REDACTED] position did not include financial analysis, a critical component of the mortgage officer position. On remand, the director should determine whether the beneficiary had the requisite work experience in the job offered as of the priority date.

The petition will be remanded for issuance of a Notice of Intent to Deny or Request for Evidence (RFE) consistent with the above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of the response, the director shall enter a new decision. As always, the burden of proof in these proceedings rests solely with the petitioner. *See Section 291 of the Act, 8 U.S.C. § 1361.*

**ORDER:** The decision of the director is withdrawn; however, the petition is currently not approvable for the reasons discussed above. As the petition is not approvable, the appeal is remanded to the Nebraska Service Center director for further action, consideration and the entry of a new decision, consistent with the above.