

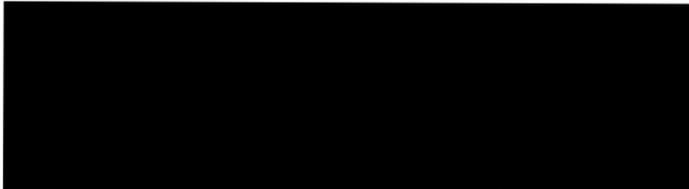
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**U.S. Citizenship
and Immigration
Services**

BL



File:

SRC-06-016-51696

Office: TEXAS SERVICE CENTER Date:

MAY 02 2007

In re:

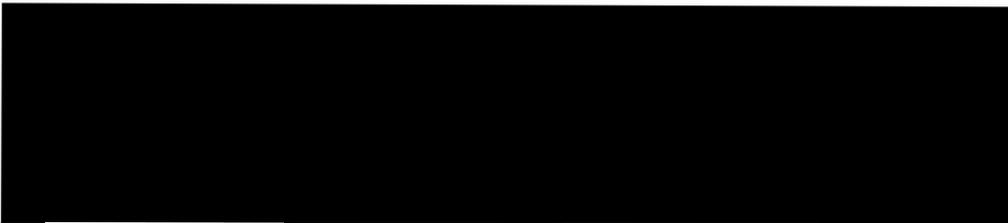
Petitioner:

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a business, which provides services for hair styling and Indian bridal make up and seeks to employ the beneficiary permanently in the United States as a hair stylist. The petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s December 2, 2005 denial, the case was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

The regulation 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

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).

shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 30, 2001.² The proffered wage as stated on Form ETA 750 for the position of hair stylist is \$590 per week, equivalent to \$30,680 per year based on a 40 hour work week. The petitioner additionally listed that the beneficiary would be paid at a rate of \$13.50 per hour for overtime. The labor certification was approved on July 8, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on October 21, 2005. Counsel listed the following information on the I-140 Petition related to the petitioning entity: date established: November 1997; gross annual income: \$35,304; net annual income: not listed; and current number of employees: one.

On November 9, 2005, the director issued a Notice of Intent to Deny ("NOID"), requesting that the petitioner submit evidence related to the petitioner's ability to pay, including the petitioner's federal tax returns for 2001, 2002, and 2003, or annual reports, or audited financial statements for those years; and W-2 Forms if the beneficiary were employed in 2001, 2002, 2003, and/or 2004. The petitioner responded. Following consideration of the response, on December 2, 2005, the director denied the case finding that the petitioner's response was insufficient to document that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, there is no evidence that the petitioner employed the beneficiary. On Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not list that she was employed with the petitioner. The petitioner did not claim that it had employed the beneficiary, and did not provide any W-2 statements for the beneficiary. Therefore, the petitioner cannot demonstrate its ability to pay the proffered wage through wage payment.

² We note that the beneficiary has the same surname as the petitioner's owner, however, it is unclear from the record whether the beneficiary is related to the owner. We note that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See also *Paris Bakery Corporation*, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in *Young Seal* that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not *bona fide* or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification." It is unclear whether there is a relationship between the two parties, but if there is a relationship and the petitioner failed to disclose this to DOL during the labor certification process, then the *bona fides* of the job offer may be in question.

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, Citizenship & Immigration Services (“CIS”) will next examine the net income figure reflected on the petitioner’s federal income tax return. 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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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.

The petitioner is structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Line 21 shows the following income:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$2,688
2003	\$3,040
2002	\$4,074
2001	\$2,710

The petitioner’s net income would not allow for payment of the beneficiary’s proffered wage in any of the above years.

As an alternative means of determining the petitioner’s ability to pay the proffered wages, CIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation’s current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation’s net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner’s ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

³According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$10,194
2003	\$7,960
2002	\$5,056
2001	\$3,015

Following this analysis, the petitioner's federal tax returns show that the petitioner would lack the ability to pay the proffered wage under the net current asset test as well for all of the above years.

