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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

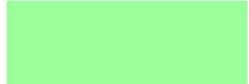


U.S. Citizenship
and Immigration
Services



DATE: AUG 29 2012 OFFICE: NEBRASKA SERVICE CENTER

FILE:



IN RE:

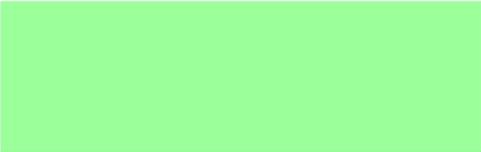
Petitioner:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew for".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a construction business. It seeks to permanently employ the beneficiary in the United States as a carpenter apprentice. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. See 8 C.F.R. § 204.5(d).

The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position according to the terms of the labor certification as of the priority date or that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed 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.

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.²

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 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).

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: Not required.

High School: 3 years.

College: Not required.

College Degree Required: Not required.

Major Field of Study: None.

TRAINING: 4 years.

Type of Training: Carpenter.

EXPERIENCE: None required.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification lists employment with the petitioner from November 22, 1999 to the date of signing the form on April 27, 2001. The number of hours worked per week is not stated. The labor certification lists employment with [REDACTED] from April 20, 1998 to October 3, 1998 for eight to ten hours per week. The employer's address is not stated. The labor certification lists employment with [REDACTED] from November 24, 1998 to July 20, 1999 for eight to ten hours per week. The employer's address is not stated. No other experience is listed, and no training is listed. The labor certification also indicates that the beneficiary completed three years of high school in Mexico in July 1995 and received a bachillerato. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

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.

The record contains three letters. The first letter dated July 15, 2009 is from [REDACTED] attorney, on [REDACTED] letterhead stating that the company employed the beneficiary as a carpenter from January 1995 to April 29, 1997. The letter does not indicate whether the employment was full or part time, does not describe the duties the beneficiary performed and does not provide any information about any training the beneficiary received from [REDACTED]. Further, the experience and/or training are not listed on the labor certification.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The second letter, dated March 23, 2009, is from [REDACTED] owner of [REDACTED]. The letter states that the company employed the beneficiary from July 1997 to July 1998 and that the beneficiary progressed from apprentice to a carpenter helper. The letter is not on company letterhead, does not indicate whether the employment was full or part time, does not describe the duties the beneficiary performed and does not provide any information about training the beneficiary received from [REDACTED]. Further, the dates of employment listed in the letter are inconsistent with the dates of employment the beneficiary provided on the labor certification.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent

competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The record does not contain independent, objective evidence to resolve the inconsistencies. Without evidence to reconcile the inconsistencies, the beneficiary's training with [REDACTED] has not been established.

The third letter dated March 13, 2009 is from [REDACTED] and [REDACTED] partners on [REDACTED] letterhead stating that the company employed the beneficiary from November 22, 1999 to the present. The letter indicates that the beneficiary was hired as a laborer and trained on the job with [REDACTED] by various foremen and partners. The beneficiary's training included training in carpentry, plumbing, and electrical trades and he advanced progressively to his current position of carpenter. The letter does not indicate how much time was spent on each of the trades. The letter also does not list how long the beneficiary's training lasted.

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).

The priority date in this case is April 30, 2001. The labor certification requires that the beneficiary possess four years of training as a carpenter on April 30, 2001. The beneficiary began his employment with the petitioner on November 22, 1999. The period from November 22, 1999 to April 30, 2001 is 17 months. Even if the AAO accepted the petitioner's letter as evidence that all of the beneficiary's training with the petitioner from November 22, 1999 to April 30, 2001 was in the carpentry trade and that his training was full-time throughout that period, it would be insufficient to establish that the beneficiary possessed four years of training as a carpenter by the priority date.

Further, the record does not contain evidence that the beneficiary completed the three years of high school required on the labor certification.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum experience and education requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

The director also determined that the petitioner had not established that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

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

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$25.17 per hour (\$52,353.60 per year based on 40 hours per week).

