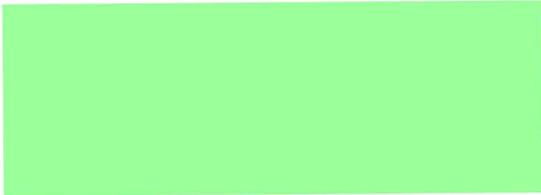


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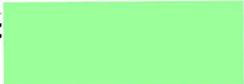


U.S. Citizenship  
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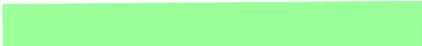


Date: **APR 26 2012**

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

The petitioner is a carpentry and woodworking business. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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 February 24, 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)(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 April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$27.82 per hour (\$57,865.60 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.<sup>1</sup>

On appeal, counsel submitted a brief; the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2001; a copy of the employment letter which was submitted with the I-140 petition; and a document dated April 14, 2009 entitled "Summary of Account and Services for [REDACTED]"

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 1995, to have a gross annual income of \$323,860, and currently to employ 4 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claims to have worked for the petitioner since 1997.

On appeal, counsel refers to the petitioner's 2001 tax return and the copy of the petitioner's money market account statement to claim that the petitioner has the ability to pay the proffered wage. Further, counsel notes that "CIS may consider the overall magnitude of the entity's business activities and the totality of the circumstances concerning a petitioner's financial performance, when determining its ability to pay the proffered wage."

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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 Forms 1099-MISC which it issued to the beneficiary in 2002, 2003, 2004, 2005, 2006 and 2007. The beneficiary's IRS Forms 1099 show compensation received from the petitioner, as shown in the table below.

- In 2002, the Form 1099 stated compensation of \$10,500.00.
- In 2003, the Form 1099 stated compensation of \$15,000.00
- In 2004, the Form 1099 stated compensation of \$15,600.00.
- In 2005, the Form 1099 stated compensation of \$18,500.00.
- In 2006, the Form 1099 stated compensation of \$19,850.00.
- In 2007, the Form 1099 stated compensation of \$21,100.00.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently through 2007. However, the petitioner has provided evidence demonstrating that it paid a portion of the proffered wage in 2002, 2003, 2004, 2005, 2006 and 2007. Thus, since the petitioner paid the beneficiary a portion of the proffered wage for the years identified, it must demonstrate the ability to pay the difference between the wages paid and the proffered wage for 2002, 2003, 2004, 2005, 2006 and 2007. The petitioner must demonstrate the ability to pay the full proffered wage for 2001.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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." *Chi-Feng Chang* at 537 (emphasis added).

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 January 22, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. 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 would be the most recent return available. However, though requested to provide the tax return for any year in which the petitioner did not pay the beneficiary the full proffered wage, the petitioner provided the tax return for 2001 only. The petitioner's tax returns demonstrate its net income for 2001, as shown in the table below.

- In 2001, the Form 1120 stated a net loss of \$526.

Therefore, for 2001, the petitioner did not have sufficient net income to pay the full proffered wage. Nor did the petitioner demonstrate sufficient net income to be able to pay the difference between wages already paid and the proffered wage for 2002, 2003, 2004, 2005, 2006 or 2007.

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

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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.<sup>2</sup> 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 2001 only, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$85,814.00.

Therefore, for the year 2001, the petitioner had sufficient net current assets to be able to pay the proffered wage. However, for the years 2002, 2003, 2004, 2005, 2006 and 2007 the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the proffered wage.

The record of proceeding also contains IRS Forms W-2 which were issued to [REDACTED] in 2002, 2003, 2004, 2005, 2006 and 2007 and the U.S. Individual Income Tax Returns (Form 1040) filed by [REDACTED] for the same years.<sup>3</sup> The owner of the petitioner is submitting his personal income statements in an effort to demonstrate that he has funds that are available to pay the proffered wage.

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." As such, the AAO cannot accept the individual tax returns of Mr. [REDACTED] to establish the petitioner's ability to pay the proffered wage from the priority date.

