



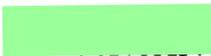
U.S. Citizenship  
and Immigration  
Services

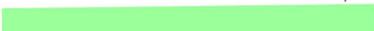
(b)(6)



DATE: **MAR 08 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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:



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 appeal will be dismissed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as an area destination director. 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.

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 March 9, 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. On appeal, additional issues concerning whether the beneficiary qualifies for the proffered position have arisen.

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). 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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 17, 2003. The proffered wage as stated on the Form ETA 750 is \$39,874 per year. The Form ETA 750 states that the position requires six years of grade school, six years of high school, and two years of experience as an area destination director or two years in the related occupation of travel industry management.

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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1976 and to have a gross annual income of \$980,096. According to the tax returns in the record, the petitioner's fiscal year runs from July 1 through June 30. On the Form ETA 750B, signed by the beneficiary on February 26, 2003, the beneficiary claimed to have begun working for the petitioner in September 2002.

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 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 submitted the following evidence of wages paid:<sup>2</sup>

- The 2003 Form 1099 stated that the petitioner paid the beneficiary \$21,080.54 in "nonemployee compensation;"

<sup>1</sup> 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).

<sup>2</sup> The 2002 Form 1099 stated that the petitioner paid the beneficiary \$7,500 in "nonemployee compensation." As 2002 preceded the priority date, this evidence will be considered only generally.

- The 2004 Form 1099 stated that the petitioner paid the beneficiary \$15,164.91 in “nonemployee compensation;”
- The 2005 Form 1099 stated that the petitioner paid the beneficiary \$20,655.22 in “nonemployee compensation;”
- The 2006 Form 1099 stated that the petitioner paid the beneficiary \$25,xxx<sup>3</sup> in “nonemployee compensation;”
- The 2007 Form W-2 stated that the petitioner paid the beneficiary \$30,000; and
- The 2008 Form W-2 stated that the petitioner paid the beneficiary \$30,000 and a 2008 Form 1099 stated that the petitioner paid the beneficiary \$2,400 in “nonemployee compensation.”

The amounts paid in each year were less than the proffered wage. As a result, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2003 was \$18,793.46; in 2004 was \$24,709.09; in 2005 was \$19,218.78; in 2006 was approximately \$14,874; in 2007 was \$9,874; and in 2008 was \$7,474.

The petitioner also submitted the front of two checks written to the beneficiary both dated November 3, 2009. There was no evidence submitted to demonstrate that these checks were negotiated through a bank or were pay checks as opposed to other payments or reimbursements. As a result, they may not be considered in determining the petitioner’s ability to pay the proffered wage.

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

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<sup>3</sup> The petitioner submitted two copies of the 2006 Form 1099. Neither copy submitted was fully legible.

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*, 558 F.3d 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*, 719 F.Supp. 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 November 18, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, it is unclear whether the petitioner's 2008 federal income tax return was yet due, however, the petitioner provided this return on appeal.<sup>4</sup> The petitioner's tax returns demonstrate its net income for 2003 through 2008, as shown in the table below.

- From July 1, 2002 through June 30, 2003, the Form 1120 stated net income of -\$5,501;
- From July 1, 2003 through June 30, 2004, the Form 1120 stated net income of -\$2,807;
- From July 1, 2004 through June 30, 2005, the Form 1120 stated net income of -\$11,311;
- From July 1, 2005 through June 30, 2006, the Form 1120 stated net income of \$10,062;
- From July 1, 2006 through June 30, 2007, the Form 1120 stated net income of -\$5,534;
- From July 1, 2007 through June 30, 2008, the Form 1120 stated net income of -\$10,896; and
- From July 1, 2008 through June 30, 2009, the Form 1120 stated net income of -\$2,234.

<sup>4</sup> As noted above, the petitioner's tax year runs from July 1 through June 30.

Therefore, for the period July 1, 2002 through June 30, 2009, the petitioner did not have sufficient net income to pay 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.<sup>5</sup> A corporation's year-end 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 July 1, 2002 through June 30, 2009, as shown in the table below.

- From July 1, 2002 through June 30, 2003, the Form 1120 stated net current assets of \$29,928.
- From July 1, 2003 through June 30, 2004, the Form 1120 stated net current assets of \$16,061.
- From July 1, 2004 through June 30, 2005, the Form 1120 stated net current assets of -\$480,849.
- From July 1, 2005 through June 30, 2006, the Form 1120 stated net current assets of -\$461,162.
- The July 1, 2006 through June 30, 2007 Form 1120 did not contain a Schedule L.
- From July 1, 2007 through June 30, 2008, the Form 1120 stated net current assets of -\$195,704.
- From July 1, 2008 through June 30, 2009, the Form 1120 stated net current assets of -\$203,441.

Therefore, for the period July 1, 2004 through June 30, 2009, the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner's net current assets are sufficient to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage in 2003 alone.

Therefore, from the date the Form ETA 750 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.

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<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

On appeal, counsel asserts that depreciation should be considered in the asset determination. As stated above, *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). The petitioner has submitted no evidence to demonstrate that depreciation in its particular case should be considered or that the conclusion reached by the Court was inapplicable or incorrect.

In addition, the petitioner submitted a letter dated May 14, 2010 from [REDACTED], Certified Public Accountant, stating that the amount of officer compensation should be considered in the ability to pay analysis as the amount allocated corresponds to the actual funds available so the amount of officer compensation could be manipulated based on the needs of the corporation. In addition, Mr. [REDACTED] states that the owner of the corporation could loan the corporation money if the need arose.

The petitioner's tax returns reflect that it paid [REDACTED] and/or [REDACTED] between \$40,000 (tax year 2003) and \$120,000 (tax year 2007). Although these amounts exceed the proffered wage in each tax year, the tax returns state that the officers devote 100% of their time to the business, and the petitioner submitted no evidence to demonstrate that its officers are willing or able to forego all or part of the compensation in any year. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. Additionally, the petitioner submitted no evidence to demonstrate that its shareholders were willing or able to loan the petitioner money should the need arise. In any event, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position.

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*,

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 demonstrated the ability to pay the proffered wage in only one of the six years for which financial evidence was submitted. On appeal, counsel states that the petitioner began operations in 1975 and has experienced a steady growth in gross income and officer compensation. Although counsel's contentions are supported by the tax returns, we cannot overlook the fact that the petitioner's net income was negative in all but one year and its net current assets have been negative since July 1, 2004. The petitioner submitted no evidence of its reputation or any evidence that it had an off year or other circumstances similar to those presented in *Sonegawa*. 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.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 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 beneficiary's qualifications, USCIS must look to the job offer portion of 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).

In the instant case, the labor certification states that the offered position requires six years of grade school, six years of high school, and two years of experience as an area destination director or in the related occupation of travel industry management. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a general manager for [REDACTED] from June 2000 to June 2001 and as a regional manager for [REDACTED] from March 1997 to May 2000.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner submitted a letter from [REDACTED], managing director of [REDACTED] stating that the beneficiary worked as a general manager from June 2000 to July 2002. This letter did not contain a description of the beneficiary's job duties in the position of general manager as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). In addition, the letter from Mr. [REDACTED]

[REDACTED] contains dates different than those claimed to have been worked by the beneficiary on the Form ETA 750. 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).

Additionally, the petitioner submitted no evidence to demonstrate that the beneficiary possessed the education required by the terms of the labor certification. The evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.