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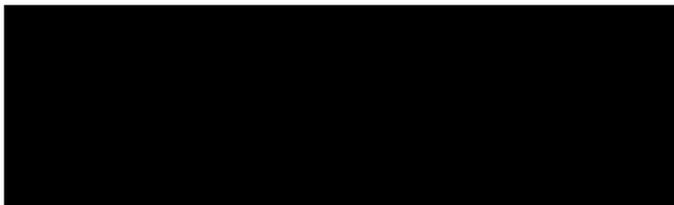
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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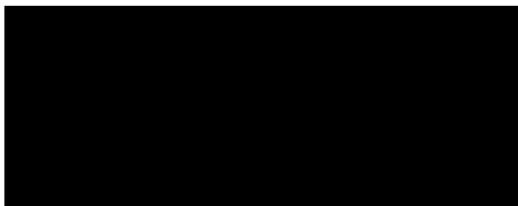
Petitioner:

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a real estate management company. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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). As set forth in the director's September 29, 2004 denial, 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.

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 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 8, 2001. The proffered wage as stated on the Form ETA 750 is \$11.70 per hour (\$24,336.00 per year based on a 40-hour work week). The Form ETA 750 states that the position requires two years of college education in the field of mathematics, computer literacy, knowledge of Microsoft Office software and two years of experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal,

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

counsel submitted a brief, a letter dated October 19, 2004 from the petitioner's President, and IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for GM Canmar Residence Corp., for 2001, 2002 and 2003. Other relevant evidence in the record includes the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1992 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 21, 2001, the beneficiary claimed to have worked for the petitioner as a bookkeeper from December 1994 to the date she signed the Form ETA 750B.

On appeal, citing *Ohsawa America*, 1988-INA-240 (BALCA 1988), *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) and an unpublished federal district court decision, counsel asserts that the personal assets of the two shareholders of the petitioner may be considered in the determination of the petitioner's ability to pay the proffered wage.

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. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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 established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.²

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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*

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).

² The record lacks any copies of IRS Forms W-2 showing wages paid to the beneficiary, and the record contains no other evidence of the wages paid to the beneficiary by the petitioner. The record therefore lacks evidence that the petitioner was paying the proffered wage during the relevant time period and lacks evidence to determine the amount of any increase which would be necessary to raise the beneficiary's actual wage to the proffered wage during that time period. The AAO therefore must evaluate the petitioner's ability to pay the entire proffered wage as of the priority date and continuing to the present.

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).

The record before the director closed on October 27, 2003. As of that date, the petitioner's 2002 federal income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120S stated net income³ of -\$43,703.00.
- In 2002, the Form 1120S stated net income of -\$90,846.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$24,336.00.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$2,106.00.
- In 2002, the Form 1120S stated net current assets of -\$15,284.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage of \$24,336.00.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had 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.⁵

³ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's 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 or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional income shown on its Schedule K for 2001 and 2002, the petitioner's net income is found on line 23 of Schedule K of its tax return.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

⁵ CIS electronic records show that the petitioner filed one other I-140 petition which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers

Citing a letter from the petitioner's President, counsel asserts in his brief accompanying the appeal that the personal assets of the two shareholders of the petitioner may be considered in the determination of the petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).⁶ Consequently, 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.

Counsel states that two DOL Bureau of Alien Labor Certification Appeals (BALCA) cases are applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988) and *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), counsel asserts that the personal assets of the two shareholders of the petitioner may be considered in the determination of the petitioner's ability to pay the proffered wage. However, counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner shows no revenue and increasing losses. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition. In addition, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

On appeal, counsel also cites an unpublished decision of a federal district court in Massachusetts. Counsel's claim is not supported by the record, as counsel has not provided a copy of the court's decision. The

to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2). The other petition submitted by the petitioner in December 2003 was denied in July 2004. The petitioner appealed the decision in November 2004 and the appeal is currently pending. The record in the instant case contains no information about the proffered wage for the beneficiary of that petition, about the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certification.

⁶ 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. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.⁷ In the instant case, the Application for Alien Employment Certification, Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of bookkeeper. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	3
	College	2
	College Degree Required	blank
	Major Field of Study	mathematics

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A requires that the applicant be computer literate and have knowledge of Microsoft Office software.

The beneficiary set forth her credentials on Form ETA 750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she worked for the petitioner as a bookkeeper from December 1994 to the date she signed Form ETA 750B, that she worked as a teacher at Solotvyn Village High School in the Ukraine from September 1979 to June 1990 and that she worked as an accountant/bookkeeper for Solotvyno

⁷ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, 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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Cooperative Trade Association in the Ukraine from July 1990 to September 1993. She does not provide any additional information concerning her employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, she represented that she has been self-employed as a bookkeeper from October 1998 to the date she signed the Form G-325 on October 15, 2003, above a warning for knowingly and willfully falsifying or concealing a material fact.

With the petition, the petitioner submitted a certificate dated January 30, 1993 from the Solotvyno Cooperative Trade Association in the Ukraine stating that the beneficiary was employed as an accountant/bookkeeper from July 1, 1990 through September 30, 1993.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The certificate submitted by the petitioner from the Solotvyno Cooperative Trade Association does not describe the beneficiary's job duties as specifically required by the regulation or state her hours of work to determine if she worked full-time or not. Thus, the petitioner failed to provide sufficient documentation of the beneficiary's prior work experience as required by 8 C.F.R. § 204.5(l)(3). Further, the evidence submitted by the petitioner does not establish that the beneficiary is computer literate and has knowledge of Microsoft Office software as required by the ETA 750 in this case. Therefore, the evidence submitted does not establish that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.