



U.S. Citizenship
and Immigration
Services

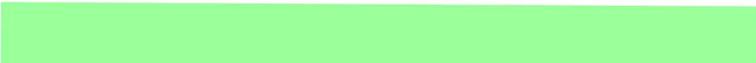
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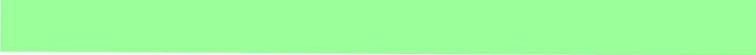


DATE: **AUG 26 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


 Ron Rosenberg

Chief, Administrative Appeals Office

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DISCUSSION: The Director, Texas Service Center (Director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on the petitioner's appeal. The appeal will be dismissed.

The petitioner describes itself as a wholesale distributor of home furnishings and housewares. It seeks to employ the beneficiary permanently in the United States as a business development specialist.

The petition requests preference classification of the beneficiary as a professional worker under section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii). An ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanies the petition.

The Director concluded that the petitioner did not establish its continuing ability to pay the position's proffered wage. Accordingly, the director denied the petition on May 21, 2014.

The record shows that the appeal is properly filed, timely, and alleges specific errors in law or fact. The record documents the procedural history of this case, which is incorporated into this decision. We will elaborate on the procedural history only as necessary.

This office conducts appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

A petition for a professional worker must be accompanied by evidence that the petitioner has the ability to pay the proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of the petitioner's annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the petition's priority date is August 26, 2011, which is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states a proffered wage of \$53,435 per year for the offered position of business development specialist.

A petitioner's ability to pay the proffered wage is an essential element in determining whether its job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2). United States Citizenship and Immigration Services (USCIS) requires a petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage. USCIS

¹ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow for the submission of additional evidence on appeal. The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

will also consider business circumstances that temporarily affect a petitioner's ability to pay. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining a petitioner's ability to pay, we first consider whether a petitioner employed the beneficiary during the relevant period. If a petitioner establishes that it paid the beneficiary a salary that equals or exceeds the annual proffered wage, we may consider the evidence *prima facie* proof of the petitioner's ability to pay.

In the instant case, the record contains copies of Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements of the beneficiary. The Forms W-2 indicate that the petitioner paid the beneficiary \$41,205.33 in 2011, \$38,438.52 in 2012, and \$41,441.92 in 2013. Because the annual wage amounts on the Forms W-2 do not equal or exceed the annual proffered wage of \$53,435, the forms do not demonstrate the petitioner's ability to pay based on its employment of the beneficiary.

However, we will consider the wages the petitioner paid to the beneficiary. The petitioner need only show that it can pay the difference between the wages it paid to the beneficiary and the annual proffered wage in the relevant years. Therefore, the petitioner must demonstrate its ability to pay \$12,229.67 in 2011, \$14,996.48 in 2012, and \$11,993.08 in 2013.

We may also determine a petitioner's ability to pay by examining the annual net income amounts stated on its federal income tax returns, without consideration of depreciation or other expenses. See *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880-01 (E.D.Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011); *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1053-54 (S.D.N.Y. 1986); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 535-37 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083-84 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) (Table) (all upholding USCIS's reliance on net income, as indicated on a petitioner's federal income tax returns without consideration of depreciation or other expenses, as a basis for determining a petitioner's ability to pay).

The record before the Director closed on February 25, 2014, with his receipt of the petitioner's response to his Request for Evidence. At that time, the petitioner's 2013 federal income tax return was not yet due. The petitioner filed the instant appeal on June 19, 2014. The petitioner's 2013 tax returns appear to have been available on appeal, as it has not claimed or provided evidence that it requested an extension of time in which to file its 2013 tax return beyond the standard April 15, 2014 deadline. However, the petitioner's 2012 income tax return is the most recent return in the record. Without a copy of the petitioner's 2013 income tax return, we cannot fully consider its ability to pay in that year.