The record indicates the petitioner is structured as a domestic general partnership and filed its tax returns on IRS Form 1065. On the petition, the petitioner claimed to have been established in 1991 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have worked for the petitioner since 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 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 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 demonstrated that it paid the beneficiary wages as shown in the table below:

- In 2001, the IRS Form W-2 shows wages paid of \$26,508.70.
- In 2002, the IRS Form W-2 shows wages paid of \$27,959.40.
- In 2003, the IRS Form W-2 shows wages paid of \$32,987.01.

- In 2004, the IRS Form W-2 shows wages paid of \$33,002.88.
- In 2005, the IRS Form W-2 shows wages paid of \$38,521.14.
- In 2006, the IRS Form W-2 shows wages paid of \$41,304.25.
- In 2007, the IRS Form W-2 shows wages paid of \$47,498.
- In 2008, the IRS Form W-2 shows wages paid of \$49,932.
- In 2009, paystubs reflect wages paid³ of \$9,018.75.

The petitioner paid the beneficiary less than the proffered wage each year from 2001 to 2009. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2001 through 2009, as represented in the following table:

- In 2001, difference of \$25,844.90.
- In 2002, difference of \$24,394.20.
- In 2003, difference of \$19,366.59.
- In 2004, difference of \$19,350.72.
- In 2005, difference of \$13,832.46.
- In 2006, difference of \$11,049.35.
- In 2007, difference of \$4,855.60.
- In 2008, difference of \$2,421.60.
- In 2009, difference of \$43,334.85.

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), *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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

³ The record contains paystubs from February and March 2009. The wages paid amount is found on the March 12, 2009 paystub as the year to date earnings. The record does not contain any other paystubs for 2009.

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).

In *K.C.P. Food*, 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).

The record before the director closed on March 25, 2009 with the receipt by the director of the petition. The petitioner did not submit copies of any federal tax returns with the petition. However, on appeal, the petitioner has submitted its tax returns for 2001 to 2008.

The petitioner’s tax returns demonstrate its net income for 2001 to 2008 as detailed in the table below.

- In 2001, the petitioner’s Form 1065 stated net income of \$173,116.⁴

⁴ For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the IRS Form 1065, U.S. Return of Partnership Income. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner’s Schedule K has relevant entries for additional income, credits, deductions and other adjustments for 2001 to 2008. Therefore, its net income is found

- In 2002, the petitioner's Form 1065 stated net income of \$221,341.
- In 2003, the petitioner's Form 1065 stated net income of \$151,261.
- In 2004, the petitioner's Form 1065 stated net income of \$(171).
- In 2005, the petitioner's Form 1065 stated net income of \$347,352.
- In 2006, the petitioner's Form 1065 stated net income of \$220,863.
- In 2007, the petitioner's Form 1065 stated net income of \$192,174.
- In 2008, the petitioner's Form 1065 stated net income of \$81,543.

Therefore, for the years 2001, 2002, 2003, 2005, 2006, 2007 and 2008 the petitioner has established that it had sufficient net income to pay the difference between the wages paid and the proffered wage. For the year 2004, the petitioner has not established that it had sufficient net income to pay the difference between the wages paid and the proffered wage.

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.⁵ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return for 2004 stated net current assets of -\$161,160. Therefore, for the year 2004, the petitioner did not establish that it had sufficient net current assets to pay the differences between the wages paid and the proffered wage.

Thus, 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.

As noted by counsel on appeal, 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

on line 1 of the Analysis of Net Income (Loss) of Schedule K.

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.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 claims to have been in business since 1991 and to have seven employees. Counsel states that the petitioner paid salaries and wages of \$59,889 in 2004 and notes that the petitioner's net income rose in 2005. The tax returns in the record reflect that the petitioner's gross receipts declined each year from 2002 to 2004 and from 2005 to 2008. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities in 2004. No evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. No evidence was provided to document that the beneficiary is replacing a former employee or an outsourced service. 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.

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.