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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: TEXAS SERVICE CENTER Date: OCT 19 2010

IN RE: Petitioner:
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:

[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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a poultry farm. It seeks to employ the beneficiary permanently in the United States as a flock manager. 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 2001 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the petitioner and former counsel did not receive the director's denial and as a result did not file a timely appeal. The petitioner found out that the instant petition had been denied based on a Congressional enquiry. Current counsel through AILA liaison received notice that the instant petition had been denied on July 29, 2008, and that a copy of the denial was mailed to current counsel and the petitioner. Current counsel submitted a motion to reopen/reconsider dated March 16, 2009. While the record does not indicate the director's disposition of the petitioner's MTR, the director forwarded the matter to the AAO. Thus the appeal to the AAO is considered 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 July 29, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 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, 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is $12.43 per hour ($25,854.40 per year). The Form ETA 750 states that the position requires two years of prior work experience in poultry and animal farming.

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 upon appeal.[1]

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 on June 28, 1988, to have a gross annual income and a net annual income of $120,000, and to currently employ two 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 April 20, 2001, the beneficiary claimed to have worked for the petitioner since 1993.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

[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 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).

On appeal, counsel asserts that the petitioner's banking and money market accounts during 2006 and 2007 could also be utilized to establish the petitioner's ability to pay the proffered wage during these two years. Counsel submits 2006 monthly statements for checking accounts with Bank of America and a money market account and bank checking account with RBC Centura, and monthly statements for tax year 2007 for another Bank of America business checking account.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

On appeal, current counsel also notes that that the petitioner's appraised value of the petitioner's owner's real estate properties could be utilized as evidence of the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage. Counsel submits copies of the Special Warranty Deed dated 1988 for the land in North Carolina that sells lands for $10 from the Travelers Insurance Company to [redacted] A second North Carolina General Warranty Deed is also submitted to the record. Counsel also submits a document that appraises an area identified as [redacted] for $3,862,000 as of December 4, 1989. Finally counsel submits a Property tax appraisal document dated 2007 for a property with a taxable value of $912,912.

However, contrary to counsel's assertion, USCIS 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.

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. With the initial I-140 petition, the petitioner submitted the beneficiary's W-2 Forms for tax years 2001 to 2005. In response to the director's RFE dated April 28, 2008, the petitioner also submitted the beneficiary's W-2 Forms for tax year 2006 and 2007. These documents indicate the petitioner paid the beneficiary the following wages: $4,777.50 in 2001; $20,261.67 in 2002; $16,812 in 2003; $10,084.03 in 2004; $10,084.03 in 2005; $33,847.50

in 2006; and $17,763.75 in 2007. Thus the petitioner only paid the beneficiary a salary equal to or greater than the proffered wage in tax year 2006. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the 2001 priority date or during any other relevant tax years, besides 2006. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages in tax years 2001, 2002, 2003, 2004, 2005, and 2007 and the proffered wage of $25, 854.40.[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*, --- F. Supp. 2d. ---, 2010 WL 956001, at 6 (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. Napolitano*, --- F. Supp. 2d. at 6 (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 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

[2] These differences are $21,076.90 in 2001; $5,592.73 in 2002; $9,042.40 in 2003; $25,770.37 in 2004; $15,770.37 in 2005, and $8,090.65 in 2007.

> 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 27, 2008 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 2007 federal income tax return was due, and the petitioner submitted it to the record. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The petitioner's tax returns demonstrate its net income, as shown in the table below.

- In 2001, the Form 1120S stated net income[3] of $36,472.
- In 2002, the Form 1120S stated net income of $123,304.
- In 2003, the Form 1120S stated net income of $144,565.
- In 2004, the Form 1120S stated net income of -$51,745.
- In 2005, the Form 1120S stated net income of $3,080.
- In 2007, the Form 1120S stated net income of -$53,298.

Therefore, for the years 2001, 2002, and 2003, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage of $25,484.40. However,

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[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 23 (1997-2003) line 17e (2004-2005) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf. (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, or other adjustments shown on its Schedule K for all relevant years, the petitioner's net income is found on Schedule K of its tax returns for tax year 2001 to 2003. For tax years 2004 to 2007, the relevant lines of the petitioner's Schedules K are blank, therefore, the AAO utilized the figures at line 21, of the petitioner's tax returns.

the petitioner did not have sufficient net income to pay the differences in tax years 2004, 2005, and 2007.

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 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 Schedules L submitted with the petitioner's tax returns for tax years 2004, 2005, and 2007 did not contain any information with regard to the above-described analysis of net current assets. On appeal, current counsel states that many tax payers they believe that completion is not required and has no tax consequences and, therefore, does not impact their ability to file the document. Counsel states that the petitioner's monthly balance sheets for 2004 and 2005 can be utilized to determine the petitioner's net current assets. Counsel notes that former counsel also submitted the petitioner's balance sheet for the year ending December 31, 2007 in response to the director's RFE that can be utilized to examine the petitioner's net assets in 2007.

With regard to tax year 2007, counsel states that the petitioner's current assets[5] are $150,282.10, and that when reduced by the petitioner's current liabilities of $45,422.36,[6] according to the USCIS methodology, the petitioner has net assets of $104,599.78. Counsel also states that in 2004, the petitioner's current assets are $361,600.33 and that when reduced by the petitioner's current liabilities of $49,768.15, the petitioner has net assets of $311,832.18. In 2005, counsel states that the petitioner's current assets are $191,810.81, and that when reduced by the petitioner's current liabilities of $46,492.70, the petitioner's net assets of $145,318.11.

The AAO does not find counsel's assertions persuasive. First, the USCIS methodology referenced by counsel is based on an examination of the petitioner's Schedules L, rather than balance sheets. Second, the petitioner's balance sheets are not part of the three types of documentation described at 8 C.F.R. § 204.5(g)(2). If counsel considers the petitioner's balance sheets as financial reports, these reports should be audited. Third, the items identified in the petitioner's balance sheet are not all

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[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] Counsel refers to the figures identified as "total short term assets" on the balance sheets as the petitioner's net assets. These figures include two checking accounts, , a money market account, accounts receivable, insurance claim receivable, notes receivable, and loans to employees.

[6] Counsel refers to figures identified as "total Short Term Liabilities" as the petitioner's net liabilities. These figures include accounts payable, FICA withholding, FIT with holding, other employee deductions, Medicare with holding, deposits, notes payable short term, and commodity credit loan.

analogous. For example, the petitioner's total current liabilities do not include mortgages, notes, bonds payable in less than 1 year, which are reflected on the Schedules L in the petitioner's tax returns for previous years. Loans to employees are indicated as part of the petitioner's short term assets, while there is not indication that such loans would be paid within a year or less. As such these loans would not be considered part of net current assets. Therefore the AAO would not consider the petitioner's unaudited monthly or year balance sheets for tax years 2004, 2005 or 2007 in lieu of the petitioner's Schedules L.

Therefore, for the years 2004, 2005, and 2007, the petitioner has not established that it had sufficient net current assets to pay the difference between the beneficiary's actual wages and 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, except for tax years 2001, 2002, 2003, and 2006.

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 (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.

In the instant case, the record indicates the petitioner farm income was highest in the 2001 priority year at $162,496. The tax returns for the ensuing years show lowered income, or negative farm income. With regard to wages, the petitioner's tax returns indicate the petitioner's two employees were considered contracted labor. The record also indicates that the petitioner had either no officer compensation or modest amounts. While the record reflects that the petitioner owns land worth a significant amount of money, the petitioner's actual business operations appear modest. 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.