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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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: **NOV 28 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.

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 a concrete company. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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 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 September 12, 2008 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)(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 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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 21, 2005. The proffered wage as stated on the Form ETA 750 is \$872 per week (\$45,344 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 in 1996 and to currently employ 23 – 30 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 10, 2004, the beneficiary did not claim to have worked for the petitioner.²

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'l Comm'r 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'l Comm'r 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the timeframe including the period from the priority date in 2005 to 2007. The AAO will credit the petitioner with payment of

¹ 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).

² The AAO notes that subsequently the beneficiary appears to have performed some work for the petitioner. Copies of paystubs from the petitioner to the beneficiary dated from December 11, 2005 to September 9, 2007 are of record. The paystubs are incomplete and do not reflect continuous employment during that time period.

\$680.00 in December of 2005, \$1,680 in 2006 and \$11,280 in 2007 as reflected by pay stubs in the record.³

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross 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

³ Other than the amounts stated from 2005 to 2007, the record does not reflect that the petitioner has employed the beneficiary.

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 September 12, 2008 with the issuance of the denial decision by the director. As of that date, the petitioner’s 2007 federal income tax return was not yet due. The petitioner’s income tax return for 2006 was the most recent return available to the director. On appeal, the petitioner submitted a copy of its 2007 tax return. The petitioner’s tax returns demonstrate its net income for 2005-2007, as shown in the table below.

- In 2005, the Form 1120S stated net income⁴ of \$9,757.
- In 2006, the Form 1120S stated net income of \$17,940.
- In 2007, the Form 1120S stated net income (loss) of (\$8,077).

Therefore, for the years 2005 to 2007, the petitioner did not have sufficient net income to pay the proffered wage remaining of \$44,644 in 2005, \$43,664 in 2006, and \$34,064 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.⁵ 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 for 2005-2007, as shown in the table below.

⁴ 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 17e (2005) and line 18 (2006 and 2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 14, 2011) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). In the present case, the petitioner’s income is found on page one of the Form 1120S tax returns.

⁵ 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 2005, the Form 1120S stated net current assets (liabilities) of (\$20,455).
- In 2006, the Form 1120S stated net current assets (liabilities) of (\$6,769).
- In 2007, the Form 1120S stated net current assets (liabilities) of (\$43,621).

For the years 2005-2006, the petitioner did not have sufficient net current assets to pay the proffered wage remaining of \$44,644 in 2005, \$43,664 in 2006, and \$34,064 in 2007.

Therefore, from the date the Form ETA 750 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 petitioner intends to employ the beneficiary as a replacement for subcontractors that the petitioner hired over the past three years. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel submits a letter from [REDACTED] the owner of the petitioning corporation, who verifies that the petitioner employed subcontractors (Exhibit A). In this letter, [REDACTED] lists the subcontractors' job functions and states that the beneficiary will be performing the same job duties as the subcontractors.⁶ However, the petitioner does not list the specific job functions of each individual subcontractor; rather, he only provides a list of the general work performed by all the subcontractors. The petitioner also submits a list of the names of subcontractors and the amounts that the petitioner paid to each during this period. The record does not list the hours worked by the named subcontractors, does not state their wages, verify their full-time employment, and state whether they also performed other kinds of work for the petitioner. The record does not reflect what portion of the amount paid to each subcontractor was for the payment of wages as opposed to the contract fees to the subcontractor.⁷ Further, the amounts paid to the subcontractors are not corroborated by any Forms 1099. For these reasons, the petitioner has not established that the petitioner will replace the subcontractors with the beneficiary or that USCIS should consider the amounts paid to the subcontractors as proof of the petitioner's ability to pay the beneficiary as of the priority date.

On appeal, counsel also argues that the petitioner has established the continuous ability to pay the proffered wage. He argues that the petitioner may submit financial statements such as profit and loss statements, bank account records or personnel records in lieu of initial evidence, and states that the AAO should consider the normal accounting practices of the petitioner even if the ability to pay is not reflected in the tax returns. Counsel asserts in his brief that the petitioner paid \$61,618.52 in 2007, \$67,814.00 in 2006 and \$94,372.75 in 2005 to subcontract cement masons. The record contains the petitioner's tax returns which corroborate contractor payments from 2005-2007 (Exhibit B). However, on review of the relevant tax years, the tax returns indicate the totals paid to all contractors by the

⁶ The job functions described in [REDACTED]'s letter are the same as those set forth in the Form ETA 750.