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<sup>2</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>3</sup> The evidence establishes that [REDACTED] are the same person. On Form I-140 and Form ETA 750, the owner of the petitioning entity is identified as [REDACTED]. Public records, accessed through WestLaw, indicate that [REDACTED] is registered as the owner of [REDACTED] which is located at [REDACTED].

Further, the signatures which appear on both Form I-140 and ETA 750 are identical to those which appear on the Forms 1040 filed by [REDACTED].

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's federal income tax return shows sufficient net current assets "to cover the salary of \$27.82 hr. (\$57,865.60 per year) and establish the petitioner can pay the proffered wage." As articulated above, the petitioner has demonstrated the ability to pay for 2001. However, the petitioner must demonstrate the ability to pay the proffered wage not only on the priority date but continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The petitioner has not submitted tax returns, audited financial statements, or annual reports for 2002-2007 to establish the ability to pay.

On appeal, counsel also asserts that the petitioner has \$100,000.00 in a money market account and that these funds represent "immediate cash" which is "available to cover the proffered wage." In order to substantiate the assertion, counsel submitted a summary of the petitioner's account which shows that the petitioner, in fact, deposited \$100,000 into an account on April 14, 2009, more than two weeks after the filing of the Form I-290B appeal in this case.<sup>4</sup>

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Further, the money market account statement reflects a deposit which was made on a single day. Counsel's reliance on the balance in the petitioner's money market account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statement somehow reflects additional available funds that are not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that is typically considered to determine the petitioner's net current assets.<sup>5</sup> Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates

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<sup>4</sup> The account summary was submitted with counsel's brief received by the AAO on April 27, 2009, one month after the petitioner filed the appeal.

<sup>5</sup> As the petitioner has not submitted tax returns for 2002-2007, Schedules L are not of record. Cash such as that in the petitioner's money market account would be reflected as a net current asset on its Schedule L for 2009, the year the account was opened, and in any year thereafter that reflects a positive balance.

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, the petitioner has provided tax returns for only one year, 2001. The petitioner has provided no other evidence which reflects the size, scope, nature or history of the petitioner's business operations. Therefore, the petitioner has not established a pattern of increasing profitability in the context of economic shortfalls. Neither has the petitioner demonstrated that it had any uncharacteristic financial disruptions which might account for its inability to pay the proffered wage for the years under consideration. 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.

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

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 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); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the proffered position requires two years of experience in the job offered, performing the following duties:

Constructs, erects, installs, and repairs structures and fixtures of wood, plywood, and wallboard, using carpenter's handtools [sic] and power tools. Shapes materials to prescribed measurements, using saws, chisels, and planes. Builds, lays out, and installs partitions and cabinet work. Applies shock absorbing, sound-deadening and decorative paneling to ceilings and walls.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a carpenter working for [REDACTED] from September 1989 until October 1994.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains one letter dated February 22, 2004 from [REDACTED]

In his letter, [REDACTED] states that the beneficiary worked for his company from November 1989 to December 1993. However, according to Form ETA 750B, the beneficiary worked for [REDACTED], in [REDACTED] from September 1989 until October 1994. The director noted the discrepancy in his request for evidence and asked that the petitioner supply independent, objective evidence demonstrating where the truth lies in this situation. In response, the petitioner provided an affidavit which represents the beneficiary's own testimony regarding his prior work experience. Such evidence is neither independent nor objective and, therefore, fails to meet the burden of proof in this proceeding. On appeal, counsel provided no new independent, objective evidence in support of the beneficiary's qualifications. Rather, counsel supplied a copy of the employment letter that was initially submitted with the I-140 petition and stated that the "beneficiary can not [sic] remember exactly the dates that he worked years ago." As such, the petitioner has not overcome the cited discrepancy in the dates of qualifying employment, as initially noted by the director. As the credibility of the letter has been called into question and the inconsistencies remain unresolved, the petitioner has not established that the beneficiary has the claimed qualifying experience.

The petitioner provided no other documentary evidence in support of the beneficiary's qualifications. The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position. For this additional reason the petition must be denied.

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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.