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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



B6

Date:

OCT 18 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 tailoring business. It seeks to employ the beneficiary permanently in the United States as a tailor ("tailors, dressmaker & custom sewers"). 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 16, 2008 denial, the issues in this case are 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 and whether the beneficiary meets the two year experience requirement set forth on the Form ETA 750.

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 3, 2003. The proffered wage as stated on the Form ETA 750 is \$10.95 per hour (\$22,776 per year). The Form ETA 750 states that the position requires two years experience in the proffered profession.

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 a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$113,862, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year runs on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 4, 2003, the beneficiary claims to have worked for the petitioner since August 2000.

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 from the priority date. Although the beneficiary stated on the ETA Form 750 that he had been employed by the petitioner since August 2000, the petitioner did not submit any documentation showing that it had paid the beneficiary any wages at any time.

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

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).

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, 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."

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 16, 2008 with the issuance of the director's decision denying the petition. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2007, the Form 1120 stated net income of \$7,814.
- In 2006, the Form 1120 stated net income of \$2,305.
- 2005 - Not submitted.
- 2004 - Not submitted.
- 2003 - Not submitted.

Therefore, for the years 2006 and 2007, the petitioner's tax returns do not state sufficient net income to pay the proffered wage. As previously stated, the priority date of the present petition is March 3, 2003. The petitioner is required to show its ability to pay the proffered wage from 2003 onward. The petitioner did not submit its tax returns for 2003, 2004 or 2005. Thus, the petitioner has not established that it had sufficient net income to pay the proffered wage in 2003, 2004 or 2005.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2007 and 2006, as shown in the table below.

- In 2007, the Form 1120 stated net current assets of (-\$1,208).
- In 2006, the Form 1120 stated net current assets of \$285.
- 2005 - Not submitted.
- 2004 - Not submitted.
- 2003 - Not submitted.

²According 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.

Therefore, for the years 2006 and 2007, the petitioner's tax returns do not state sufficient net current assets to pay the proffered wage. As noted above, the petitioner did not submit its tax returns for 2003, 2004 or 2005. Thus, the petitioner has not established that it had sufficient net current assets to pay the proffered wage in those years as well.

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.

USCIS records indicate that the petitioner has filed an additional Form I-140 petition on October 12, 2007. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). The proffered wage or the priority date for the additional worker is not stated in the record. Regardless of the wage, since the petitioner has not established its ability to pay the proffered wage of the present beneficiary based upon its net income or net current assets, it cannot show the ability to pay the proffered wage of another worker based upon its net income or net current assets.

On appeal, counsel submits reviewed financial statements for the petitioner and copies of the petitioner's 2006 and 2007 tax returns, as well as copies of 2006 and 2007 tax returns for [REDACTED] Inc. [REDACTED] Counsel states the petition is approvable and that a brief will be filed in support of the appeal within 30 days of the filing of the appeal (October 3, 2008). To date, no brief has been filed.

The tax returns of [REDACTED] submitted by the petitioner on appeal are not relevant to these proceedings. The EIN for this company is different from the EIN for the petitioner. [REDACTED] Inc. appears to be a separate legal entity with no obligation to pay the proffered wage. The tax returns, therefore, will not be considered. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The reviewed, but unaudited, financial statements of the petitioner for 2006 and 2007 will not establish the petitioner's ability to pay the proffered wage and counsel's reliance on them is misplaced.³ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on

³ As the petitioner submitted its tax returns for 2006 and 2007, those returns will be accepted as evidence of the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2) for the years 2006 and 2007.

financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The preparer of the reports states clearly that the reports are "reviewed" and not audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered 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 [REDACTED] 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 [REDACTED]. Her clients included [REDACTED]. The petitioner's clients had been included in the lists of the best-dressed [REDACTED]. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at [REDACTED]. The Regional Commissioner's determination [REDACTED] was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As [REDACTED], 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, the petitioner did not submit copies of its tax returns for 2003 through 2005 or any other accepted regulatory proscribed evidence pursuant to 8 C.F.R. 204.5(g)(2) for those years. Thus, it has not established its ability to pay the proffered wage based upon its net income or net current assets for those years. The petitioner's tax returns also state insufficient net income or net current assets to pay the proffered wage in 2006 and 2007. The tax returns submitted show low net income and low or negative net current assets. The gross income of the petitioner is low and that associated with a small business. The salaries paid noted on the 2006 and 2007 tax returns are \$19,035 and \$0 respectively,⁴ both of which are less than the proffered wage. The petitioner has

⁴ The petitioner states that it employs three workers, however, based on the stated salaries on the tax returns, it does not appear that the petitioner employs more than one worker. This raises the

sponsored another worker which, according to the evidence of record, it would be unable to pay wages in addition to any wages paid to the present beneficiary. The petitioner has not established that its reputation in the industry is such that it is more likely than not that it would have had the continuing ability to pay the proffered wage from the priority date onward. The record does not establish a period of sustained profitability for the petitioner since the priority date. Nor does it establish any unusual circumstances which could have adversely affected the petitioner's profitability on a temporary basis. 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.

As previously stated, the director also found that the petitioner had not established that the beneficiary met the two year experience requirement of the Form ETA 750 and denied the petition

question of whether the job offered is bona fide. The director questioned whether the beneficiary was related to the petitioner. The petitioner acknowledges that the beneficiary is the owner's brother, and states that the beneficiary has no ownership interest. The petitioner further states that DOL did not inquire whether there was any familial relationship. We note that the second sponsored worker also appears to be related. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). However, we additionally note that a relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). Based on the petitioner's tax returns, the low salaries paid to all workers and the fact that the beneficiary is related to the petitioner, it is not clear that a bona fide full-time job offer exists from the priority date onward. The job offer must be for full-time employment. *See* 20 C.F.R. § 656.3. The petitioner should address this issue in any further filings.

on this basis as well. 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. 401, 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). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The regulation at 8 C.F.R. § 204.5(l)(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.

Experience letters include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The petitioner has offered no evidence of the beneficiary's qualifying work experience, and did not address the matter on appeal. For this additional reason, the appeal must be denied.

Accordingly, 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.