

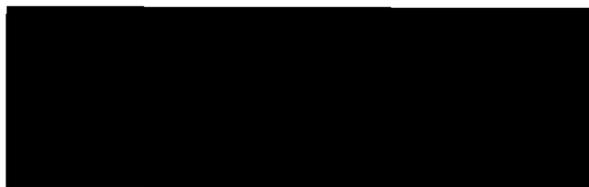
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Date: NOV 21 2011 Office: TEXAS SERVICE CENTER

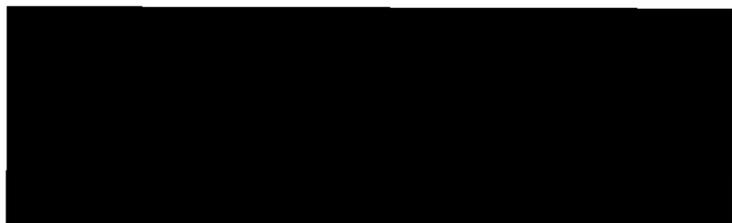
FILE:



IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile wholesale and retail parts dealer. It seeks to employ the beneficiary permanently in the United States as a secretary. 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 failed to submit sufficient evidence to demonstrate the ability to pay. The petition was denied, 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 6, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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).

In the instant proceeding, the Form ETA 750 was accepted on July 23, 2004. The rate of pay or the proffered wage specified on the Form ETA 750 is \$11 per hour or \$22,880 per year. The Form ETA 750 states that the position requires a minimum of one year of experience in the job offered.

The beneficiary stated on the Form ETA 750B that she worked as a personal secretary for a company in Mumbai, India, called "Trufit Auto Work" since February 2004. The record includes a letter dated June 10, 2005 from S. Crasto, Proprietor, stating that the beneficiary, from February 2004 to present, worked as a secretary performing routine clerical and administrative functions such as drafting correspondence, scheduling appointments, organizing and maintaining papers and electronic files as well as providing information to callers. The record also contains a letter of employment indicating the beneficiary worked as a secretary in Mumbai from January 2002 to December 2003 at [REDACTED]. The AAO notes that the beneficiary failed to list this employment on the Form ETA 750, part B, although it is relevant employment.

To show that the petitioner has the ability to pay \$11 per hour or \$22,880 per year beginning on July 23, 2004, the petitioner submitted copies of the following evidence:

- Forms 1120, U.S. Corporation Income Tax Return, for the years 2004 through 2008; and
- A form 1120S, U.S. Income Tax Return for an S Corporation, for 2009.

In adjudicating the petition, the AAO found that the petitioner had filed two immigrant visa petitions for beneficiaries other than the beneficiary in this case.¹ Because of this finding, the AAO issued an RFE on July 1, 2011, noting that the petitioner would need to demonstrate its ability to pay the proffered wage to each beneficiary from the priority date until each beneficiary obtains his or her legal permanent residence. For purposes of determining the ability to pay in this case, the AAO advised the petitioner to submit a copy of the labor certification that the petitioner had filed for the beneficiary whose application to adjust status (Form I-485) was pending in 2004 and 2005. The AAO also advised the petitioner to submit copies of that beneficiary's Forms W-2, 1099-MISC, or other evidence of payment.

In response to the director's RFE, the petitioner submitted the following evidence:

- Copies of the other beneficiary's Forms W-s for 2003-2006;
- Copies of the other beneficiary's payroll summary and pay checks for 2005 and 2006; and
- Copies of Forms W-2, payroll checks and paystubs of the beneficiary who adjusted her status to legal permanent residence in 2002.²

¹ Both petitions were approved (one was approved in December 2000 and the other in July 2003), and both beneficiaries named in those petitions had been granted legal permanent residence – one in 2002 and the other in 2005. Only the second is relevant to this proceeding. The petitioner must show that it has the ability to pay both the beneficiary in the instant proceeding and the beneficiary whose petition was filed in 2004 by the petitioner. The ability to pay must be shown from 2004, the filing date in the instant proceeding, to 2005, when the beneficiary obtained legal permanent residence status.

² These documents are irrelevant for purposes of determining the ability to pay, since the petitioner is only required to show the ability to pay from the priority date (July 23, 2004).

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation from 2004 to 2008 and as an S corporation in 2009. On the petition, the petitioner claimed to have been established on October 23, 1992, to currently employ 11 workers, and to have gross annual income and net annual income of \$3,105,619 and \$61,685, respectively.

Since this matter involves one other immigrant visa filing, the petitioner must establish that the job offer to the other beneficiary and the beneficiary in this case 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 each 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay each beneficiary's proffered wage, 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 examine whether the petitioner employed and paid all of the beneficiaries 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.

No evidence has been submitted to show that the beneficiary has been employed by and received wages from the petitioner during the qualifying period from the priority date.³ Thus, 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 demonstrate that it can pay the full proffered wage of \$22,880 per year from July 23, 2004.

In addition to this amount, the petitioner must also be able to pay the proffered wage of the other beneficiary ("B1"). The table below shows the proffered wages of the other beneficiary and the payments he received from the petitioner in 2004 and 2005 (all in \$):

Tax Year	B1		
	Actual Wage (AW)	Proffered Wage/year (PW)	AW less PW
2004	40,000.00	40,000.00	Meets PW
2005	39,999.96	40,000.00	Meets PW

³ In the AAO's Request for Evidence dated March 28, 2011 the beneficiary was asked where she currently lives and works, and in response, the petitioner states that the beneficiary currently lives in Pembroke Pines, Florida. No response is given with respect to her employment.

