



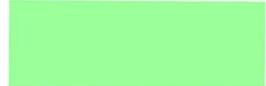
U.S. Citizenship
and Immigration
Services

(b)(6)

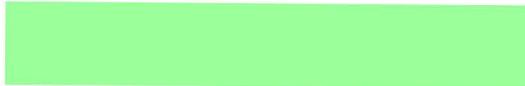


DATE: JUN 13 2013

OFFICE: NEBRASKA SERVICE CENTER FILE:



IN RE: Petitioner:
Beneficiary:



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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a skilled nursing facility. It seeks to employ the beneficiary permanently in the United States as a laundry keeper. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor 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. 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 January 28, 2010 denial, the 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on November 12, 2008. The proffered wage as stated on the ETA Form 9089 is \$8.34 per hour (\$17,347.20 annually). The ETA Form 9089 states that experience in working in a health laundry facility is desirable but not mandatory.

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 AAO notes that the petitioner's corporate name as listed on the labor certification and Form I-140 is [REDACTED]. The 2008 tax return in the record is for [REDACTED] which lists the same Federal Employer Identification Number (FEIN) as the labor certification and Form I-140 entity but a different address. According to the California Secretary of State, [REDACTED] filed for incorporation in 2006. The record includes a California Department of Health license for [REDACTED] to operate and maintain [REDACTED] and a Form W-9, Request for Taxpayer Identification Number and Certification, for "[REDACTED]." The record also includes a City of Bakersfield Business Tax Certificate issued June 1, 2009 with an expiration of June 30, 2010, and a Health Insurance Benefit Agreement where [REDACTED] is stated to be a d/b/a of [REDACTED]. The petitioner appears to be a d/b/a of [REDACTED]. However, the record does not include evidence that the d/b/a was filed with and approved by the State of California. The AAO will address the petitioner's ability to pay the proffered wage based on the tax return submitted, but for this analysis to be accepted the petitioner must submit official evidence (i.e. the d/b/a was filed with and approved by the State of California by the time of the priority date) that the tax returns in the record are its tax returns. In any further filings, the petitioner should submit evidence to resolve this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence in the record indicates that the petitioner is structured as an S corporation. On the petition, the petitioner states that it was established in April 2006 and it has 100 employees. On the ETA Form 9089, signed by the beneficiary on June 1, 2009, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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

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).

lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

The record before the director closed on September 18, 2009, when the director received the petitioner’s response to the director’s RFE. As of that date, the petitioner’s 2008 tax return was the most recent return available.

The tax returns submitted demonstrate net income for 2008, as shown below.

- In 2008, the Form 1120S stated net income of \$75,549.²

Therefore, for the year 2008, while the tax returns submitted would reflect sufficient net income to pay the proffered wage if this was the only petition filed, as raised in the director’s decision, however, the petitioner has filed for other workers. According to USCIS records the petitioner has filed 50 I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg’l Comm’r 1977). The evidence in the record does not document for all 50 petitions the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been revoked,

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 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 28, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). In 2008 the Schedule K for the tax return submitted included a deduction and other adjustments, therefore the net income is found on line 18 of Schedule K.

or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The petitioner submitted a list of 31 sponsored workers in response to the director's RFE. The director noted in her decision that this would result in a collective wage of \$330,000 to pay all of the sponsored workers. The petitioner submitted a list of 21 names on appeal and wages due in the amount of \$386,588.80. The petitioner does request that 10 of the original 31 petitions be withdrawn. However, this leaves 19 petitions unaccounted for. The petitioner would need to totally account for all sponsored workers, priority dates, all proffered wages, and wages paid to those workers, if any, in order to determine whether the petitioner can pay this beneficiary in consideration of all of its sponsored workers. The petitioner's net income in 2008 would be insufficient to meet either the petitioner's estimated total wage obligation or total considering all 50 workers.

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

The tax returns submitted demonstrate end-of-year net current assets for 2008, as shown below.

- In 2008, the Form 1120S stated net current assets of \$251,687.

Based on the net current assets in 2008, the tax return submitted would reflect the ability to pay the proffered wage in those years if this was the only petition filed. However, as mentioned, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document all of the priority dates, proffered wages or wages paid to each beneficiary, whether any of the other petitions have been revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Based on the petitioner's partial estimate of the other wages due, the petitioner would not be able to establish its ability to pay its total wage burden in 2008 and therefore has not established its ability to pay this beneficiary's proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and

new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *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 needs to fully address all of its sponsored workers in order for the AAO to determine whether it can meet its total wage burden and establish its ability to pay the beneficiary's proffered wage and the wages of its other sponsored workers. The evidence submitted fails to establish this. The wages of each sponsored employee, and any wages paid to those employees, is not clear. Also, the petitioner has not provided official evidence that it is a d/b/a of [REDACTED] and that the tax returns in the record are its tax returns. The record does not include evidence of any unusual events that temporarily disrupted the business. Considering these factors and the prior discussion of ability to pay the proffered wage, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO affirms the director's decision that the petitioner failed to establish that it had the ability to pay the beneficiary the proffered wage as of the priority date. Therefore, the beneficiary does not qualify for classification as an other worker under section 203(b)(3)(A) of the Act.

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.