

(b)(6)

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: **NOV 03 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center on February 26, 2009. The petitioner subsequently filed a motion to reopen and motion to reconsider. The motion to reopen was granted and the previous decision of the director was affirmed on May 4, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dentist's office. It seeks to employ the beneficiary permanently in the United States as a dental assistant. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary is qualified to perform the duties of the proffered position according to the terms of the labor certification. 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 May 4, 2009 decision, the issues in this case are 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 or not the beneficiary is qualified to perform the duties of the proffered position according to the terms of 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 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).

Here, the Form ETA 750 was accepted on December 3, 2004. The proffered wage as stated on the Form ETA 750 is \$20 per hour (\$41,600 per year based on 40 hours per week).

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 a C corporation. The petitioner did not indicate on the petition the year the petitioner was established, the petitioner's gross income or the current number of workers employed. The submitted federal income tax returns indicate that the petitioner was established March 18, 1981. According to the tax returns in the record, the petitioner's fiscal year runs from April 1 to March 31 of the following year. On the Form ETA 750B, signed by the beneficiary on November 11, 2004, 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 immigrant 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'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 Sonegawa*, 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 2004, the IRS Form W-2 shows wages paid of \$30,644
- In 2005, the IRS Form W-2 shows wages paid of \$29,100.
- In 2006, the IRS Form W-2 shows wages paid of \$29,900.27.

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).

The petitioner paid the beneficiary less than the proffered wage each year from 2004 to 2006. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2004 through 2006, as represented in the following table:

- In 2004, difference of \$10,956.
- In 2005, difference of \$12,500.
- In 2006, difference of \$11,699.73.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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).

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 August 17, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner’s tax returns demonstrate its net income for fiscal years 2004 to 2006, as shown in the table below.

- In 2004, the Form 1120 stated net income of \$39,499.
- In 2005, the Form 1120 stated net income of \$(2,263).
- In 2006, the Form 1120 stated net income of \$(2,517).

As noted above, the petitioner’s federal income tax returns indicate that the petitioner’s fiscal year runs from April 1 to March 31 of the following year. Form W-2 shows the amount the petitioner paid the beneficiary during a calendar year whereas the federal income tax return relates to the petitioner’s fiscal year which runs from April 1 to March 31 of the following year. Thus, determining the petitioner’s ability to pay in each year is not simply a matter of combining the net income from the tax return and the wages listed on the Form W-2. It is not clear how much, if any, of the petitioner’s yearly net income is attributable to each calendar year; thus, it is not clear how much, if any, of the petitioner’s net income was available to pay the proffered wage in each calendar year. The record is devoid of evidence establishing that enough of this net income was available in each calendar year, to make up the difference between the proffered wage and the wage actually paid to the beneficiary in each calendar year.

Accordingly, for the years 2004 to 2006, 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.² A corporation’s year-end

²According 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

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. 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 2004 to 2006, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of \$28,867.
- In 2005, the Form 1120 stated net current assets of \$16,906.
- In 2006, the Form 1120 stated net current assets of \$10,140.

Form W-2 shows the amount the petitioner paid the beneficiary during a calendar year whereas the federal income tax return relates to the petitioner's fiscal year which runs from April 1 to March 31 of the following year. Thus, determining the petitioner's ability to pay in each year is not simply a matter of combining the net current assets from the tax return (which are stated as of March 31) and the wages listed on the Form W-2. It is not clear how much, if any, of the petitioner's net current assets were available to pay the wage on December 31 of each calendar year. The record is devoid of evidence establishing that enough of the net current assets were available at the end of each calendar year, to make up the difference between the proffered wage and the wage actually paid to the beneficiary in each calendar year.

Accordingly, for the years 2004 to 2006, the petitioner has not established that it had sufficient net income to pay the difference between the wages paid and 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

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

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 has been in business since 1981. Its gross receipts declined from 2004 to 2005, and the petitioner has not established its historical growth since its incorporation. No evidence was provided to explain any temporary or uncharacteristic disruption in its business activities. While the petitioner's tax returns indicate that it paid its sole shareholder officer compensation in 2005 and 2006, the record contains no evidence establishing that the shareholder was willing or able to forgo his officer compensation to pay the proffered wage in those years.³ 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 director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position according to the terms of the labor certification.

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).

In evaluating the labor certification to determine the required qualifications for the position, 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).

³ The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 of dental assistant has the following minimum requirements:

EDUCATION

Grade School: 8 years

High School: 4 years

College: Not required

College Degree Required: None

Major Field of Study: None

TRAINING: 2 years as a medical assistant

EXPERIENCE: 2 years in the job offered

OTHER SPECIAL REQUIREMENTS: None

The labor certification states that the beneficiary qualifies for the offered position based on experience as a student at [REDACTED] from 2002 to the date of signing November 11, 2004. The labor certification also indicates that the beneficiary was employed as a medical assistant with [REDACTED] from February 2000 to May 2001. No other experience is listed. 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)(ii)(A) states:

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.

The record contains a copy of the beneficiary’s Professional Certificate in Nursing and transcripts from [REDACTED] in 1999. The record also contains a credential evaluation completed by [REDACTED] on May 21, 2002 indicating that the beneficiary’s

nursing certificate was awarded upon completion of two and a half years of study in the field of nursing.

The record contains two experience letters. The first letter dated August 23, 2001 is from [REDACTED] Head of Wages and Fringe Benefits on [REDACTED] letterhead stating that the company employed the beneficiary full time from November 20, 2000 to May 19, 2001 as a Nursing Assistant.⁴ The letter does not provide a description of the duties of the position and does not provide a description of any training the beneficiary received. Further the dates of employment on the letter are inconsistent with the dates of employment listed 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 reconcile the inconsistencies. Without evidence to reconcile the inconsistencies, the beneficiary's employment with [REDACTED] has not been established. Further, evidence of experience as a medical assistant would not be considered experience in the job offered as a dental assistant as required by the labor certification. In addition, the letter does not describe any training received by the beneficiary and is insufficient to establish that the beneficiary completed the required two years of training as a medical assistant. Further, the letter only certifies six months of employment, and the labor certification requires two years of experience as a dental assistant.

The second letter dated March 10, 2009 is from [REDACTED] General Manager on [REDACTED] letterhead stating that the company employed the beneficiary as a Dental Assistant from January 1999 to April 2001. The letter does not indicate whether the employment was full or part time and it does not provide a description of the duties performed. The letter does not meet the regulatory requirements of 8 C.F.R. § 204.5(I)(3)(ii)(A) and will not be accepted as evidence of the beneficiary's experience. This employment is also 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. Further, the dates of employment in the letter overlap with the dates the beneficiary claims to have been employed full time by [REDACTED]. This casts doubt on the letter.

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

⁴ On Form G-325A, Biographic Information, submitted to USCIS in 2007, the beneficiary left blank a section requiring her to list her last occupation abroad.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The petitioner has not resolved the inconsistencies and doubts regarding the beneficiary's experience with independent, objective evidence and has provided no evidence of any training received by the beneficiary.

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.

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.