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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  
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FILE:

[REDACTED]  
EAC 04 214 53007

Office: VERMONT SERVICE CENTER

Date:

**AUG 04 2009**

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

[REDACTED]

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The visa petition is now before the AAO on a motion to reopen/reconsider. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(3) states:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Since counsel has not provided a reason for reconsideration supported by pertinent precedent decisions indicating that the decision was based on an incorrect application of law or USCIS policy, and has not established that the decision was incorrect based on the evidence of record at the time of the initial decision, the motion does not meet the requirements for reconsideration.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

*Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence with the motion demonstrates that the petitioner had sufficient funds to pay the proffered wage.

The petitioner is a full service Italian restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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. The AAO concurred with the director's decision on appeal.

The record shows that the motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the AAO's December 27, 2006 dismissal, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary 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, 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 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 [USCIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (35 hour week) or \$34,379.80 annually.

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).

Relevant evidence submitted on motion includes counsel's brief, a copy of the *NYS Department of State Division of Corporations* website showing that the petitioner was incorporated on January 7, 1977 ([http://appsext8.dos.state.ny.us/corp\\_public/CORPSEARCH.ENTITY\\_INFORMATION?\\_nameid=4893](http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?_nameid=4893) (accessed on January 22, 2007)), copies of the petitioner's previously submitted 2001 and 2002 Forms 1120, U.S. Corporation Income Tax Returns, for fiscal years October 1 through September 30, a copy of the owner of the petitioner's personal residence closing statement, and copies from various websites showing that the petitioner exists and is in business. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 Form 1120 for fiscal year October 1, 2001 through September 30, 2002 reflects taxable income before net operating loss deduction and special deductions or net income of -\$2,635 and net current assets of \$11,667.

The petitioner's 2002 Form 1120 for fiscal year October 2, 2002 through September 30, 2003 reflects taxable income before net operating loss deduction and special deductions or net income of -\$122,403 and net current assets of -\$49,188.

On motion, counsel states:

- 1) [The petitioner] has been a strong, established family-owned and family-operated local restaurant for over [the] last thirty years in Brooklyn, New York where it has sustained a strong business and historical growth, well-known reputation in the local restaurant business, and consistent neighborhood customers which is relevant in evaluating the company's ability to pay the proffered wage.
- 2) [The petitioner's] corporation acts more like a sole proprietorship rather than a corporation; and therefore, USCIS may "pierce the corporate veil" and look at the personal income and assets of the owner . . . in evaluating the company's ability to pay the proffered wage. . . .

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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 30, 2001.

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 (1<sup>st</sup> 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 27, 2005 with the receipt by the director of the petitioner's submissions in response to the director's

request for evidence (RFE). As of that date, the petitioner's 2004 federal income tax return was not yet due based on its tax year filing schedule. Therefore, the petitioner's income tax return for 2003 is the most recent return available.<sup>1</sup> The petitioner's tax returns demonstrate its net income for fiscal years 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net income of -\$2,635.
- In 2002, the Form 1120 stated net income of -\$122,403.

Therefore, for the fiscal years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$34,379.80.<sup>2</sup>

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$11,667.
- In 2002, the Form 1120 stated net current assets of -\$49,188.

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<sup>1</sup> The petitioner did not submit its income tax return for fiscal year 2003 either in response to the RFE, on appeal, or on motion.

<sup>2</sup> It is noted that the priority date of the visa petition is April 30, 2001. Therefore, the petitioner should have submitted its tax return for fiscal year 2000 to establish that it had sufficient funds to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The petitioner did not do so.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage. Additionally, as noted above, the petitioner did not submit either its 2000 or 2003 tax returns, both of which are necessary to determine the petitioner's ability to pay from the priority date to the present.

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.

Counsel asserts in his brief accompanying the motion that the petitioner has established its ability to pay the proffered wage of \$34,379.80 based on compensation of officers, its owner's personal assets, and on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel is mistaken. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return.

The documentation presented here indicates that [REDACTED] 100 percent of the company's stock. According to the petitioner's IRS Forms 1120, [REDACTED] elected to pay him/herself \$36,400 in fiscal years 2001 and 2002. These figures are not supported by any Forms W-2. We note here that the compensation received by the company's owner during fiscal years 2001 and 2002 was a fixed salary and not a flexible amount based on the profitability of the corporation. In addition, the owner has not stated that he/she has other business interests which could cover his/her personal expenses. Instead, the fixed amount of the compensation of officers would indicate that it is a set salary, and wages already paid to others cannot be used to establish the petitioner's ability to pay the proffered wages in the pertinent years. Again, USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Furthermore, although counsel claims that the petitioner is a small family-owned and family operated business which does not observe corporate formalities nor does it have functioning corporate officers and/or directors, the petitioner has not submitted any evidence to corroborate counsel's claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533,

534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, the fact remains that the petitioner is a corporation, an entity separate and apart from its owners and shareholders, and therefore, the owner is not obligated to pay the debts of the corporation. 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Counsel claims on motion that the petitioner’s owner owns “personal property valued at approximately \$250,000 where over \$100,000 of this value is held in equity; which clearly establishes [the petitioner’s] ability to pay [the beneficiary] the proffered wage of \$34,379.80 per year.” However, the sole owner’s home is considered to be a long-term asset (having a life longer than one year), and its value is not considered to be readily available to pay the proffered wage to the beneficiary as the property is not easily converted into cash. Additionally, as noted above, the assets of the shareholder cannot be considered in determining the petitioner’s ability to pay the proffered wage. 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). Therefore, the AAO will not consider the real estate property of the sole owner when determining the petitioner’s ability to pay the proffered wage of \$34,379.80

On motion, counsel also asserts that upon the approval of the visa petition, the beneficiary would replace the owner’s “role at the restaurant and be able to be accordingly compensated from the yearly salary [the owner] has been receiving from the company since 1977.” However, the record does not verify the owner’s full-time employment, or provide evidence that the petitioner has replaced or will replace the owner 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 owner involves the same duties as those set forth in the Form ETA 750 for the beneficiary’s employment as a full-time cook. The petitioner has not documented the position or duties of the owner who performed the duties of the proffered position. If the owner performed other kinds of work, then the beneficiary could not replace him or her.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity’s business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner’s financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that

the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner's tax returns indicate it was incorporated on July 1, 1977. The petitioner has provided its tax returns for fiscal years 2001 and 2002, with neither tax return establishing the petitioner's ability to pay the proffered wage of \$34,379.80. As noted above, the petitioner failed to submit its 2000 and 2003 tax returns. Counsel asserts that the petitioner has "been consistently reporting gross sales of over \$500,000 per year for the last thirty years."<sup>4</sup> The petitioner has not submitted any prior or subsequent tax returns to evidence this claim or to show that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. The websites that counsel submitted showing the petitioner's name only corroborates that the entity exists, not that the petitioner is well-known or successful. 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 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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

**ORDER:** The motion to reopen is granted. The AAO's decision of December 27, 2006 is affirmed. The petition remains denied.

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<sup>4</sup> The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).