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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 05 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 fast food 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 May 21, 2009 denial, at issue in this case is whether the petitioner has had the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 4, 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 indicates that the position requires two years of experience in the proffered position.

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 on appeal.[1]

The evidence in the record shows that the petitioner is structured as a C corporation. According to information provided on the petition, the petitioner currently employs seven workers. The petitioner left blank the box on the petition in which it was to list the date it was established. According to the tax returns in the record, the petitioner's fiscal year begins on May 1 and ends on April 30. On the Form ETA 750B, signed by the beneficiary on April 18, 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, 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 Sonegawa*, 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. Here, the petitioner submitted 2002, 2003, 2004, 2005, 2006, 2007 and 2008 Forms W-2, Wage and Tax Statement, which indicate that the petitioner paid the beneficiary a portion of the proffered wage in those years. The Forms W-2 in the record reflect the following information:

- The 2002 Form W-2 states that the petitioner paid the beneficiary $14,400 in 2002, or $16,716.80 less than the proffered wage.
- The 2003 Form W-2 states that the petitioner paid the beneficiary $14,400 in 2003, or $16,716.80 less than the proffered wage.
- The 2004 Form W-2 states that the petitioner paid the beneficiary $15,600 in 2004, or $15,516.80 less than the proffered wage.

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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 2005 Form W-2 states that the petitioner paid the beneficiary $15,600 in 2005, or $15,516.80 less than the proffered wage.
- The 2006 Form W-2 states that the petitioner paid the beneficiary $15,600 in 2006, or $15,516.80 less than the proffered wage.
- The 2007 Form W-2 states that the petitioner paid the beneficiary $15,600 in 2007, or $15,516.80 less than the proffered wage.
- The 2008 Form W-2 states that the petitioner paid the beneficiary $15,600 in 2008, or $15,516.80 less than 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). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

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 24 of the Form 1120-A, U.S. Corporation Short Form Income Tax Return, or on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on April 21, 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, the petitioner's 2008 federal income tax return was not yet due. The 2007 tax return should have been available on that date, but the petitioner did not submit that return.[2] The petitioner's tax returns demonstrate its net income for 2002 through 2006, as shown in the table below.[3]

- The 2002 Form 1120-A states net income of $5,986.
- The 2003 Form 1120 states net income (loss) of -$1,080.
- The 2004 Form 1120 states net income of $12,450.
- The 2005 Form 1120 states net income of $7,987.
- The 2006 Form 1120 states net income of $20,355.

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[2] The tax returns in the record are for [redacted] at the same address as the petitioner. The [redacted] Secretary of State online database of [redacted] corporations indicates that [redacted] is currently an active business at the address listed for the petitioner. *See* [redacted] to conduct search for [redacted] accessed July 29, 2010. The petitioner's owner as stated in this proceeding is listed as that company's Chief Executive Officer at that online database. *See id.*, accessed July 29, 2010. The Form ETA 750 in the record lists the employer as [redacted] at the same address as the petitioner. According to an Internet search conducted by this office, [redacted] is the doing business as (d/b/a) title of the petitioner and the title as it is written on the petition is apparently a misspelling of the d/b/a title. *See* [redacted] accessed July 29, 2010. For purposes of this analysis, the AAO will consider the information on the corporate tax returns in the record as being the financial information of the petitioner. However, in any future filings, the petitioner should list on the petition its legal title and its d/b/a title, using the correct spelling for both. This will document with greater clarity that the tax returns in the record are those of the petitioner.

[3] The petitioner's 2001 tax return which covers the period from May 1, 2001 through April 30, 2002 is in the record. This return is not analyzed in this section as it covers the period just before the October 4, 2002 priority date. The 2001 tax return will be considered later in this discussion when reviewing the totality of the petitioner's financial circumstances.

Therefore, in 2002 through 2005, the petitioner did not have sufficient net income to cover the proffered wage, or to cover the difference between the wage it paid the beneficiary in those years and the proffered wage. In 2006, the petitioner did have sufficient net income to cover the difference between the proffered wage and the wage paid the beneficiary in 2006 or $15,516.80.

Thus, the petitioner has established an ability to pay the proffered wage in 2006 based on the actual wages paid the beneficiary in that year and its net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS 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(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 2002 through 2005, as shown in the table below.

- The 2002 Form 1120 states net current assets of $5,624.
- The 2003 Form 1120 states net current assets of $738.
- The 2004 Form 1120 states net current assets of $7,923.
- The 2005 Form 1120 states net current assets (liabilities) of -$116,631.

Therefore, in the years 2002 through 2005, the petitioner did not have sufficient net current assets to cover the proffered wage.

Thus, for the year 2006, the petitioner has established that it had the ability to pay the wage. It has not shown an ability to pay the wage in 2002 through 2005 through an examination of wages paid to the beneficiary, its net income or net current assets.

On appeal, counsel submitted affidavits in which the petitioner's owner attested to having a monthly income between approximately $42,000 and $68,000 during the relevant period. Counsel indicated that the AAO should look to the assets of petitioner's owner as funds that are available to pay the proffered wage. This is not correct. USCIS (legacy INS) 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

[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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

USCIS will also consider the overall magnitude and circumstances of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

Here, the tax returns in the record indicate that the petitioner was established in 1999. The petition states that the petitioner currently employs seven workers. The petitioner has not established its historical growth since incorporating. Its gross receipts have fluctuated during 2001 through 2006 as follows: $388,822 in 2001; $398,712 in 2002: $328,301 in 2003: $347,079 in 2004: $625,037 in 2005: and $710,536 in 2006. During 2001 through 2006, the total wages paid its employees have been relatively modest, as follows: $36,000 in 2001; $86,080 in 2002; $90,690 in 2003; $104,173 in 2004; $106,243 in 2005; and $74,777 in 2006. Also, officer compensation amounts were modest during 2001 through 2006 at this company which has two officers, (one of whom devotes one-hundred percent of his time to working for the petitioner); officer compensation amounts were as follows: $52,000 in 2001; $30,333 in 2002; $39,000 in 2003; $39,000 in 2004; $39,000 in 2005; and $39,000 in 2006. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it has had the continuing ability to pay the proffered wage from 2002 onwards.

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.