



U.S. Citizenship
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Services

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FILE: [REDACTED]
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Office: NEBRASKA SERVICE CENTER

Date:

NOV 19 2009

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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. 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 September 11, 2007 denial, the single 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, counsel stated that a brief and/or additional evidence would be submitted to the AAO within 30 days. The appeal was filed on October 15, 2007. As of this date, more than 24 months later, the AAO has received nothing further.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) states in pertinent part:

Additional time to submit a brief. The affected party may make a written request to the AAO for additional time to submit a brief. The AAO may, for good cause shown, allow the affected party additional time to submit one.

The regulation at 8 C.F.R. § 103.3(a)(2)(viii) states in pertinent part:

Where to submit supporting brief if additional time is granted. If the AAO grants additional time, the affected party shall submit the brief directly to the AAO.

Counsel, here, did not request any additional time beyond the 30 days listed on Form I-290B. Therefore, a decision will be determined based on the record, as it is currently constituted.¹

¹ It should be noted that counsel's lack of providing a brief is also a basis for denial. As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. Counsel here has not specifically identified any erroneous conclusion of law or statement of fact. Additionally, counsel failed to submit a brief or any additional evidence. The appeal could, therefore, have been summarily dismissed.

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 31, 2002. The proffered wage as stated on the Form ETA 750 is \$14.96 per hour (\$31,116.80 per year). The Form ETA 750 states that the position requires eight years of grade school and two years of experience in the job offered of restaurant cook.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

² 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).

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 1995, to have a gross annual income of \$989,286, and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is May 1 through April 30 of each year. On the Form ETA 750B, signed by the beneficiary on May 9, 2002, the beneficiary did not claim to have worked for the petitioner.

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 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of May 31, 2002.

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). 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 expenses were paid rather than net income.

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 116. “[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 petitioner’s tax returns demonstrate its net income for fiscal years 2002 through 2005, as shown in the table below.

- In fiscal year 2002, the Form 1120 stated net income of -\$3,916.
In fiscal year 2003, the Form 1120 stated net income of -\$7,458.
- In fiscal year 2004, the Form 1120 stated net income of -\$179.
In fiscal year 2005, the Form 1120 stated net income of \$20,977

Therefore, for the fiscal years 2002 through 2005, 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 assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be

converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ 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 fiscal years 2002 through 2005, as shown in the table below.

- In fiscal year 2002, the Form 1120 stated net current assets of -\$51,801.
- In fiscal year 2003, the Form 1120 stated net current assets of -\$61,976.
- In fiscal year 2004, the Form 1120 stated net current assets of -\$43,738.
- In fiscal year 2005, the Form 1120 stated net current assets of -\$67,174.

Therefore, for the fiscal years 2002 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, 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.

On appeal, counsel asserts:

The Nebraska Service Center denied [the petitioner's] Form I-140, Immigrant Petition for Alien Worker, finding that [the petitioner] did not have the financial ability to meet the proffered wage upon an initial submission of evidence without issuing a Request for Additional Evidence. By way of explanation of its premature decision, the Nebraska Service Center stated, "[A]ll the necessary evidence has been submitted and no underlying questions have arisen in regard to missing evidence and no additional explanation of the admissible documentary and written evidence is required. It appears to the Service that the petitioner has submitted all available

³According 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.

evidence and the Service will therefore render a decision.” The Service committed reversible error when it found that [the petitioner] had completed its documentation and foreclosed [the petitioner’s] ability to submit additional evidence/explanation of its financial ability to meet the proffered wage.

The Service’s premature failure foreclosed [the petitioner’s] owner from explaining its customary accounting practices. The Service examined only [the petitioner’s] income and net assets. It did not take into consideration the sizeable compensation of officers for all relevant years and depreciation, which are evidence of [the petitioner’s] ability to meet the proffered wage contained in the initial evidence submitted. *See Matter of _____*, Vermont Service Center, EAC 01 018 50413 (AAO January 31, 2003) (where sole shareholder of medical corporation routinely minimizes taxable income by taking it as compensation to avoid double taxation, the net profit on the return should not control). Additionally, [the petitioner] is solely owned by [REDACTED]. As such, the sole proprietor’s assets may be used to determine the employer’s financial ability. *See Matter of Ranchito Coletero*, 02-INA-105 (BALCA January 8, 2004). [The petitioner] is only one of several restaurants and businesses solely owned by [REDACTED]. As an accounting practice, he pools the resources of all of his companies to lower his tax burden and meet his financial obligations. In taking a narrow view of the tax returns and by foreclosing any opportunity for further explanation, the Service incorrectly found that [the petitioner] did not have the financial ability to meet the proffered wage.

Counsel is mistaken. It should be noted that the USCIS is not obligated to issue a request for evidence (RFE) if all required initial evidence has been submitted (in the instant case, the petitioner’s tax returns), but the evidence submitted does not establish eligibility. The regulation at 8 C.F.R. § 103.2(b)(8) states in pertinent part:

(ii) **Initial evidence.** If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS, in its discretion, may deny the application or petition for lack of initial evidence for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) **Other evidence.** If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; . . .

The regulation does not state that the USCIS is obligated to issue a RFE when the evidence in the record does not establish eligibility.

On appeal, counsel claims that the director should have considered officer compensation when determining the petitioner’s ability to pay the proffered wage of \$31,116.40. The 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). The petitioner submitted no evidence indicating that the officer of the corporation would be willing to forgo more than 40% of his compensation to cover the proffered wage of \$31,116.80 in this case. Further, the petitioner failed to submit a W-2 for the petitioner's owner to evidence his income, and the petitioner failed to submit evidence to show that officer compensation payments were not fixed by contract or otherwise.⁴ In addition, counsel cites to a non-precedent decision in support of his decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished 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). Therefore, the AAO will not consider the owner's compensation of officers, in the instant case.

Furthermore, counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how DOL's Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Again, precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

With regard to depreciation, counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and

⁴ In fact, three of the four tax returns submitted show that the petitioner's owner earned the same amount, \$74,984, in those three years (fiscal years 2002, 2004, and 2005). Therefore, it would appear that the petitioner's owner was paid a fixed amount in most years. USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner 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). 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. 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. Therefore, the AAO will not consider the petitioner's depreciation when determining its continuing ability to pay the proffered wage of \$31,116.80. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).

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 (BIA 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's tax returns indicate it was incorporated on May 31, 2001. The petitioner has provided its tax returns for fiscal years 2002 through 2005 with none of those tax returns establishing the petitioner's ability to pay the proffered wage of \$31,116.80. Furthermore, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities.

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.

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

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.