The petitioner's tax returns reflect annual net income amounts of \$(259,370) in 2011 and \$(188,596) in 2012.² Because the petitioner's annual net income amounts are negative, they do not demonstrate

² Numbers in parentheses indicate negative amounts. If the income of an S corporation like the petitioner derives exclusively from a trade or business, line 21 of the petitioner's IRS Form 1120S U.S. Income Tax Return for an S

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its ability to pay the differences between the wages it paid to the beneficiary and the annual proffered wage in 2011 and 2012.

In addition, we may review a petitioner's net current assets to determine its ability to pay a proffered wage. Net current assets reflect the difference between current assets and current liabilities.³ Lines 1 through 6 of Schedule L of a corporation's federal income tax returns indicate its year-end current assets. Lines 16 through 18 of the same schedule reflect its year-end current liabilities. If the sum of a corporation's total, year-end net current assets and the wages it paid to the beneficiary equals or exceeds the annual proffered wage, USCIS considers a petitioner able to pay the proffered wage.

In the instant case, the petitioner's tax returns reflect year-end net current assets of \$980 in 2011 and \$(671) in 2012. Because the sums of the petitioner's annual net current assets combined with the wages it paid the beneficiary in the corresponding years are less than the annual proffered wage, the petitioner has not demonstrated sufficient net current assets to pay the proffered wage in 2011 and 2012.

Therefore, based on examinations of the wages it paid to the beneficiary, its net income, and its net current assets, the petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

On appeal, the petitioner argues that USCIS erred in discounting its bank account balances and the wages it paid other employees as proof of its ability to pay the proffered wage. The petitioner submitted statements of three bank accounts in its name. It argues that the statements show average monthly account balances sufficient to cover the differences between the wages it paid to the beneficiary and the proffered wage. The statements reflect average monthly balances of \$1,405.65 from August 2011 through January 2014 for one account, \$20,585.45 from August 2011 through March 2012 for another account, and \$1,779.30 from January 2012 to January 2013 for the third account.

The petitioner's bank account statements do not establish its ability to pay the proffered wage. Bank statements are not among the three types of evidence required to illustrate a petitioner's ability to pay a proffered wage, as enumerated in 8 C.F.R. § 204.5(g)(2). While the regulation allows additional material "in appropriate cases," the instant petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of it. Also, bank statements show the amount in an account on a given date and

Corporation reflects its annual net income. However, an S corporation with income, credits, deductions, or adjustments from other sources reports its annual net income on Schedule K. See Instructions for Form 1120S, IRS, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 31, 2014) (stating that Schedule K is a summary schedule of all shares of the corporation's income, deductions, credits, etc.). Because the instant petitioner adjusted its income from other sources, lines 17e of its Schedules K for 2011 and 2012 reflect its annual net income amounts.

³ Current assets generally consist of items that can be liquidated within one year, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000). Current liabilities, on the other hand, generally constitute obligations payable within one year, such as accounts payable, short-term notes, and accrued expenses like taxes and salaries. *Id.*

cannot show a sustainable ability to pay a proffered wage. In addition, as previously discussed, we have considered the petitioner's current assets as part of our net current assets analysis. The petitioner has not demonstrated that the current asset amounts stated on its federal income tax returns for 2011 and 2012 do not include the account balances reflected in the bank statements. Therefore, the petitioner has not established that the bank account balances constitute additional sources of funds from which it could have paid the proffered wage.

The petitioner also submitted an October 10, 2013 letter from its president and sole shareholder, and copies of 2011 and 2012 Forms W-2 it issued to two former employees. The letter states that the petitioner employed the workers in 2011 and part of 2012 before transferring them to another company owned by the petitioner's president. The Forms W-2 indicate that the petitioner paid the workers combined total wages of \$36,187.52 in 2011 and \$15,760.40 in 2012. The petitioner appears to argue that the wages it paid the transferred workers in 2011 and 2012 could have been used to fund the difference between the wages it purportedly paid beneficiary and the proffered wage in those years.

