

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B6

File:

WAC 05 227 53172

Office: TEXAS SERVICE CENTER

Date:

AUG 10 2009

IN RE:

Petitioner:

Beneficiary:

Petition: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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.

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is a Chinese food restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. The petition is accompanied by a copy of the Form ETA 750,² Application for Alien Employment Certification, certified by the U.S. 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated June 6, 2007, 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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.³

¹ The petitioner reorganized in 2003 from a sole proprietorship to a "C" corporation named Rong's Food & Services, Inc.'s d/b/a China Diner.

² Although requested by the director, a duplicate original of the labor certification could not be located.

³ The petitioner filed for the beneficiary under the "other worker" category. However, the labor certificate required two years of experience and could only be properly filed as a skilled worker petition. The petitioner should have been denied on this basis as well. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also 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 regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$2,200.00 per month (\$26,400 per year). The petitioner filed the Form I-140 on August 16, 2005, and the petitioner identified on that form is China Diner, 510 Perkins Street, Ukiah, California.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

Relevant evidence in the record includes a copy of the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a "Certificate of Working Experiment" [sic] dated July 3, 1998; Rong's Food & Services, Inc.'s d/b/a China Diner (FEIN [REDACTED] U.S.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

Internal Revenue Service (IRS) Form 1120 tax returns for 2003, 2004⁵ and 2005; the sole proprietors' U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2001 2002, 2003, 2004, 2005, and 2006, together with Wage and Tax Statements (W-2) from "outside employment;"⁶ and the petitioner's (Rong's Food & Services, Inc.'s d/b/a China Diner) City of Ukiah business license for 2005.

The evidence in the record of proceeding shows that the petitioner was initially structured as sole proprietorship and then became a "C" corporation on July 29, 2003. On the petition, the petitioner claimed to have been established in 1998 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year when it was organized as a sole proprietorship is based on a calendar year, and after it re-organized as a "C" corporation, the petitioner's fiscal year begins on July 1st and ends on June 30th of each year. The net annual income and gross annual income stated on the petition were \$47,405.00 and \$210,308.00 respectively. On the Form ETA 750, signed by the beneficiary on March 27, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that documents submitted in this case and on appeal prove the petitioner's ability to pay the proffered wage.

Counsel states that the sole proprietorship's tax returns (Form 1040 for 2001, 2002, and in 2003 up to the date of re-organization into a corporate form of organization), together with the submitted personal expenses of the sole proprietors, demonstrates the petitioner's ability to pay the proffered wage.

After the date of re-organization of the petitioner into a corporation, counsel asserts that the petitioner continued to have the ability to pay the proffered wage. Counsel asserts that the sole proprietors' income and bank account holdings, after subtracting the "family's expenses"⁷ in years 2003, 2005 and 2006 demonstrate the petitioner's ability to pay the proffered wage. Since the business was converted from a sole proprietorship to a corporation on July 29, 2003, the income and

⁵ There are two Form 1120 federal tax returns submitted by the petitioner for 2004. The 2004 tax return dated June 20, 2005 by its preparer is marked "estimated." Net tax income on that return is \$47,405.00. A second 2004 Form 1120 tax return submitted as dated May 4, 2007, stated net income as <\$1,817.00>. The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss. No explanation was submitted explaining this adjustment. We will accept the tax return for 2004 that is dated May 4, 2007.

⁶ That is not derived from the subject restaurant business, but considered within the sole proprietor's adjusted gross income.

⁷ The sole proprietors' personal expenses are relevant. However, once the petitioner re-organized to a corporate form, the shareholders' assets or expenses would not be considered in determining the petitioner's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

assets of the shareholders cannot be evidence of the ability of the corporation's ability to pay the proffered wage.⁸

Accompanying the appeal, counsel submits a legal brief and additional evidence which is an exhibit entitled "Average Estimated Monthly Expenses" for years 2001 through 2007; the sole proprietor's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for 2001, 2002, 2003, 2004, 2005 and 2006; a Wage and Tax Statement (W-2) from Hewlett-Packard Corporation to a spouse for 2001; the sole proprietor's Redwood Credit Union account statements for December 2001, December 2002, December 2003, December 2004; the business' "China Diner Charge Account" dated as of: December 31, 2001, December 31, 2002, December 31, 2003, December 31, 2004, December 31, 2005, and December 31, 2006; Rong's Food & Services, Inc.'s d/b/a China Diner (FEIN [REDACTED]) U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2003, 2004, and 2005; and the sole proprietors' Bank of America account statement dated December 21, 2005, and December 20, 2005.

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, U.S. 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 Sonogawa*, 12 I&N Dec. 612 (BIA 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.

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. 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

⁸ The AAO notes that throughout counsel's brief, he misconstrues the sole proprietor's assets, for example he describes bank accounts in 2001 and 2002, as corporate accounts when the corporation had not yet come into being. We will accept that he means business accounts in those years.

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 that exceeded the proffered wage 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.

