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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

PUBLIC COPY



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DATE: **MAY 31 2011** Office: TEXAS SERVICE CENTER

FILE: 

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

The petitioner is a digital printing business. It seeks to employ the beneficiary permanently in the United States as a pre-press graphic designer. 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 priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary had acquired the education necessary for the proffered position. 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 December 11, 2007 denial, the first 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 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$11.67 per hour (\$24,273.60 per year). The Form ETA 750 at part 14 states that the position requires a bachelor's degree in graphic design and two years experience in the job offered or five years of experience in a related occupation, pre-press graphic design. The petitioner listed at part 15 special requirements to include: "must have strong technical working knowledge of graphics and common office software such as Adobe Photoshop, Adobe Illustrator, Adobe Acrobat, Adobe InDesign, Adobe Pagemaker, QuarkXpress, Corel Draw, Ms Office Work, Excel, Powerpoint and Publisher. PC & MAC platforms and operating systems."

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 an S corporation. On the petition, the petitioner claimed to have been established on September 1, 1999 and that it currently employs three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on November 21, 2006, the beneficiary claims to have been employed by the petitioner since October 1999.

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 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 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. The petitioner submitted a copy of the IRS Forms W-2 that it issued to the beneficiary. The Forms W-2 demonstrates the wages paid to the beneficiary as shown in the table below.

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).

- In 2001, the Form W-2 stated total wages of \$20,771.56 (a deficiency of \$3,502.04).
- In 2002, the Form W-2 stated total wages of \$17,419.75 (a deficiency of \$6,853.85).
- In 2003, the Form W-2 stated total wages of \$23,118.39 (a deficiency of \$1,155.21).
- In 2004, the Form W-2 stated total wages of \$23,969.58 (a deficiency of \$304.02).
- In 2005, the Form W-2 stated total wages of \$24,274.69.
- In 2006, the Form W-2 stated total wages of \$24,966.31.

Therefore, for the years 2001, 2002, 2003, and 2004, the petitioner has not established that it had the ability to pay the proffered wage.

If, as in this case, 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 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 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 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 record before the director closed on December 4, 2007, with receipt of the petitioner’s response to the director’s Notice of Intent to Deny. As of that date, the petitioner’s 2007 federal income tax return was not yet due. The petitioner’s 2006 tax return is the most recent return available before the director. The proffered wage is \$24,273.60.

The petitioner’s 1120S² tax returns demonstrate its net income as shown in the table below:

- In 2001, the Form 1120S stated net income of \$10,775.00.
- In 2002, the Form 1120S stated net income of (\$80,851.00).
- In 2003, the Form 1120S stated net income of (\$43,162.00).
- In 2004, the Form 1120S stated net income of (\$27,894.00).

Therefore, for the years 2002, 2003, and 2004, the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages paid to the beneficiary.

² 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), and line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 28, 2011) (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, credits, deductions, or other adjustments shown on its Schedule K, the petitioner’s net income is found on Schedule K of its tax returns. In the instant matter, the petitioner’s Schedule K was used to determine the net income amounts.

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.³ 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 return demonstrates its net current assets as shown in the table below:

- In 2002, the Form 1120S stated net current assets of (\$277,107.00).
- In 2003, the Form 1120S stated net current assets of (\$23,235.00).
- In 2004, the Form 1120S stated net current assets of (\$16,389.00).

Therefore, the record does not demonstrate that the petitioner had sufficient net current assets in 2002, 2003, and 2004 to pay the difference between the proffered wage and wages paid to the beneficiary.

Therefore, from the date the labor certification 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.

On appeal, counsel asserts that the director failed to consider all of the facts and evidence in the case in order to obtain an accurate account of the petitioner's financial ability to pay the proffered wage.

Counsel asserts that the petitioner's business assets should be taken into consideration in determining the petitioner's ability to pay the proffered wage.

Contrary to counsel's claim, the AAO rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.

³According 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.

Counsel asserts that USCIS should add back depreciation to the petitioner's net income. However, as noted above, both USCIS and the federal courts have concluded that adding back depreciation to net income overstates the petitioner's ability to pay the proffered wage. Depreciation is a real expense. *See, e.g., River Street Donuts, LLC.*

The evidence presented on appeal cannot be concluded to outweigh the evidence of record 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. 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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2002, 2003, and 2004. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in 2002, 2003, and 2004, other than those years just being unprofitable. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

A second issue in this case is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had the education and qualifications for the proffered position. In determining whether the beneficiary is qualified to perform the duties of the proffered position, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

On the Form ETA 750 labor certification as certified by the DOL, the petitioner indicated in Part 14 that the job offer required a bachelor's degree in graphic design and two years experience in graphic design or five years in the related occupation of pre-press graphic design as of the priority date, April 27, 2001. At Part 15 of the Form ETA 750, other specific requirements, the petitioner noted, "must have strong technical working knowledge of Graphics and common Office software such as Adobe Photoshop, Adobe Illustrator, Adobe Acrobat, Adobe InDesign, Adobe Pagemaker, QuarkXpress, Corel Draw, MS Office Word, Excel, Powerpoint and Publisher, PC & MAC platforms and operating systems."