However, wages paid to others generally do not establish a petitioner's ability to pay a proffered wage, unless the others performed the job duties of the offered position and will be replaced by the beneficiary. The instant petitioner has not demonstrated that the beneficiary has or will replace the two transferred workers in the offered position. The letter from the petitioner's president does not indicate the former job titles or duties of the transferred workers, or whether their positions were full- or part-time in nature. Moreover, the record indicates that the petitioner has employed the beneficiary in the offered position since October 1, 2006. Because the petitioner employed the transferred workers in 2011 and 2012 while the beneficiary was already performing the duties of the offered position, the record suggests that the beneficiary will not replace the transferred workers. In addition, the beneficiary's 2013 Form W-2 indicates that the petitioner did not pay the beneficiary the proffered wage of the offered position even after these employees left. Therefore, the petitioner's payment of wages to the transferred workers in 2011 and 2012 does not demonstrate its ability to pay the proffered wage to the beneficiary during the relevant years.

As previously indicated, USCIS may consider the overall magnitude of a petitioner's business in determining its ability to pay. See *Matter of Sonogawa, supra*, at 614-15. In *Matter of Sonogawa, supra*, the petitioner had conducted business for more than 11 years and routinely generated gross annual incomes of about \$100,000 before reporting a loss during the year of the petition's filing. The loss resulted from the petitioner's change of business locations, which caused it to simultaneously pay rent on two properties for a 5-month period and to incur substantial moving costs. The petitioner was also unable to conduct business for a brief time during the move. Despite its difficulties, the Regional Commissioner determined that the petitioner would likely resume successful business operations and established its ability to pay the proffered wage. The Regional Commissioner noted that the petitioner was a fashion designer whose work had been featured in national magazines, her clients included the then Miss Universe, movie actresses, society matrons, and women on the lists of the best-dressed in California, and she lectured on fashion design at design and fashion shows throughout the United States and at California colleges and universities.

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As in *Matter of Sonogawa, supra*, USCIS may consider evidence relevant to a petitioner's ability to pay beyond the wages it paid to the beneficiary, its net income, and its current assets. USCIS may consider such factors as: the number of years the petitioner has conducted business; established historical growth of its business; its number of employees; the occurrence of uncharacteristic business expenditures or losses; its reputation within its industry; or any other evidence relevant to its ability to pay the proffered wage.

In the instant case, the record indicates that the petitioner has conducted business since 1995. When it filed the accompanying labor certification on August 26, 2011, the petitioner claimed to employ five people. However, it claimed to employ only two people when it filed the petition on October 11, 2013.

The petitioner's tax returns indicate that its annual gross revenues and amounts paid in salaries and wages declined from 2011 to 2012. The returns also reflect a significant drop in the petitioner's total assets. The petitioner, a wholesale distributor, reports no inventories at the end of 2012, suggesting that it was no longer doing business.

In addition, the petitioner's president stated in her individual bankruptcy petition in 2011 that she accrued more than \$100,000 in credit card debt for use in the petitioner's business and loaned the corporation a total of \$326,750 from 1996 to 2010. *See In re de Balthazar*, No. 3:11-BK-31497 (Bankr. N.D. Fla. Jan. 4, 2012). The petitioner's tax returns also state "loans from shareholders" as a liability at the end of 2011. The president's stated use of her personal assets to fund the corporation's operations suggests that, unlike the petitioner in *Matter of Sonogawa, supra*, the instant petitioner has experienced financial difficulties in the past, including the year of the priority date.

Also unlike the petitioner in *Matter of Sonogawa, supra*, the instant petitioner has not claimed or established any uncharacteristic business expenditures or losses, and has not submitted any evidence regarding its reputation within its industry. Thus, assessing the totality of the circumstances in this case pursuant to *Matter of Sonogawa, supra*, we conclude that the petitioner has not established its continuing ability to pay the proffered wage from the petition's priority date onward.

Beyond the Director's decision, the petitioner also has not established the beneficiary's qualifications for the offered position.⁴ A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

⁴ We may deny an application or petition that fails to comply with technical requirements of the law even if a Director did not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. Dep't of Justice, supra*, at 145 (stating that this office conducts appellate review on a *de novo* basis).