The petitioner additionally submitted one bank statement for the time period September 1, 2005 to September 30, 2005. The statement showed that the petitioner had \$42,590 as its ending balance for September 30, 2005. First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Additionally, one statement alone would not demonstrate the petitioner's ability to pay from April 30, 2001 to the present, but rather would represent only the amount that the petitioner had in its account as of September 30, 2005.

On appeal, counsel provides that the petitioner had the following amounts in gross income reported on the petitioner's federal tax returns: 2001: \$35,603; 2002: \$36,617; 2003: \$36,672; and 2004: \$35,304.

As noted above, *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, provides that the petitioner's net income figure, rather than the petitioner's gross income is the proper figure for consideration.

Counsel further provides that the petitioner's owner took additional personal funds she had from an account that she held individually and deposited the funds into the petitioner's business account when the labor certification was approved to pay the beneficiary's wage. Counsel asserts that the money held in the bank account should be combined with the petitioner's net current assets, and together would show the petitioner's ability to pay the proffered wage. In support, counsel provides a letter from the owner's bank, which provided that the owner "had a banking relationship with Wachovia Bank since 1/27/97." We note that the letter refers to the owner individually, and does not refer to the petitioning entity. Further the letter provides, "She had a personal money market account . . . that was opened on 6/26/00. This money market was closed and the balance was moved into a business account . . . for [the petitioner]." The letter continues that the owner, in her individual capacity, "has a brokerage account with Wachovia Securities that was opened on 9/2/97."

Several points are relevant related to the preceding paragraph. First, funds that the petitioner has available in its bank account would have already been considered in the net current analysis above, based on a review of the petitioner's Schedule L. Second, 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). The petitioner must demonstrate its ability to pay the proffered wage from the priority date onward, which again in this case is April 30, 2001. *See* 8 C.F.R. § 204.5(g)(2). The petitioner cannot obtain, deposit, or otherwise find additional funds when the labor certification is approved; the petitioner must demonstrate its ability to pay from the time that the labor

certification is filed. Third, the petitioner is formed and operates as an S Corporation, as such, the owner's personal assets would not be considered.⁴ A corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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 [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Next, counsel contends that the petitioner has met its payroll obligations of \$9,600 every year. In order for the petitioner to expand its revenue, the petitioner requires the services of the beneficiary. In support, counsel cites to *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990), *remanded* in 875 F.2d 898 (D.C. Cir. 1989) for consideration of the beneficiary's ability to generate income.

The petitioner has not provided any regional demographic information, business plans, or statistics to demonstrate the potential revenue growth that the beneficiary's employment might generate, and relies solely on the speculative possibility that the beneficiary's employment should generate more income. 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). *See also 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 visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts.

Counsel further argues the petition should be viewed under a *Sonegawa* totality of the circumstances approach, and that a petitioner's reasonable expectation of future financial profit should be considered.

In *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), the petitioner provided evidence to show that the petitioner had sustained significant expenses in one year related to the relocation of the business, and an increase in rent, which accounted for the petitioner's decrease in ability to pay the required wages. The petitioner in *Sonegawa* also provided magazine articles, which helped to establish the petitioner's reputation, and potential future growth. Counsel, here, has not provided any evidence to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the prevailing wage. Additionally, by reviewing the petitioner's net income, as well as the petitioner's net current assets, the petitioner's financial status has been fairly considered. Further, if we were to examine the totality of the circumstances, the petitioner's gross receipts alone would barely cover the beneficiary's salary and have not demonstrated any more than a minimal \$1,000 increase for two of three years; the petitioner's net income for the highest year would pay seven weeks of the beneficiary's salary, and its highest year net current assets might pay one-third of the beneficiary's annual wages; the petitioner employs only one individual, who

⁴ We note that counsel has also submitted the owner's personal income tax returns. Similarly, the individual personal income reflected on these returns would not be relevant, since the petitioner is an S Corporation. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The petitioner additionally cites to *Matter of Ranchito Coletero*, 02-INA-105 (BALCA Jan. 8, 2004). *Ranchito Coletero* deals with a business formed as a sole proprietorship, and is not directly applicable to the instant petition, which deals with a corporation. Further, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions.

is likely related to the beneficiary. Based on a totality of the circumstances, we would not conclude that the petitioner has demonstrated its ability to pay the beneficiary the proffered wage.

Based on the foregoing, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.