In the Notice of Intent to Deny, dated November 6, 2007, the director noted that the priority date in the instant matter is April 27, 2001, and that the evidence in the record showed that the beneficiary received his bachelor's degree in Graphic Design on June 11, 2006. The director requested that the petitioner submit evidence to demonstrate that the beneficiary had obtained a bachelor's degree and the required two years experience or five years experience in a related occupation as of the priority date. In response to the director's request for evidence, counsel for the petitioner submitted an unapproved prior ETA 750 labor certification and a job advertisement. The petitioner stated that the original labor certification filed in April 2001 and the job advertisement never stated that a bachelor's degree was required in order to qualify for the proffered position, but that the original labor certification specified that an associate's degree was the educational prerequisite.

The director determined that the petitioner failed to demonstrate that the beneficiary had the required education and experience; and therefore, did not qualify for the job offered in the labor certification application.

On appeal, counsel asserts that the petitioner made a mistake on the labor certification requiring a bachelor's degree; and that in fact, only an associate's degree or relevant work experience in

the job offered is required for the proffered job. Counsel further asserts that as indicated on the job order and news paper advertisement, the petitioner did not recruit for a candidate with a bachelor's degree.

Contrary to counsel's claim, the unapproved Form ETA 750 has not been certified by the DOL and has no priority date; and therefore, cannot be considered as evidence of the education and experience requirements for the job offered. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Based upon the information contained in the Form ETA 750, the petitioner specifies that a candidate for employment should possess a bachelor's degree in graphic design and two years experience as a graphic designer or five years experience in a related occupation, pre-press graphic designer. This is the Form ETA 750 certified by the DOL and which must be the basis upon which the Form I-140 is filed. See 8 C.F.R. § 204.5 (1)(3)(i). Therefore, the petitioner must demonstrate in the instant case that the beneficiary has the education and experience required to qualify for the job offered regardless of the alleged mistake made by the petitioner. Contrary to counsel's claims, USCIS may not add or remove terms from the labor certification. See *Matter of Silver Dragon Chinese Restaurant, supra*.

The petitioner submitted as evidence a copy of a Certificate of Completion from [REDACTED] which indicated that the beneficiary had met the standards required for completion of animation, interactive, layout and integration as of October 6, 2004. The petitioner also submitted a copy of school transcripts and a Bachelor's of Art Degree in Graphic Design from [REDACTED] which indicated that the beneficiary had earned the degree in Graphic Design as of June 11, 2006. Although this evidence demonstrates that the beneficiary has received an educational degree in graphic design and a certificate of completion from a designer's school, the education was acquired subsequent to the priority date; and therefore, cannot be used to establish that the beneficiary has met the labor certification educational requirements as of the priority date, April 27, 2001. Regardless, even if the AAO were to accept the petitioner's position that only an associates degree is required for the proffered employment, there is no evidence in the record to demonstrate that the beneficiary earned an associate's degree as of the priority date.

The petitioner submitted as evidence of the beneficiary's experience, two letters dated September 25, 1998 and February 25, 1999, from [REDACTED], in which the representatives stated that the company employed the beneficiary as a Technician II from July 12, 1994 through April 1, 1999. The representatives also stated that the beneficiary was assigned to the [REDACTED] and that he worked on "Windows '95, MIMS/Mincom, Microsoft Office 95 & 97 include Microsoft Excel, Microsoft Word, Microsoft Exchange, Microsoft Power Point, OrgChart, Microsoft Outlook and various other program[s] which be [are] related by Windows '95 & Microsoft Office 95 & 97." The letters do not indicate that the beneficiary was ever employed as a graphic designer or a pre-press graphic designer, nor do they include a specific description of the job duties performed by the

beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The petitioner has failed to establish that the beneficiary had the required two years of experience in the job offered or five years of experience in a related occupation as stated in the Form ETA 750, as of the priority date. The petitioner has also failed to establish that the beneficiary possessed all of the special requirements as noted in part 15 of the labor certification, as of the priority date.

Accordingly, it has not been established that the beneficiary has the requisite education and experience, and is thus qualified to perform the duties of the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 27, 2001. *See Matter of Wing's Tea House* at 158. Regardless, even if the AAO were to take into consideration the beneficiary's education or experience for the job offered, the petitioner has failed to establish its ability to pay the proffered wage, and the appeal would still be dismissed on that ground. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an alternative grounds for denial. 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.