



U.S. Citizenship
and Immigration
Services

(b)(6)

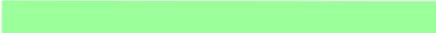


Date: **MAR 15 2012**

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:

SELF-REPRESENTED

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

(b)(6)

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

The petitioner is a building management enterprise. It seeks to employ the beneficiary permanently in the United States as a building superintendent under section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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 the petitioner failed to demonstrate its ability to pay the wage pursuant to 8 C.F.R., § 204.5(g)(2), and the petitioner failed to establish the beneficiary met the minimum requirements of the job offer per the labor certification as required by 8 C.F.R. § 204.5(l)(3)(ii)(B).¹

On appeal, the petitioner submitted a brief relating to its ability to pay the proffered wage as well as a letter attesting to the beneficiary's work experience from his former employer and the corresponding translation.

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.

As set forth in the director's December 22, 2008 denial, at issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

¹ The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the petitioner. The designated agency on the Form G-28 has been ordered to cease providing immigration services by the Attorney General of the State of New York. Therefore, the AAO will not recognize the attorney in this proceeding. See 8 C.F.R §§ 1.1(f), 103.2(a)(3), 292.

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). 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001, which is the priority for this case. The proffered wage as stated on the Form ETA 750 is \$25.37 per hour (\$52,769 per year). The Form ETA 750 states that the position requires two years of experience in the job offered as a supervisor of janitorial services.

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.³

The evidence in the record of proceedings shows that the petitioner is structured as an S corporation. On the petitioner's income tax returns, the petitioner claimed to have been established on July 6, 1992 and to employ 3 workers. Further the income tax returns indicate the petitioner's fiscal year is based on the calendar year. On the Form ETA 750, signed by the beneficiary on April 4, 2001, 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 750 labor certification application establishes a priority date for any immigration petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 considerations. *See Matter of Sonegawa*, 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

³ 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. § 203.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 established that it employed and paid the beneficiary at less than the proffered wage during the period from the priority date of April 30, 2001 to the present.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

The petitioner submitted copies of the beneficiary's Forms W-2 for 2001 through 2007, however the Forms W-2 for 2001 and 2002 represent wages paid by an entity other than the petitioner and will not be considered. Wages paid to the beneficiary by the petitioner are reflected below. The amount in parentheses reflects the difference between the wages paid and the proffered wage.

- In 2003, the Form W-2 shows the petitioner paid the beneficiary \$1,912.50 (\$50,856.50)
- In 2004, the Form W-2 shows the petitioner paid the beneficiary \$35,178.84 (\$17,590.16)
- In 2005, the Form W-2 shows the petitioner paid the beneficiary \$35,267.56 (\$17,501.44)

- In 2006, the Form W-2 shows the petitioner paid the beneficiary \$36,167.35 (\$16,601.65)
- In 2007, the Form W-2 shows the petitioner paid the beneficiary \$38,319.43 (\$14,449.57)

If, as in this case, the petitioner has employed and paid the beneficiary, the USCIS will look to the petitioner's tax returns to establish whether the petitioner had sufficient funds to pay the difference between the actual wages paid and the proffered wage. In this case the petitioner did not provide income tax returns for 2001, 2002 or 2007.⁴ The petitioner's tax returns demonstrate its net income for 2003 to 2006, as shown in the table below.

- In 2003, the Form 1120S stated net income⁵ of \$33,283.
- In 2004, the Form 1120S stated net income of (\$90,340).
- In 2005, the Form 1120S stated net income of (\$103,186).
- In 2006, the Form 1120S stated net income of \$22,413.

Therefore, for the years 2001 through 2005 and 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage. For 2006, the petitioner's net income, plus the wages actually paid to the beneficiary are sufficient to establish ability to pay for that year only.

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.⁶ A corporation's year-end current assets are shown

⁴ The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii).

⁵ 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) line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 30, 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 additional income and credits shown on its Schedule K for each year submitted, the petitioner's net income is found on Schedule K of its tax returns.

⁶ 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.

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 2003 through 2005, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of \$101,796.
- In 2004, the Form 1120S stated net current assets of (\$1,984,651)
- In 2005, the Form 1120S stated net current assets of (\$2,048,257)

For 2003, the petitioner had 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, except for 2003 and 2006.

On appeal, the petitioner asserts that USCIS should consider the petitioner's total assets and cash assets without consideration of expenses or liabilities. The petitioner's assertion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is without merit. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS considers net income and net current assets when assessing a petitioner's ability to pay the proffered wage.

In addition, the petitioner submitted three AAO decisions; AAU EAC 97 156 51725, AAU EAC 94 145 52233 and AAU EAC 95 119 50221, none of which are precedent decisions and binding on the Service. In each case, the petitioning entity submitted bank statements to attempt to establish ability to pay the proffered wage. This reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that would have been considered in determining the petitioner's net current assets. Finally, the petitioner did not submit the petitioner's bank statements to support its argument.

Petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner makes no specific claims of temporary hardship, lists no unusual one-time expenses, and in fact did not submit complete tax returns. 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 petitioner also failed to establish the beneficiary met the minimum requirements of the job offer listed on the labor certification as of the priority date. In his denial of December 22, 2008, the director dismissed the original experience letter stating:

USCIS cannot accept the submitted letter because it does not meet the requirements pursuant to 8 CFR 204.5(g)(1). The letter does not clearly demonstrate the name, address and title of the author. The letter does not indicate that the duties mentioned specifically refer to the beneficiary's work experience; the beneficiary's name is never mentioned in the experience letter.

On appeal, the petitioner submitted another experience letter from the same former employer as the letter the director dismissed. This letter does not include the address of the employing entity. The letter does not describe the duties of the position performed by the beneficiary or whether the

employment was full-time. The letter states that the dates of employment were from January 1984 to March 1987, which conflicts with the beneficiary's statement on Form ETA 750 that he worked at [REDACTED] Mexico from 1986 to 1989. The letter submitted upon appeal is dated March 26, 2008, therefore it is unclear why, if this letter was available at the time the petition was filed, it was not submitted as initial evidence rather than one that did not include the beneficiary's name or the address or title of the author. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

There is no independent, objective evidence in the record that explains or reconciles this inconsistency. Therefore, for the reasons explained above, the evidence in the record does not establish that the beneficiary possessed the two years of experience in the offered position as of the priority date as required by the terms of the labor certification.

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.