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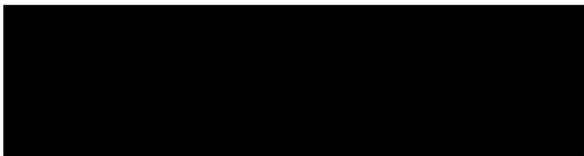
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUL 12 2010

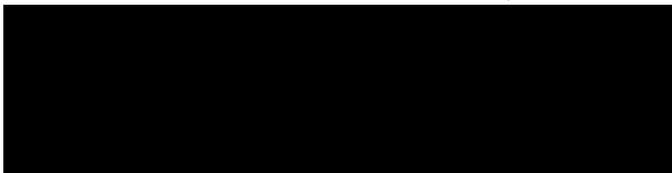
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 \$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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a music store. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the 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 and denied the petition accordingly.

The record shows that the appeal is properly and timely filed, 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.

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 and in response to the AAO's request for evidence.¹

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 ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089), 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 ETA Form 9089 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).

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).

Here, the ETA Form 9089 was accepted on December 1, 2006. The proffered wage as stated on the ETA Form 9089 is \$57,000 per year. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner. However, in response to the director's request for evidence, counsel claimed that the beneficiary started the employment with the petitioner in February 2007. On the petition, the petitioner claimed to have an establishment date in 1979, a gross annual income of \$1,250,000, a net income of \$75,000 and 15 employees.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 submitted documentary evidence to demonstrate the beneficiary's compensation from the petitioner. The petitioner's Quarterly Wage and Withholding Report for the first and second quarters of 2007 show that the petitioner paid the beneficiary \$8,153.41 in the first quarter of 2007 and \$8,898.05 in the second quarter of 2007. The beneficiary's paystubs show that the petitioner paid the beneficiary \$6,487.38 in July and August of 2007 at the level of \$38,924.28 per year. The petitioner failed to establish its ability to pay the full proffered wage for these years through the examination of wages actually paid to the beneficiary, however, the petitioner demonstrated that it employed and paid the beneficiary a partial proffered wage, and the petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference between wages actually paid to the beneficiary and 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). 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).

The evidence in the record shows that the petitioner is structured as a C corporation and the petitioner’s fiscal year starts April 1 and ends March 31 next year. The record contains a copy of the petitioner’s Form 1120 U.S. Corporation Income Tax Return for its fiscal year 2006. The priority date in this case falls on December 1, 2006 and the petitioner’s tax return for its fiscal year 2006 covers from April 1, 2006 to March 31, 2007. Therefore, the petitioner’s 2006 tax return is the tax return covering the priority date in this case. The petitioner’s tax return demonstrates its net income for its fiscal year 2006, as shown below.

- In the fiscal year of 2006 (4/1/06-3/31/07), the Form 1120 stated net income² of \$3,366.

As previously discussed, the petitioner’s Quarterly Wage and Withholding Report shows that the petitioner paid the beneficiary \$8,153.41 in the first quarter of 2007 (1/1/07-3/31/07), and thus, the petitioner demonstrated that it paid the beneficiary a partial proffered wage of \$8,153.41 in its fiscal year 2006. Therefore, the petitioner must demonstrate that it had sufficient net income to pay the difference of \$48,846.59 between wages actually paid to the beneficiary and the proffered wage in

² For a C corporation, USCIS considers net income to be the figure shown on Line 28, Taxable income before net operating loss deduction and special deductions, of the Form 1120, U.S. Corporation Income Tax Return.

that fiscal year. However, the petitioner's tax return shows that the petitioner did not have sufficient net income to pay the difference. Therefore, the petitioner failed to establish its ability to pay the proffered wage for the fiscal years 2006 through the examination of wages actually paid to the beneficiary and 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.³ 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 submitted the first page of the tax return for its fiscal year 2006 only. Without Schedule L of the Form 1120, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the difference of \$48,846.59 between wages actually paid to the beneficiary and the proffered wage in the fiscal year 2006, and thus, the petitioner failed to establish its ability to pay the proffered wage for 2006 through the examination of wages actually paid to the beneficiary and its net income or net current assets.

The record does not contain any regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements, to demonstrate the petitioner's net income or net current assets for its fiscal year 2007 and thereafter. Without the regulatory-prescribed evidence, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage in 2007 onwards and thus, the petitioner failed to establish its ability to pay the proffered wage for 2007 onwards.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the instant 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 submits a letter dated April 24, 2008 from a certified public accountant and Citibank Account Opening Screen Print asserting that the petitioner's line of credit bank loans and loans from its shareholder could provide additional funds to pay the beneficiary the proffered wage. However, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make

³ 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.

loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The record contains the petitioner's financial statements for different periods of time. However, these income statements are not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel also submits a letter from the petitioner's sole shareholder stating that the 100% shareholder have the ability to draw from discretionary funds either from her line of credit with the banks or from money she lend to the corporation. 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.

Counsel urges that the beneficiary's ability to generate income can be used in determining the petitioner's ability to pay the proffered wage. Counsel cites *Masonry M* 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.⁴ Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a software engineer will significantly increase profits for a music store. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Against the projection of future earnings, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner also states that the beneficiary has taken over additional tasks of a terminated employee which makes an additional sum of approximately \$30,000 available to further supplement the proffered wage. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the terminated employee involves the same duties as those set forth in the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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

⁴ Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

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, counsel suggests to consider that the petitioner has been operating for the last 29 years in the historic Old Town District of Pasadena, California. Although its gross sales are around \$1,500,000 and the total income is more than \$500,000, it had very low net income, for instance, only \$3,366 in 2006. The petitioner paid its 15 employees the salaries and wages of \$264,899, averagely \$17,659.93 per person per year. The petitioner did not establish its ability to pay the proffered wage for a single year. Given the evidence in the record as a whole, it is reasonable to conclude that the petitioner would not have additional income or assets to pay the proffered wage in this matter. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has no ability to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the year of the priority date and subsequent years. Therefore, the petitioner has not established that it 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.