



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 11 2013

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

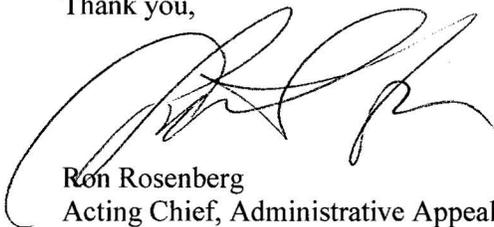


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a 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, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal is dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage.¹

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 if properly submitted upon appeal.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ The petitioner's first counsel who prepared the Form ETA 750 and submitted the original Form I-140, Immigrant Petition for Alien Worker, was convicted of immigration fraud on April 2, 2012 and subsequently was sentenced to five years in prison on April 10, 2013. *See* online article *Huge Immigration Fraud ends in 5-year prison term*, available at <http://online.wsj.com/article/APd04c88227e0f49d28aea1d27febc6249.html> (accessed May 16, 2013). The petitioner's second counsel was suspended from the practice of law for one year, commencing June 29, 2012.

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 6, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000. The Form ETA 750 also states that the position of manager requires 2 years of work experience in the job offered of manager.

The Part B of the Form ETA 750 was signed by the beneficiary on April 1, 2001. The only prior job listed is for [REDACTED] Pakistan where the beneficiary claims that he worked as a manager from January 1, 1990 to November 1992. The employer's name was handwritten on with the dates of asserted employment after filing the labor certification.

The Form I-140, was filed on January 19, 2011, and designated as an amendment to a previously filed Form I-140 stating that the petitioner is a successor-in-interest to the previous petitioner, [REDACTED] the entity listed on the Form ETA 750. Part 5 of the petition indicates that the petitioner was established on January 15, 2000, employs five workers, declares a gross annual income of \$427,800, and a net annual income of \$50,000. In fact, the [REDACTED] corporate online records indicate that the petitioner was established on June 30, [REDACTED].

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application 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 overall 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).

As noted above, the petitioner claims that it is a successor-in-interest to a predecessor entity. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the

²See New York state corporation online records (accessed May 5, 2013) at: http://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_na...

provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*"). The petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects, including evidence of the ability to pay the proffered wage. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In this case, the record contains a copy of a contract of sale dated July 21, 2005, which is signed by each representative of the petitioner and the predecessor company. The record also contains evidence that the liquor license held by the predecessor firm expired and is now held by the petitioner. The record further contains an affidavit from the petitioner's representative referring to the purchase of the business throughout the document as having occurred in 1995, not 2005. Additionally, multiple copies of unsigned drafts of various documents relating to the sale of the business have been submitted to the record, including one that indicates that [REDACTED] the predecessor's president "hereby resigns from all corporate offices. . ." in the predecessor's organization, and a document that refers to the purchase of shares in the predecessor firm by the petitioner's owner from Mr. [REDACTED] of the predecessor company. Additionally submitted to the record is Mr. [REDACTED] affidavit, dated February 14, 2012, explaining the delay in providing the tax returns of the predecessor company and stating that after the business was sold to the petitioner, it was dissolved. It is noted, however, that the online corporation records of the state of New York do not reflect that [REDACTED] is dissolved. Rather, it is regarded as an "active" domestic business corporation with Mr. [REDACTED] remaining as the Chief Executive Officer and at the same address as the petitioner.³ This contradictory and discrepant information casts doubt as to the

³ See New York state corporation online records at http://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_na... (Accessed May 5, 2013.)

nature of the relationship between the two entities and the existence of a successor-in-interest relationship. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In view of the above, the AAO cannot conclude that the petitioner has established that it is a successor-in-interest to the predecessor entity.

With respect to a petitioner's ability to pay the proffered wage, it is noted that in determining the ability to pay 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. As noted by the director, the record does not indicate that the petitioner or the asserted predecessor entity has employed or paid the beneficiary any wages.

If a 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. 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).

As an alternative method of reviewing a petitioner’s ability to pay a proposed wage, USCIS will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁴ Current assets would generally be shown on line(s) 1 through 6 of Schedule L of a corporate tax return. Current liabilities are shown on line(s) 16 through 18 of Schedule L. Net current assets represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. If a corporation’s end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁵

⁴ A petitioner’s total assets are not considered in this calculation. A petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets would not be converted to cash during the ordinary course of business and would 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 will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

⁵ 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.

In this case, as indicated in the record, the federal tax returns have been provided piecemeal based upon the claim of difficulty in securing them from the accountant. However, in reviewing the 2001 and 2002 returns, it is noted that column d of Schedule L showing the end-of-year figures for [REDACTED] assets and liabilities are discrepant from column b of Schedule L beginning-of-year figures shown for this entity. As these figures should match, it raises a question as to the reliability of all the tax returns because the same tax preparer has prepared all the returns of the claimed predecessor and the petitioner. 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. 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. See *Matter of Ho*, at 582, 591-592. Moreover, it is noted that the petitioner and claimed successor to [REDACTED] failed to establish its ability to pay the proffered wage in 2005, as neither its net income of -\$2,658 nor its net current assets of \$10,031, as shown on its 2005 tax return, was sufficient to cover its share of the proffered wage during the year of the purported change of ownership. In view of the above, even if the petitioner was considered the successor to [REDACTED], which has not been established, the record does not reliably establish the initial entity's and asserted successor entity's continuing ability to pay the proffered wage from the priority date onward.

It is noted that in *Matter of Sonogawa*, the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

Unlike the *Sonogawa* petitioner, as noted above, the tax returns' figures submitted to the record cannot be regarded as reliable. This petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonogawa* are applicable. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonogawa*. Additionally, the petitioner has failed to establish its valid successorship to the entity that filed the labor certification, and it cannot be concluded as set forth above, that both entities have established the continuing ability to pay the beneficiary's proffered wage.

Beyond the decision of the director, the petitioner has not established that the beneficiary possessed two years of experience in the job offered as required by the terms of the Form ETA 750.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled Workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As stated above, the beneficiary claimed on Part B of Form ETA 750 that he worked as a manager for [REDACTED] in Pakistan from January 1990 until November 1992. The petitioner has submitted an employment verification letter dated December 6, 1992 from [REDACTED] that confirms this employment, although the letter does not confirm full-time employment. Moreover, the record also contains a biographic form (G-325A), signed by the beneficiary on July 20, 1994. It instructs the signer to list previous employment for the past five years. The only occupation listed by the beneficiary is "student," which he classifies himself from March 1988 to March 1993, during the time period of his claimed employment with [REDACTED]. No explanation is contained in the record for this inconsistency. 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. 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. *See Matter of Ho*, at 582, 591-592. It may not be concluded that the petitioner has established that the beneficiary possessed two years of work experience in the job offered as of the priority date.

Therefore, the petitioner has not established that it is the successor-in-interest to the predecessor business and has not established the continuing ability to pay the proffered wage. Additionally, the petitioner has not demonstrated that the beneficiary possessed the required two years of experience as set forth by the terms of the labor certification.

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*, 299 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 reviews appeals on a *de novo* basis).

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.