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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: **JAN 04 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook preparing Cantonese-Style dishes. 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 the petition was based on a bona fide job offer but rather that a pre-existing familial relationship likely affected the labor certification process. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 July 17, 2008 and November 13, 2008 denials, the primary issue in this case is whether or not the petition was based on a bona fide job offer and whether a pre-existing familial relationship likely affected the labor certification process.

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 director issued a Notice of Intent to Deny (NOID) in which he noted that a review of service records showed that a familial relationship existed between the beneficiary, the president of the petitioner and the beneficiary of another I-140 petition. Hence, the director requested that the petitioner submit verifiable documentary evidence that a bona fide job opportunity exists and was open to qualified U.S. workers. The petitioner responded to the director's NOID by submitting an affidavit signed by the president of the petitioner in which he stated that the beneficiary (and the beneficiary of I-140 petition [REDACTED]) were his nephews. In the decision, the director determined that it did not appear that the familial relationship was purposefully hidden from the DOL, but that this finding did not preclude the director from making such an inquiry. Consequently, the director denied the petition.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a bona fide job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

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

Id. at 405. Furthermore, a relationship invalidating a bona fide job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart* 374, 2000-INA-93 (BALCA May 15, 2000).

In this matter, the petitioner admits that the beneficiary is the nephew of the petitioner's owner. Although the petitioner claims in an affidavit to have conducted its recruitment in accordance with the DOL's procedures, the petitioner has not submitted any evidence establishing that this was a bona fide job opportunity available to U.S. workers. Going on record without 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)). Given the familial relationship between the parties, it is more likely than not that a bona fide job opportunity available to all qualified U.S. workers never existed. The appeal is dismissed.

Beyond the decision of the director, the appeal will also be dismissed because the petitioner has failed to establish its continuing ability to pay the proffered wage or to establish that the beneficiary is qualified for the proffered position with two years of work experience in the job offered.

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 DOI.. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on July 18, 2003. The proffered wage as stated on the Form ETA 750 is \$11.82 per hour based upon a 40 hour work week (\$24,585.60 per year). The Form ETA 750 at part 14 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.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and that it employs eight 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 15, 2003, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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. 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. The petitioner has not submitted any evidence to demonstrate that it employed the beneficiary.

If, as in this case, 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). 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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

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 May 5, 2008, with receipt of the petitioner's response to the director's Request for Evidence (RFE). The petitioner's 2006 tax return is the most recent return available before the director. The proffered wage is \$24,585.60.

The petitioner's IRS Form 1120S² tax returns demonstrate its net income as shown in the table below:

- In 2003, the Form 1120S stated net income of \$4,805.00.
- In 2004, the Form 1120S stated net income of \$5,751.00.
- In 2005, the Form 1120S stated net income of \$7,254.00.
- In 2006, the Form 1120S stated net income of \$35,484.00

Therefore, for the years 2003, 2004, and 2005, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary. It is also noted that although the evidence shows that the petitioner had net income which exceeded the proffered wage in 2006, USCIS electronic records show (and the president of the petitioner admits) that the petitioner has filed at least one other I-140 petition which has been pending during the time period relevant to the instant petition. That petition, [REDACTED] has a priority date of July 18, 2003 and a proffered wage of \$24,585.60. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2). Here the petitioner did not have sufficient net income to pay both proffered wages in 2006.

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 petitioner's current assets and current liabilities.³ A corporation's year-end current assets are

² 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 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 28, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K, the petitioner's net income is found on Schedule K of its tax returns.

³According 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

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 return demonstrates its net current assets as shown in the table below:

- In 2003, the Form 1120S stated net current assets of \$30,196.00.
- In 2004, the Form 1120S stated net current assets of \$42,561.00.
- In 2005, the Form 1120S stated net current assets of \$56,322.00.
- In 2006, the Form 1120S stated net current assets of \$96,791.00.

As noted above, although the evidence shows that the petitioner had net current assets which exceeded the proffered wage in 2003, 2004, 2005, and 2006, USCIS electronic records show (and the president of the petitioner admits) that the petitioner has filed at least one other I-140 petition which has been pending during the time period relevant to the instant petition. The petitioner did not have sufficient net current assets to pay both proffered wages in 2003 and 2004.

Therefore, from the date the labor certification 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 the record does not establish that the petitioner had the ability to pay the proffered wage as of the priority date, the appeal will be dismissed for this additional reason.

In addition, the petitioner has failed to establish that the beneficiary has two years of experience as a restaurant cook. On the Form ETA 750 and I-140, the petitioner describes the job to be performed as:

Cooks Cantonese-style dishes, dinner and other food according to recipes.
Prepares meats, soups, sauces, vegetables and other food prior to cooking.
Seasons and cooks food Cantonese-style according to prescribed methods.
Portions and garnishes food and serves food to waiter on order. Plans menus and develops new dishes.

The petitioner submitted two translated letters dated May 20, 2003, from the general manager of the [REDACTED] who stated that the beneficiary was employed by the restaurant as a cook from January 1995 through October 1996, and that the beneficiary was promoted to be a chef in October 15, 1996, and continues to work in that position. The manager also stated that the beneficiary's job is to "cook dishes," and that "he could create new style dishes." However,

cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the employment letters do not include a specific description of the job duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's priority date, which as noted above, is July 18, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

As the record does not establish that the beneficiary had the qualifications stated on the Form ETA 750 as of the priority date, the appeal will be dismissed for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.