



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 25 2013 OFFICE: TEXAS SERVICE CENTER

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 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,

Rachel Nifonzo
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. Thereafter, the AAO granted the motion to reconsider filed by the petitioner, but affirmed its prior decision. The matter is again before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a construction company. It seeks to permanently employ the beneficiary in the United States as a cement mason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Permanent Alien Certification, approved by the Department of Labor (DOL).

The director determined that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage and denied the Form I-140, Immigrant Petition for Alien Worker, accordingly. On appeal, the AAO also found that the record did not establish the petitioner's ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2) and affirmed this finding in response to the petitioner's first motion

In support of the instant motion, the petitioner has submitted a February 5, 2013 statement from its president, [REDACTED], as well as documentation relating to the incorporation and operations of [REDACTED], which includes: the Articles of Incorporation for [REDACTED], filed as of May 21, 2002; and federal tax returns for [REDACTED] for the years 2002 through 2006. The petitioner also provides copy of credit card statements from 2002 and 2003 and a 2002 home equity loan statement.

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reopen and the motion to reconsider are properly filed and timely. Although the petitioner has not met the requirements for a motion to reconsider, it has satisfied those for a motion to reopen, submitting new facts with supporting documentation not previously provided. Therefore, the motion is granted and the AAO will reopen the matter.

The AAO now turns to the issue of whether the petitioner has established a continuing ability to pay the offered wage.

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 In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

As discussed on appeal and in response to the petitioner's prior motion, United States Citizenship and Immigration Services (USCIS) in determining a petitioner's ability to pay first examines whether the petitioner has been employing the beneficiary as of the date on which the labor certification was accepted for processing by the Department of Labor (DOL). In such cases, if the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during the required period, that evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS examines the net income figure reflected on the petitioner's federal income tax returns, 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).¹ If the petitioner's net income during the period time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where an employer's net income or net current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

¹ 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).

In its January 21, 2010 decision on appeal, the AAO specifically reviewed evidence of the wages paid to the beneficiary by the petitioner as of the April 30, 2001 priority date, finding that these earnings did not equal or exceed the proffered wage of \$19.16/hour or \$39,852.80/year based on 40 hours per week. In this same decision, the AAO noted that the net income and net current assets reflected in the petitioner's tax returns for the period 2001 through 2006 established only its ability to pay the proffered wage in 2006. In the years 2001 through 2005, the AAO found, neither the petitioner's net income nor its net current assets established its ability to pay the difference between the actual wages paid to the beneficiary and the proffered wage. It also indicated that these same tax returns reflected a substantial decline in the petitioner's gross receipts and that the petitioner could not, therefore, establish that the totality of its circumstances demonstrated its ability to pay the proffered wage, pursuant to *Sonegawa*.

In response to the petitioner's February 19, 2010 motion to reconsider, the AAO considered its claim that certain assets it had acquired in 2002 were proof of "additional financial gain" that demonstrated its ability to pay the proffered wage. However, the AAO found these depreciable assets, as they would not be converted to cash during the ordinary course of business and would not, therefore, be available to pay the proffered wage, did not demonstrate the petitioner's ability to pay.

In support of the instant motion, [REDACTED] the petitioner's president, asserts that the financial resources of [REDACTED] should be considered in determining the petitioner's ability to pay the proffered wage as he is the only stockholder and controls both companies. He asserts that, in 2001 and 2002, he acquired equipment with a resale value in excess of \$490,000.00 and that in 2006 this equipment had been paid for, resulting in profits. [REDACTED] also states that he had a line of credit in excess of \$200,000.00 at this time. As a result, he contends, it can be assumed that even though the petitioner did not have sufficient net income to pay the proffered wage during the years 2001 through 2005, these funds were available. [REDACTED] asks that the AAO consider the financial situations of both his companies when determining ability to pay and, further, that the beneficiary's wages be deducted from the proffered wage when considering the petitioner's ability to pay the proffered wage.²

As evidence of the petitioner's financial solvency, [REDACTED] submits tax returns for [REDACTED] for the years 2002 through 2006; [REDACTED] articles of incorporation; credit card statements from 2002 and 2003, each of which reflects available credit; and a 2002 [REDACTED] that shows available credit of \$55,300.00.

Although the AAO acknowledges [REDACTED] formation of [REDACTED], the petitioner cannot use [REDACTED] financial resources to establish its ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining

² The AAO notes that both its January 21, 2010 and January 14, 2013 decisions indicate that it has considered whether the petitioner's net income or net current assets would cover the difference between the beneficiary's earnings and the proffered wage, and has found this to be the case only for 2006.

the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. 5 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Accordingly, the AAO will not consider the federal tax returns for [REDACTED] that have been submitted by the petitioner.

The credit card statements and [REDACTED] equity statement also fail to establish the petitioner's ability to pay the proffered wage. In calculating the ability to pay the proffered wage, USCIS will not augment a petitioner's net income or net current assets by adding in its credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See John Downes and Jordan Elliot Goodman, Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998). It cannot be treated as cash or as a cash asset.

Accordingly, the new evidence submitted by the petitioner on motion does not demonstrate its ability to pay the proffered wage as of the April 30, 2001 priority date of the Form ETA 750.

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. Accordingly, the prior decisions of the AAO will be affirmed.

ORDER: The motion to reopen is granted. The decisions of the AAO dated January 21, 2010 and January 14, 2013 are affirmed. The petition remains denied.