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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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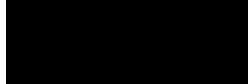


**U.S. Citizenship
and Immigration
Services**



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FILE:



Office: TEXAS SERVICE CENTER

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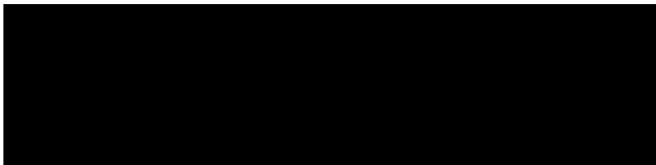
IN RE:

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:

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 \$630. 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,

A handwritten signature in cursive ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a manufacturer and installer of stainless steel custom commercial kitchen equipment, hoods, exhausters, blowers, and other equipment business. It seeks to employ the beneficiary permanently in the United States as an electroplating (mgr.) specialist. 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 (the 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 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.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 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 September 30, 2003. The proffered wage as stated on the Form ETA 750 is \$48,000.00 per year. The Form ETA 750 states that the position requires a four-year Bachelor of Science degree and two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

Accompanying the petition and labor certification, counsel submitted the petitioner's federal income tax (Form 1120S) return for 2006.

The director issued a request for evidence (RFE) to the petitioner dated February 21, 2008, and requested the petitioner submit, *inter alia*, its federal income tax (Form 1120S) returns for 2004 and 2005.

In response, the petitioner submitted a letter from the petitioner's accountant dated April 29, 2008; the petitioner's federal income tax (Form 1120S) returns for 2004 through 2007.

On appeal counsel submitted a legal brief, the petitioner's federal income tax (Form 1120S) returns for 2004 through 2007, and a sworn statement from the petitioner's president made August 1, 2008.

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 1989 and to currently employ 15 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 July 16, 2003, the beneficiary did not claim to have worked for the petitioner since January 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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

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 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).

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. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 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 USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitan*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

² The petitioner's accountant by his letter statement dated April 29, 2008, stated that the salary and wages amounts stated on the petitioner's tax returns included the beneficiary's salary, but evidence of the beneficiary's own wages, salary or compensation was not submitted by the petitioner.

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 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on May 14, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2003, the Form 1120S stated net income of \$323.00.
- In 2004, the Form 1120S stated net income of <\$20,826.00>.
- In 2005, the Form 1120S stated net income of <\$10,357.00>.
- In 2006, the Form 1120S stated net income of <\$883.00>.
- In 2007, the Form 1120S stated net income of <\$2,361.00>.

Therefore, for the years 2003 through 2007, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets.³ Net current assets are the difference between the

³ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS 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, credits, deductions or other adjustments, net income is found on line 17e for the 2005 return of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/f1120s.pdf> (accessed November 18, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income deductions and other adjustments shown on its Schedule K for 2005, the petitioner’s net income is found on Schedule K of its 2005 tax return.

petitioner's current assets and current liabilities. 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 as shown in the table below.

- In 2003, the Form 1120S stated net current assets of approximately⁴ <\$2,662.00>.
- In 2004, the Form 1120S stated net current assets of <\$4,327.00>.
- In 2005, the Form 1120S stated net current assets of \$27,477.00.
- In 2006, the Form 1120S stated net current assets of \$36,651.00.
- In 2007, the Form 1120S stated net current assets of \$46,565.00.

Therefore, for the years 2003 through 2007, 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 its net income or net current assets.

On appeal, counsel asserts officers' compensation as stated in the petitioner's tax returns was available to pay the proffered wage.

Shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Following the accountant's letter dated April 29, 2008, to the same effect, the corporation's surplus capital was distributed as discretionary officer's compensation during the same years. Compensation of officers is an expense category explicitly stated on the Form 1120S. Counsel cites several unpublished AAO decisions in support of his contention.⁵ Officers' compensation is a deduction used to determine net income, and once paid, is not an asset available to pay the proffered wage. It is not an uncommon practice for a petitioner's stockholder or stockholders to direct a corporation's net income and essentially compensate him or themselves with it, thus sheltering it from additional taxation. In this matter, the amount of officers' compensation does vary over the course of the pertinent years demonstrating that the amount does not represent some contractually obligated and fixed amount of compensation. The officer or officers receiving the compensation are

⁴ The tax return was only partly legible.

⁵ 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).

the stockholders. It is not clear from the evidence submitted, that the company president, at least in 2006 and 2007, had the discretion to set his own compensation.

The petitioner's president stated that his officers' compensation "would have been drawn [upon]" to pay the proffered wage. Therefore, the petitioner's owner is offering to give up some of his compensation in 2008, five years after the priority date, to pay the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Furthermore, it is not credible that an officer truly would or could have sacrificed such a large portion of his income to pay the beneficiary the proffered wage in, for example, 2004. In 2004, the officer was paid \$26,450.00 in officer's compensation, but since the company suffered a loss in 2004 of <\$20,826.00>, the president would have had to sacrifice his entire salary and this would still not have been sufficient. The proffered wage is \$48,000.00, or 181% of the officer's compensation in 2004. Therefore, it does not appear reasonable to conclude without evidence to the contrary, that the petitioner had the ability to pay the proffered wage through an examination of officers' compensation in all years. Finally, given the nominal net income in 2003 and sustained losses in 2004 through 2007 (i.e. stated negative net incomes on the tax returns), it seems unlikely that the petitioner could have used any sacrificed officers' compensation to pay the beneficiary the proffered wage. For this reason, the petitioner's figures for compensation of officers may not be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income, or in this instance loss.

Similarly, the petitioner's accountant by his letter statement dated April 29, 2008, states that depreciation, officers' compensation, the company's payroll, and the beneficiary's wages for 2004 through 2007, are proof of the petitioner's ability to pay the proffered wage, but there is no independent objective evidence in the record to substantiate this contention. As already stated, according to *River Street Donuts*, depreciation cannot be added back to net income. The shareholders have not relinquished their officers' compensation to pay the proffered wage, and only the president in 2008 has only made such an offer many years after the priority date, on appeal. As is described above, the petitioner has not demonstrated that it had the ability to pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

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.

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 Sonegawa*, 12 I&N Dec. 612. 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.

In the instant case, the petitioner was established in 1989, and employs 15 workers. In 2004 through 2007, the gross receipts of the petitioner increased from \$999,297.00 in 2003 to \$1,751,025.00 in 2007. Despite these increases, the petitioner's net income for the same years was only nominal in 2003, consistently negative from 2004 through 2007, with only nominal net current assets as against its gross receipts. In the instant case, there is a paucity of information concerning the petitioner's finances, reputation in its business sector, wages paid to the beneficiary, its assets or liabilities or anything meaningful to review or analyze the petitioner's business prospects. There is insufficient evidence in the record to conclude that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In addition, there is no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities.

Finally, the record is not persuasive in establishing the petitioner suffered uncharacteristic business losses during the years in question. Although the petitioner claims on appeal that 2004 was particularly difficult because of the "aftermath of the economic shock that resulted from the 9/11

terror attacks in New York City in 2001," the petitioner failed to substantiate this claim with any evidence or to explain why the aftermath affected the business in 2004, but not in some way in 2003. The petitioner's gross revenues actually rose in 2004 from those stated in 2003. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.