The petitioner paid the beneficiary in the other petition the full proffered wage for that position during the required time. Therefore, the petitioner must be able to show that it can pay the full proffered wage of the current beneficiary of \$22,880 from 2004.

The petitioner can show that it 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 (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 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 2004-2009 as shown below:

- In 2004 the Form 1120 stated net income⁴ of \$53,469.
- In 2005 the Form 1120 stated net income of \$83,752.
- In 2006 the Form 1120 stated net income of \$61,685.
- In 2007 the Form 1120 stated net income (loss) of (\$2,220).
- In 2008 the Form 1120 stated net income of \$68,176.
- In 2009 the Form 1120S stated net income⁵ of \$53,067 (line 21 of the Form 1120S).

Based on the information above, the petitioner has sufficient net income to pay the wages of the beneficiary in all years from the priority date except in 2007.

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.⁶ 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. The petitioner’s tax returns demonstrate its net current assets (liabilities) for 2007, as shown in the table below:

- In 2007, the Form 1120 stated net current assets of \$905,237.

The petitioner’s net current assets in 2007 were more than the proffered wage of \$22,880 per year. Therefore, the petitioner has met its burden of establishing by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date.

⁴ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120 (net income before net operating loss).

⁵ 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. Otherwise, the net income (loss) is found on line 23 (2002), line 17e (2005), or line 18 (2006-2009) of schedule K. *See* Instructions for Form 1120S, 2009, at <http://www.irs.gov/pub/irs-prior/i1120s--2009.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

⁶ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the relevant evidence, the AAO is persuaded that the petitioner has that ability. We conclude that the petitioner has met the burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage continuously from the priority date.

Nevertheless, the appeal cannot be sustained, and the petition cannot be approved, as the petitioner has not established that the job offer is *bona fide* or that a valid test of the labor market was conducted.

In the AAO's Request for Evidence (RFE) dated July 11, 2011 the AAO advised the petitioner to submit verifiable evidence of the relationship between the beneficiary and one of the owners of the petitioning company () to demonstrate that the job offer is *bona fide*.

The AAO stated:

If, in fact, there is a familial relationship between () and the beneficiary, you then must show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. 20 C.F.R. §§ 626.20(c)(8) and 656.3; also see *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by blood or the relationship may be financial, by marriage, or through friendship. See *Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor (DOL) advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In response to the AAO's RFE, counsel for the petitioner acknowledges that () is the sister of the beneficiary, but further states that that fact alone does not support the conclusion that the underlying labor certification was fraudulent.

In adjudicating the appeal, the AAO observes that the petitioner is owned by two people, [REDACTED] and [REDACTED]. Based on the petitioner's response to the AAO's RFE dated July 11, 2011, we now know that the beneficiary is the sister of [REDACTED]

On appeal, in support of its assertion that the job offer is *bona fide* and fills a legitimate need of the company, the petitioner states that the position currently offered to the beneficiary was previously filled by another worker whose job the current beneficiary will fill. The previous secretarial position was filled by [REDACTED].⁷

In addition, a search of USCIS electronic databases shows that [REDACTED] prior to filing the labor certification application in the instant case, filed a Petition for Alien Relative, Form I-130, for the beneficiary on January 10, 2003. That petition was approved on May 29, 2009. [REDACTED] motivation to help her sister obtain law permanent residence casts doubt on the *bona fides* of the recruitment effort conducted in this case.

Neither counsel nor the petitioner has submitted any verifiable evidence to demonstrate that the job offer is *bona fide*. There is no evidence in the file indicating that the petitioner informed the DOL prior to recruitment that the beneficiary is the sister of one of the owners of the petitioning company or that the DOL was aware of that familial relationship. Under these circumstances and based on the facts stated above, the AAO determines that the petitioner has not shown that the job offer was *bona fide*. Since there is a familial relationship between the beneficiary and one of the owners of the petitioning company that appears to not have been disclosed to the DOL, the petitioner has not established that there was a valid test of the labor market. Rather than using the labor certification procedure to hire U.S. workers, the petitioner has utilized the labor certification process to facilitate its shareholder's family members' immigration to the United States.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to

⁷ [REDACTED], according to the petitioner, left the company several years ago. USCIS records reflect that [REDACTED] is also related to the petitioner's shareholder [REDACTED]. The previous beneficiary is the sister-in-law of [REDACTED] as she is married to [REDACTED] brother. The petitioner filed an immigrant visa petition for [REDACTED] that was approved in December 2000, and she became a legal permanent resident in February 2002. The petitioner's pattern of sponsoring close family members through labor certification applications cannot be ignored, and casts doubt on the validity of the labor market test conducted in the instant case. [REDACTED] the husband of the previous beneficiary, [REDACTED] the petitioner's shareholder, and the beneficiary, according to USCIS electronic databases, all have the same parents.

explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592. As the petitioner has not submitted independent, objective evidence to establish the validity of its test of the labor market, and/or that the job offer is *bona fide*, the petition must be denied.

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 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.