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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: **AUG 27 2012** Office: NEBRASKA SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other Worker 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility for the elderly (RCFE). It seeks to employ the beneficiary permanently in the United States as a homecare aide/caregiver. As required by statute, the petition is accompanied by an ETA Form 9089 labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to submit evidence to demonstrate its ability to pay the proffered wage or that the beneficiary had the required training and experience as of the priority date. 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 March 3, 2009 denial, the issues in this case are whether the petitioner demonstrated the ability to pay the proffered wage and whether the beneficiary had the required experience and training as of the priority date.

The AAO maintains plenary power to review each appeal on a *de novo* basis. *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 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment

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).

Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on December 1, 2006. The offered wage as stated on the ETA Form 9089 is \$8.50 per hour (\$17,680 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation.² On the petition, the petitioner claimed to have been established in 1999 and to currently employ two workers. On the ETA Form 9089, signed by the beneficiary on May 12, 2008, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. Comm. 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. Comm. 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. On appeal, counsel states that the beneficiary received \$17,680 from the petitioner in 2007. Despite this statement of counsel, no evidence was submitted to demonstrate that the petitioner paid the beneficiary any amount in 2007 or any other year. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).³ Going on record without

² The Federal Employer Identification Number (FEIN) supplied on the tax documents as well as the ETA Form 9089 was returned as nonexistent when queried in publicly available databases. Similarly, the e-mail address provided on the ETA Form 9089, [REDACTED] appears to be unrelated to the business of the RCFE. In any further filings, the petitioner should submit evidence concerning these discrepancies. "[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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

³ Counsel stated that evidence of the beneficiary's salary was provided, however, no objective evidence such as canceled checks, pay stubs, Forms W-2 have been submitted to establish wages paid to the beneficiary.

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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. 878, 881 (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 tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. “[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*, 719 F.Supp. 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 May 16, 2008 with the receipt by the director of the petitioner’s initial submission. As of that date, the petitioner’s 2006 federal income tax return was the most recent return available. The petitioner submitted no tax returns or other evidence concerning its ability to pay with its initial submission. On appeal, the petitioner submitted its 2007 tax return and an application for an extension of time in which to file its 2008 return. The 2007 tax return states the petitioner’s net income as \$3,090. This amount is less than the proffered wage and is therefore insufficient to establish the petitioner’s ability to pay the proffered wage for that year. Counsel stated in his attachment to the appeal that the petitioner was providing a copy of the 2006 tax return, however, no such tax return appears in the record. Thus, the petitioner has not established the ability to pay the beneficiary the certified wage in either 2006 or 2007 from its net income.

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 assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁴ On the Form 1120, 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. On the Form 1120-A, a corporation’s year-end current assets are shown on Part III, lines 1 through 6. Its year-end current liabilities are shown on lines 13, 14, and 16. 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 2006 tax return was not submitted. The 2007 tax return shows net current assets of -\$8,135. Negative net current assets are insufficient to demonstrate the petitioner’s ability to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner did not establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income, or net current assets.

⁴ 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.

The petitioner submitted a profit and loss statement dated March 23, 2009. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. 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.

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 (BIA 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.

The petitioner submitted no regulatory proscribed financial information for 2006. The petitioner's 2007 Form 1120 demonstrates a net income of \$3,090 and net current assets of -\$8,135. The petitioner submitted no information or evidence about its reputation or any similarities to liken the petitioner's situation to that of *Sonogawa*. The evidence does not demonstrate that the petitioner had one unusual or extraordinary year or that the financial picture presented by its tax return for 2007 is inaccurate. 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.

In addition to the issue as to whether the petitioner has the ability to pay the proffered wage, the director found that the petitioner failed to adequately document that the beneficiary has the required training and experience for the position offered. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(l)(3)(i) specifies for the classification of an other worker that:

(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.

* * *

(D) *Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The ETA Form 9089 requires a high school education, three months of training in elder caregiving or as a health care aide or alternatively, an associate's degree in nursing or medicine or status as a registered nurse, nursing assistant, or certified nursing assistant. In addition to these requirements, the ETA Form 9089 also requires certification in CPR, First Aid, and Health Screening and the worker "must know food nutrition, food preparation, food storage and menu planning, must be willing to be fingerprinted to be submitted to the Department of Justice" and that the worker "must be a live-in staff member." The petitioner submitted no evidence before the director regarding the beneficiary's qualifications. On appeal, the petitioner submitted a letter from [REDACTED] the [REDACTED] stating that the beneficiary worked with the elderly from May 1, 2006 to November 15, 2006. The letter states that the beneficiary provided "personal assistance, medical attention, emotional support and cleaning assistance for the elderly ... [and] cleaning services at the residences ... [and] also received knowledge in the preparation of meals and in helping feed the elderly." This letter does not state [REDACTED] position with [REDACTED] and does not state whether the beneficiary worked in a full-time or part-time capacity. In addition, the beneficiary failed to list this experience on Form ETA 750B. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). The petitioner also submitted a letter from [REDACTED] [REDACTED] stating that the beneficiary was employed as a general medical assistant from March 12, 2004 to September 10, 2005. This letter is insufficient to establish that the beneficiary received training in elder caregiving or as a health care aide as required by the terms of the labor certification.

In regards to the training and specific requirements of the labor certification, the petitioner also submitted a January 7, 2008 Certificate of Completion for "Medication - Annual Class" conducted by one of its owners, a Health Screening Report dated April 11, 2007 including a tuberculosis screening result, a certification in CPR/Basic First Aid issued March 18, 2009. These trainings and certifications are dated after the priority date of the labor certification. As a result, they are insufficient to prove that the beneficiary met the specific requirements of the labor certifications prior to the certification date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. The petitioner also submitted a first aid certification dated April 26, 2006, which is sufficient to satisfy that requirement of the labor certification. No evidence was submitted that the beneficiary had the

required training, that he had the required health screening, or that he possessed the specific skills in meal and food preparation as required by the specific terms of the labor certification. In addition, no evidence was submitted to show that the beneficiary submitted or was willing to submit fingerprints or that he was willing to work as a live-in caregiver. As a result, we are unable to determine that the beneficiary possessed the training and specific requirements required by the labor certification by the time of 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.