

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: DEC 26 2012

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), approved the immigrant visa petition. On March 17, 2010, the director issued a Notice of Intent to Revoke (NOIR). The petition was revoked on September 13, 2010. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as [REDACTED]. It seeks to permanently employ the beneficiary in the United States as an evening manager. 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). The director revoked the petition, finding that the beneficiary failed to demonstrate the requisite experience for the job.

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 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 Department of Labor accepted the Form ETA 750 on April 30, 2001. On the Form ETA 750, Question #14, the petitioner requires a minimum of high school completion and two years of experience in the job offered as evening manager prior to the priority date.

On Form ETA 750B, the beneficiary claims to have completed H.P. high school [REDACTED] India from May 1963 to May 1973. The beneficiary also claims to have worked at [REDACTED] & Company in India from April 1987 to May 1995 as a general manager.

The record fails to contain evidence of the beneficiary's completion of high school. The record does, however, contain three employment letters from [REDACTED]. The first letter, dated June 30, 1995, from [REDACTED] President, states that the beneficiary worked for the company from April 1987 to May 1995. The letterhead contains only the company name and general address with no phone number or logo. As noted by the director, the company name in the letterhead contains a spelling error and, thus, lacks credibility as evidence of the beneficiary's experience.

On appeal, counsel asserts that the employment letter was prepared by an individual who was not very familiar with the English language, resulting in a typographical error. Counsel asserts that this is a harmless error and does not affect the merits of the case. Counsel submits two additional letters from [REDACTED] both dated September 20, 2010 and signed by [REDACTED]

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). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Proprietor.² One letter states that the company was established in 1961 and describes the company. The other letter states that the beneficiary worked for the company from April 1987 to June 1995. These letters have a significantly different letterhead than the letterhead dated June 30, 1995 with regard to the font, format, addition of a logo and phone numbers, and contains no spelling errors. The experience letter also states an employment end date of June 1995; whereas, the initial experience letter stated May 1995. No explanation for the significant difference in letterhead or the inconsistent dates is provided. The significant contrast and inconsistencies between the beneficiary's experience letters casts doubt on the overall credibility of the beneficiary's work experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

On appeal, the petitioner also provides tax invoices for [REDACTED] bank statements for [REDACTED], a letter from [REDACTED] asserting that [REDACTED] and Company has been a client of the bank for 22 years, and an Allotment of Tax Payer Identification Number (TIN) issued [REDACTED]. The bank statements and tax invoices are dated in 2010. This evidence does not document the existence of [REDACTED] from 1987 to 1995, the dates of the beneficiary's claimed employment. Nor does this evidence document the beneficiary's employment as a general manager. The Allotment of TIN is dated in 2003 and does not bear any official or government seal. The letter from the bank does not verify the beneficiary's employment with [REDACTED] and only supports the existence of the company since 1998 (22 years prior to the date of the letter).

On appeal, counsel also claims to submit the beneficiary's personal tax returns reflecting salaries received from [REDACTED] from 1988 to 1994. These documents contain the name [REDACTED] which does not appear on the instant petition or Form ETA 750B. No other document in the record indicates that the beneficiary has a middle name or alias. There is no evidence in the record to indicate that [REDACTED] and the beneficiary are one and the same person. Further, these documents fail to establish that the beneficiary's experience meets the requirements of the labor certification, as no job description is provided.

Given the above, the AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum 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.

² A search of the Westlaw database reveals that a company named [REDACTED] exists with principal addresses in Texas and Georgia in the United States. [REDACTED] lists its executives as [REDACTED]

Another issue in this matter is whether the petitioner has established the continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$29.44 per hour (\$61,235.20 per year based on forty hours per week). The Form ETA 750 states that the position requires completion of high school and two years of experience in the job offered as an evening manager.

The record indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ more than ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on June 12, 2007, 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 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date or subsequently.

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 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 at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on April 21, 2010 with the receipt by the director of the petitioner's submissions in response to the director's Notice of Intent to Revoke. As of that date, the petitioner's 2010 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2009 is the most recent return available. The petitioner failed to submit its tax returns for 2009. The petitioner's tax returns demonstrate its net income for 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net income³ of \$20,587.
- In 2002, the Form 1120S stated net income of \$26,250.
- In 2003, the Form 1120S stated net income of \$31,062.
- In 2004, the Form 1120S stated net income of \$38,219.
- In 2005, the Form 1120S stated net income of \$39,516.
- In 2006, the Form 1120S stated net income of \$33,766.
- In 2007, the Form 1120S stated net income of \$31,294.
- In 2008, the Form 1120S stated net income of \$33,402.

Therefore, for the years 2001 through 2008, the petitioner did not have sufficient net income to pay the proffered wage of \$61,235.20.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the

³ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 11, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 through 2008, the petitioner's net income is found on line 21 of page one of its tax returns.

petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2008, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$25,406.
- In 2002, the Form 1120S stated net current assets of \$82,951.
- In 2003, the Form 1120S stated net current assets of \$48,891.
- In 2004, the Form 1120S stated net current assets of \$92,156.
- In 2005, the Form 1120S stated net current assets of \$135,643.
- In 2006, the Form 1120S stated net current assets of \$172,611.
- In 2007, the Form 1120S stated net current assets of \$196,712.
- In 2008, the Form 1120S stated net current assets of \$126,359.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 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*,

⁴According 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.

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 record reflects that the petitioner has been doing business since 1999. On appeal, counsel asserts that, based on the financial data, the petitioner is "on the road to prosperity." The evidence submitted does not reflect a pattern of significant income growth between 2001 and 2008. The petitioner's net current assets were inconsistent from 2001 through 2003, steadily grew from 2004 through 2007, but then dropped in 2008. No explanation was provided for the decline. In 2001 and 2003 the petitioner's tax returns reflect that it paid salaries and wages of \$12,000 and \$30,200, respectively. To pay the beneficiary, the petitioner would have had to more than double its salaries paid in 2003, and pay more than five times of all salaries in 2001. The petitioner failed to provide any regulatory-prescribed evidence of its ability to pay the proffered wage in 2009. In addition, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 1999. Nor has it included any evidence or detailed explanation of the corporations' milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments. 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 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.