

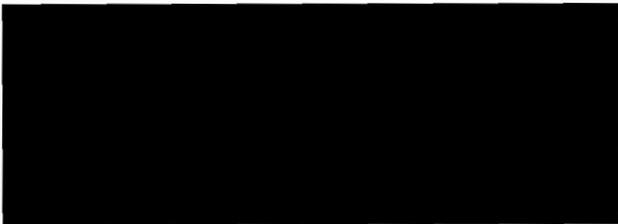
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U.S. Department of Homeland Security
U.S. Citizenship and Immigrations Services
Office of Administrative Appeals
Washington DC 20529-2090

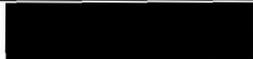


**U.S. Citizenship
and Immigration
Services**



B6

FILE:



Office: TEXAS SERVICE CENTER

Date:

APR 06 2009

SRC 06 099 51256

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be

submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971).

Here, the ETA 750 was accepted for processing on November 18, 2003. The proffered wage as stated on Part A of the ETA 750 is \$12.70 per hour, which amounts to \$26,416 per year. On Part B of the ETA 750, signed by the beneficiary on October 15, 2003, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on February 7, 2006, the petitioner states that it was established on May 3, 1993, currently employs two workers, reports a gross annual income of \$82,335, and a net annual income of \$19,203.

With the petition and in response to the director's request for additional evidence, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2003, 2004, and 2005. The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns additionally contain the following information:

| | 2003 | 2004 | 2005 |
|-------------------------|------------|-----------|------------|
| Net Income ¹ | \$ 45,292 | \$19,203 | \$ 18,814 |
| Current Assets | \$ 3,500 | \$20,000 | \$ 30,136 |
| Current Liabilities | \$ 65,099 | \$62,960 | \$105,718 |
| Net Current Assets | -\$ 61,599 | -\$42,960 | -\$ 75,582 |

¹Where 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 (2001-2003) and line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 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.). Here, the figure from line 21 was used for the 2003 tax return because page(s) 2 and 3 were missing from the return. Because the petitioner had additional deductions shown on its Schedule K for 2004, the petitioner's net income is found on line 21 of page 1 of its tax return. In 2005, because no additional deductions were shown on Schedule K, net income is found on line 21.

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also provided copies of the petitioner's 2005 compiled financial statement and a copy of a personal financial statement from Wachovia Bank related to the personal holdings of the petitioner's sole shareholder in the petitioning business and two other businesses.³

Following a review of the evidence submitted, the director denied the petition on May 4, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage through the financial documentation provided to the record. The director noted that although the petitioner's tax returns reflected sufficient net income in 2003 to cover the proffered wage, in 2004 and 2005 neither net income nor net current assets were sufficient pay the proposed wage offer of \$26,416.

On appeal, the petitioner, through counsel, submits various documents related to the individual assets of the sole shareholder, including a copy of his individual 2005 federal income tax return; a copy of a letter, dated May 17, 2006 from MetLife Financial Services reciting the cash value of three insurance policies; a copy of a letter, dated May 15, 2006 from Scot Financial Services affirming that the sole shareholder has a portfolio worth almost \$300,000; a copy of an unsigned, undated facsimile transmission from Wachovia Bank relating the average total value of the sole shareholder's individual holdings including a commercial certificate of deposit for \$50,000 and a personal certificate of deposit of \$16,000. The petitioner further provided a copy of a document from Wachovia Bank, dated May 17, 2006, indicating that deposits held on behalf of the sole shareholder totaled almost \$200,000, representing four accounts. Except for this letter that listed the petitioning business as one of the four accounts, and a copy of a 2005 Wage and Tax Statement (W-2) designating the sole shareholder's spouse as an employee, none of the documentation mentions the petitioning business by name.

² 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.

³ These businesses are identified as "[REDACTED]" and "[REDACTED] Inc."

In asserting that this evidence based on the sole shareholder's personal holdings should be considered in the corporate's petitioner's ability to pay the proffered wage, counsel cites no legal authority. He also states that the commercial certificate of deposit was intended to pay proffered wages, if necessary, and that the director failed to consider the income potential of hiring a new specialty employee.

Counsel's assertions related to the petitioner's ability to pay the proffered salary are not convincing. 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. As noted above, the language set forth in the regulation at 8 C.F.R. § 204.5(g)(2) clearly requires that the ability to pay the certified wage is demonstrated at the time the priority date is established and is *continuing* until the beneficiary obtains lawful permanent residence. (Emphasis added.) *See also Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Regarding the corporate petitioner's 2005 financial statement submitted to the underlying record as a compilation, 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 2005 financial statements that were provided are not persuasive evidence of the petitioner's ability to pay the certified wage. The accountant's report that accompanied this financial statement 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.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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 during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As mentioned above, no evidence of the beneficiary's employment has been provided.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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. The court specifically rejected the argument that the USCIS should have considered income before expenses were paid rather than net income.

Similarly, reliance on copies of the sole shareholder's personal holdings is misplaced where the petitioner is a corporation. Contrary to counsel's primary 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. 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.

The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is additionally noted that evidence in the form of an unsigned letter will not be considered in this case because it fails to represent anything more than a draft of some document that may or may not represent the truth of the matter asserted. Such a document holds little probative value. Truth is to be determined not by the quantity of evidence alone, but by its quality. See *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989). Similarly, counsel's assertions related to the purpose of the commercial certificate of deposit are not supported by the record or document that this fund was held by the corporate petitioner rather than individually by the primary shareholder. Nor does the evidence demonstrate that this money somehow represented funds outside those

reflected on the petitioner's corresponding tax return, such as the cash specified on Schedule L that would already be considered in determining the petitioner's net current assets. Finally, counsel's unsupported suggestion that the employment of the beneficiary would increase the petitioner's potential income was offered without any detail or documentation and does not outweigh the evidence presented in the corporate tax returns. Counsel's unsupported assertions do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In 2003, as determined by the director, the petitioner has demonstrated its ability to pay the proffered wage in this year because its net income of \$45,292 was enough to cover the beneficiary's proposed wage offer of \$26,416.

In 2004, neither the petitioner's net income of \$19,203 nor its net current assets of -42,960 was sufficient to pay the proffered wage. The petitioner's ability to pay the proffered salary has not been established for this year.

In 2005, neither the petitioner's net income of \$18,814, nor its net current assets of -\$75,582 was enough to pay the certified wage or demonstrate the petitioner's ability to pay the proffered wage during this year.

In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. *Sonogawa* related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, as set forth above, the petitioner's three tax returns reflected a decrease in net income in each of the years reported. Its net current assets are all shown as losses. No unusual or unique business circumstances have been shown to exist in this case that parallel those described in *Sonogawa*, nor has it been established that 2003 was an uncharacteristically unprofitable year within a framework of profitable years for the petitioner.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is November 18, 2003. Based on a review of the underlying record and the arguments and evidence submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

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.