In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of the labor certification to determine the minimum requirements for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position of business development specialist requires a bachelor's degree or a foreign equivalent degree in business administration. The labor certification does not require any experience for the position. However, Part H.14. of the ETA Form 9089 states that "other requirements" include "[i]n-depth knowledge of linens and dry goods wholesaling, including advertising, promotion, organization, sales, systems, and marketing; fluent spoken and written business Hungarian."

In support of the beneficiary's possession of the requirements stated in Part H.14. of the ETA Form 9089, the petitioner submitted a February 22, 2011 letter from its president. The letter states that, in a prior position with the petitioner, the beneficiary "acquired significant knowledge of linens and dry goods wholesaling and displayed an ability to conduct business with our Hungarian business partners."

The February 22, 2011 letter by the petitioner's president does not establish that the beneficiary meets all of the requirements specified in Part H.14. of the ETA Form 9089. The letter states that the beneficiary translated and interacted "with foreign partner operations, many of which are based in Hungary" and that she "displayed an ability to conduct business with our Hungarian business partners." However, the letter does not indicate that the beneficiary is "fluent [in] spoken and written business Hungarian" as specified on the labor certification. Even if the petitioner's letter indicated the beneficiary's fluency in speaking and writing "business Hungarian," the record would lack independent, objective evidence of her fluency because the petitioner's letter is self-serving and would not establish her fluency without additional evidence that the petitioner is qualified to make such an evaluation. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve inconsistencies in the record by independent, objective evidence); see also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Assoc. Comm'r 1998) (stating that going on record without support documentary evidence is insufficient to meet the burden of proof in visa petition proceedings) (citation omitted). Therefore, the record does not establish that the beneficiary possessed all of the minimum qualifications for the offered position by the petition's priority date.⁵

⁵ The record also does not establish that the beneficiary meets the offered position's minimum educational requirements of a bachelor's degree in business administration. The record indicates that the beneficiary received a Bachelor of Science Business Administration (B.S.B.A.) in marketing. The United States university that issued her degree also offers a B.S.B.A. in "general business." See [http://\[redacted\]departments/management/undergradmajors/general-business/](http://[redacted]departments/management/undergradmajors/general-business/) (accessed Aug. 18, 2014). The record does not contain evidence that the petitioner intended to accept a B.S.B.A. in marketing – as opposed to a B.S.B.A. in general business or a Bachelor of Business Administration degree – to meet the educational requirements of the offered position. Cf. *Matter of Ling*, 13 I&N Dec. 35, 38 (Reg'l Comm'r 1968) (holding that, because "business administration" is a general term including both professional and nonprofessional activities, a degree in business administration alone is insufficient to qualify the holder as a member of the professions under section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32)). In any future filings regarding this petition, the petitioner must submit

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Also beyond the Director's decision, the record does not establish the petitioner's ability to employ the beneficiary in the offered position. A labor certification remains valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the ETA Form 9089. 20 C.F.R. § 656.30(c)(2). A petitioner must actually desire and intend to employ a beneficiary under the conditions specified in the accompanying labor certification. *Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966).

In the instant case, the record does not establish that the offered position of business development specialist continues to exist. The labor certification states that the position involves "[o]versight of a planning team." However, as of the petition's filing date of October 11, 2013, the Form I-140, Petition for Alien Worker, states that the petitioner employed only two people, one of whom was presumably the beneficiary. Also, as previously discussed, the petitioner's tax returns reflect minimal assets and no inventories at the end of 2012, suggesting that the petitioner, a wholesale distributor, no longer conducts business. Therefore, the record does not establish that the job opportunity continues to exist.

In summary, the record does not establish the petitioner's continuing ability to pay the proffered wage from the petition's priority date onward, the beneficiary's qualifications for the offered position, or that a *bona fide* job opportunity continues to exist. Therefore, the petitioner's request to classify the beneficiary as a professional worker under section 203(b)(3)(A)(ii) of the Act cannot be granted.

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

copies of its labor certification documentation, including the recruitment report, advertisements, prevailing wage determination, notice of filing, and any resumes or applications received from applicants, as evidence of its intent to accept a B.S.B.A. in marketing to meet the minimum educational requirements of the offered position.