⁷ Such costs generally include profit, equipment, insurance, wages and other costs of business charged by a subcontractor in addition to specific wages for hours worked.

petitioner in those years, e.g. \$65,553 in 2007, \$74,862 in 2006 and \$102,073 in 2005, and do not break down what amounts were paid to subcontractors and/or to cement masons.⁸ Even were the AAO to accept the petitioner's handwritten notes as proof of the amounts paid to cement contractors, as noted above, the amounts paid are not specific as to wages, hours worked, duration of employment, etc. and may have included costs for the cement truck, mixer, the cement, unemployment and health insurance costs, profits and other costs in addition to wages. Further, as explained above, the petitioner has not sufficiently established whether the subcontractors provided additional services other than the duties of cement mason, or that the beneficiary will in fact replace the work performed by the subcontractors. Thus, the AAO will not consider the amounts paid to the subcontractors as available to the petitioner to pay the beneficiary's wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner 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 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, there is nothing extraordinary in the record that would parallel the circumstances in *Sonogawa*. The petitioner has been in business for 15 years and employs 23-30 people. Unlike

⁸ The petitioner's handwritten notes (Exhibit C) are not audited and not supported by IRS Forms 1099, contracts, or other documentation produced contemporaneously with the contracts' performance dates and do not name the source materials the petitioner referred to when listing the figures.

Sonegawa, the petitioner in this case has not shown any evidence reflecting the business' reputation or historical growth. Nor has it included any evidence or detailed explanation of the business' milestone achievements. The record does not contain any newspapers or magazine articles, awards or certifications indicating the business' accomplishments. Further, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has the petitioner established that it had uncharacteristically substantial expenditures from 2005-2007. The petitioner has not shown unusual circumstances causing it to earn less money than it would typically have made during these years. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the director's decision, the AAO finds that the beneficiary lacked the qualifying work experience necessary for this position. 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).

On the petitioner's I-140, dated May 16, 2008, the petitioner requested that the beneficiary be classified as a professional or skilled worker. Because the petitioner required no education for this position in the Form ETA 750, the AAO will interpret that to mean that the petitioner wishes to classify him as a skilled worker. 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 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 (Acting Reg'l Comm'r 1977). Here, the labor certification application was accepted on March 21, 2005.

As stated above, 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 relevant evidence in the record includes the beneficiary's employment letters. The record does not contain any other evidence relevant to the beneficiary's qualifications.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (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. at 406 (Comm. 1986). *See also. Mandany v. Smith*, 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).

The required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. In the instant case, the labor certification states that the position has the following minimum requirements:

Block 14:

Education: Nothing listed

Experience: 2 years in the job offered

Block 15: Nothing listed

The beneficiary states that he has the requisite two years of experience in the job offered or related occupation as required on the Form ETA 750 by the petitioner. On the Form ETA 750B, the beneficiary lists two positions:

1) Name and Address of Employer: Various jobs

No address listed

Name of Job: Not listed

Date Started – Date Left: 7/2003 – Present

Kind of Business: Not listed

No. of Hours Per Week: Not listed

Describe in Detail the Duties Performed: Not listed

2) Name and Address of Employer: [REDACTED]

Name of Job: Cement Mason

Date Started – Date Left: 01/2001 – 06/2003

Kind of Business: Construction Co.

No. of Hours Per Week: 40

Describe in Detail the Duties Performed: Spread, level, smooth and finish surfaces of poured cement and concrete to specified depth and texture w/use of hand/power tools. Check and attend to defective spots and patches holes with fresh cement and/or concrete. Remove rough spots w/grinder, chisel and hammer and patch with epoxy compound. Mold expansion joints; mix cement and concrete.

The regulation at 8 C.F.R. § 204.5(i)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In the present case, the petitioner submitted a job letter from [REDACTED]. As required by statute, this letter named the beneficiary, provided the months and years that the beneficiary worked for this company, and provided a description of the experience of the alien. However, the letter does not provide the name, address and title of the employer. Therefore, the record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification. For this additional reason, the petition must be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.