



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: JUN 27 2013 Office: NEBRASKA SERVICE CENTER [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:

[REDACTED]

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.

Thank you,

Rachel NiTino
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion to reopen will be granted, the AAO's decision will be withdrawn, and the matter will be remanded to the director for further consideration.

The petitioner is a clothing manufacturer. The petitioner seeks to employ the beneficiary permanently in the United States as a custom tailor. 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. The director denied the petition accordingly.

Here, the Form ETA 750 was accepted on April 21, 2004. The proffered wage as stated on the Form ETA 750 is \$16.20 per hour based upon a 40 hour work week (\$33,696.00 per year based on 40 hours per week). The Form ETA 750 at part 14 states that the position requires two years of experience in the job offered of custom tailor.

As set forth in the director's May 6, 2008 denial and the AAO's January 13, 2012 decision, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director determined that the petitioner had not submitted sufficient evidence to demonstrate its ability to pay the proffered wage at the time the priority date was established and continuing to the present. The AAO determined on appeal that the petitioner had submitted its tax returns for 2004, 2005, and 2006; and that the petitioner failed to demonstrate its ability to pay the proffered wage for 2004 and 2005.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issue. Therefore, on motion the issue is whether the petitioner has established its ability to pay the proffered wage for 2004, 2005, and other relevant years.

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 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. On motion, counsel asserts that the amounts paid into the petitioner's profit sharing plan should be considered in determining its ability to pay the proffered wage. The petitioner also submits a copy of its 2010 tax return.

The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because counsel does not assert that the director and the AAO made an erroneous decision through misapplication of law or policy.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation in the 2004 and 2005 fiscal years and as an S corporation in 2010. On the petition, the petitioner claimed to have been established on March 15, 1989 and that it currently employs four workers. According to the tax returns in the record, the petitioner's fiscal year was from April 1 through March 31 each year in 2004 and 2005. The record also shows that the petitioner adopted the calendar year as its fiscal year for 2010. On the Form ETA 750B, signed by the beneficiary on April 15, 2004, the beneficiary does not claim to have been employed by the petitioner.

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

¹The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

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. 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 or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The record of proceeding does not contain any evidence to demonstrate that the beneficiary was employed by the petitioner.

If, as in this case, 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). 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).

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 proffered wage is \$33,696.00.

In 2004 (April 1, 2004 through March 31, 2005), the petitioner reported on Form 1120 a net income of \$4,572.00.

In 2004 (April 1, 2004 through March 31, 2005), the petitioner reported on Form 1120 net current assets of -\$127,407.00.

In 2005 (April 1, 2005 through March 31, 2006), the petitioner reported on Form 1120 a net income of \$32,482.00.

In 2005 (April 1, 2005 through March 31, 2006), the petitioner reported on Form 1120 net current assets of -\$104,201.00.

Therefore, the petitioner has failed to demonstrate its ability to pay the proffered wage through wages paid to the beneficiary, or its net income, or its net current assets for 2004 and 2005.

In 2010, the petitioner’s 1120S² tax return demonstrates its net income of \$49,157.00. Therefore, the petitioner has demonstrated its ability to pay the proffered wage in 2010.

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

On motion, counsel asserts that, based upon the totality of the circumstances, the petitioner has established its ability to pay the proffered wage in the relevant years. Counsel further asserts that the amounts paid into the petitioner's profit sharing plan should be considered in determining its ability to pay the proffered wage.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. The petitioner's tax returns for the periods ending March 31, 2005 and March 31, 2006 show that \$97,355.00 and \$64,633.00, respectively, were paid into the petitioner's pension, profit-sharing plans. Pension, profit-sharing plans is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for pension, profit-sharing plans may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

We note here that the compensation received by the company's owners during these years was not a fixed salary and was in an amount in excess of the proffered wage each fiscal year.

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 the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

In the present case, however, it does not appear that counsel is suggesting that USCIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their business. Counsel infers that the amount paid to the owners, into a profit sharing plan is determined by the profitability of the corporation. It does not appear that any of these numbers represent fixed expenses. We concur with the arguments presented by counsel on motion. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered wage can be paid by the petitioner in 2004 and 2005.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). Accordingly, after a review of the petitioner's federal tax returns

and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the proffered wage in the 2004 and 2005 fiscal years.

Upon review of the record, the AAO has determined that the petitioner has overcome the director's decision that the petitioner had the ability to the proffered wage in 2004 and 2005 fiscal years and in 2006.

Therefore, the director's decision with respect to the issue of the petitioner's ability to pay the proffered wage in those years is withdrawn.

However, the petition may not be approved for several reasons. First, the record of proceeding does not contain copies of the petitioner's tax returns or audited financial statements for 2007, 2008, 2009, 2011, and 2012, which is relevant in determining whether the petitioner has established its continuing ability to pay the proffered wage.

Second, the petitioner has failed to establish that the beneficiary is qualified for the proffered position with two years of experience in the job offered. In a letter dated June 25, 2007, the declarant stated that the beneficiary was employed by Master Tailor from February 1999 through April 2003. However, the letter does not specify the beneficiary's job title or the number of hours he worked per week. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is July 30, 2007. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In view of the foregoing, the AAO will remand the case to the director for further action. The director may request any additional evidence considered pertinent to the petitioner's claims; and the director shall provide the petitioner a reasonable period of time to submit additional evidence. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.