The sole proprietors' Form 1040 tax returns demonstrate the following financial information concerning the petitioner's ability to pay up to the time when the petitioner became a "C" corporation on July 29, 2003:

Tax Return for Year:	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business (Schedule C)	Petitioner's Cost of Labor (Schedule C)
2001	\$103,430.00	\$164,721.00	\$15,073.00	\$10,519.00	\$ -0-
2002	\$107,567.00	\$173,904.00	\$-0-	\$10,228.00	\$17,546.00
2003	\$ 92,827.00	\$132,919.00	\$-0-	\$ 5,707.00	\$19,626.00

Counsel has submitted "Average Estimated Monthly Expenses," "[The Sole Proprietors] Personal Monthly Expenses Estimates" for years 2001 through 2007, which state for years 2001, 2002 and 2003 "Total Est. Year" of \$29,482, \$31,198.00 and \$47,954.00. However, we note that the petitioner only provided nine personal expense items in the monthly expense estimate while the director requested in her request for evidence (RFE) dated April 25, 2007, at least 20 items. Further, the petitioner did not submit any documentary substantiation for the expense items provided. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).⁹

Further, the electronic records of USCIS show that the petitioner filed another I-140 petition in 2001 and sponsored an additional beneficiary who later adjusted to permanent resident status in 2003. Therefore, the petitioner must show that it had sufficient income to pay both the beneficiary's wages at the priority date and those for that second sponsored worker to the date of adjustment in 2003. If this matter is pursued, proof of the petitioner's ability to pay the proffered wage for all sponsored beneficiaries is demanded.

The evidence submitted is insufficient to determine with certainty whether the sole proprietor could pay

⁹ If this matter is pursued, all the expenses items requested by the director in her RFE must be addressed along with evidence to document those expenses.

both sponsored workers and support the sole proprietor's family of four for the years 2001, 2002 and 2003.

The petitioner's Form 1120 tax returns demonstrate the following financial information concerning the petitioner's ability to pay from the time the petitioner became a C corporation on July 29, 2003:

- In 2003, the Form 1120 stated net income (line 28) of <\$10,575.00>.
- In 2004, the Form 1120 stated net income of <\$1,817.00>.
- In 2005, the Form 1120 stated net income of \$4,235.00.

Since the proffered wage is \$26,400 per year, the petitioner, operating in its corporate form as Rong's Food & Services, Inc.'s d/b/a China Diner, did not have sufficient net income to pay the proffered wage for years 2003, 2004 and 2005.

If the net income the petitioner demonstrates it had available during the 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.¹⁰ 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. No Schedules L (or an audited balance sheet) was prepared for the Form 1120 tax returns for 2003, 2004 and 2005.¹¹ Without a Schedule L statement for years 2003, 2004 and 2005, or an audited financial statement containing asset and liability items found on Schedule L, we are unable to determine the petitioner's net current assets.

¹⁰ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹¹ According to the IRS instructions for Form 1120, Schedule L, corporations with total receipts and total assets less than \$250,000.00 in a tax year are not required to complete a Schedule L.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,¹² copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel states that the "Average Estimated Monthly Expenses," "[The Sole Proprietors'] Personal Monthly Expenses Estimates" for years 2004 and 2006, the sole proprietors' personal tax returns, and the sole proprietors' personal bank statements are evidence of the corporation's ability to pay the proffered wage. Following the 2003 incorporation that reorganized the business into a corporate form, the sole proprietors' assets and income are no longer relevant evidence of the corporation's ability to pay the proffered wage. Because 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel characterizes the "China Diner Charge Account" (dated December 31, 2004, and December 31, 2005) as corporate bank account statements. There is no evidence that the accounts submitted are corporate accounts. If the charge accounts are the corporation's expenses, expense are not assets available to pay the proffered wage. Counsel's assertion that the sole proprietors' personal assets are evidence of the petitioner's, ability to pay the proffered wage is misplaced. After July 29, 2003 when the sole proprietorship became a corporation, the owners' individual assets would no longer be considered. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N at 530. The account statements are both dated after the petitioner changed its business organization to a corporate form.

On the petition, the petitioner claimed to have been established in 1998 and to currently employ five workers. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates 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.

¹² 8 C.F.R. § 204.5(g)(2).

It is clear from the totality of the evidence submitted in this case, that in the years 2001, 2002, 2003, the adjusted gross income of the petitioners stated on those Form 1040 tax returns was principally derived from “outside” wages and not derived from the subject restaurant business. Once the business changed form, and the “outside wages” were not part of the corporate income tax returns, the business demonstrated a loss in 2003, 2004 and a nominal profit in 2005. Further, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*. Accordingly, the petitioner cannot establish its ability to pay the proffered wage based upon the totality of the petitioner’s circumstances.

The petitioner is contending that the sole proprietors are able to demonstrate their ability to pay the proffered wage based on the sole proprietors’ adjusted gross income and their assets, albeit, without consideration of the spouses’ fully documented personal living expenses or the number of beneficiaries sponsored. The petitioner’s contention is misplaced. As already stated, following the 2003 incorporation that reorganized the business into a corporate form, the sole proprietors’ assets and income are not longer relevant evidence of the corporation’s ability to pay the proffered wage.

The evidence submitted fails to establish that the petitioner has 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.