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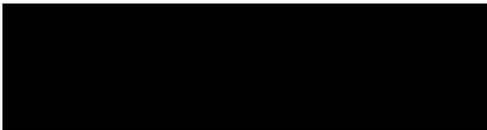


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUL 09 2009
LIN 06 206 51782

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

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

The petitioner claims to be a restaurant. It seeks to employ the beneficiary permanently in the United States as a "cook, Portuguese/Brazilian style." The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by 8 C.F.R. § 204.5(i)(3), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).

As set forth in the director's July 24, 2007 denial, the primary 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.

On appeal, counsel asserts that the owner of the petitioner has sufficient personal funds to pay the proffered wage. Counsel also claims that the owner is willing to reduce his compensation in order to pay the proffered wage.

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 AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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.¹

The evidence in the record of proceeding includes the following:

- Form 1120, U.S. Corporation Income Tax Return, for 2001.
- Forms 1120-A, U.S. Corporation Short-Form Income Tax Return, for 2002 through 2006.
- Affidavit of the petitioner's owner stating that he pledges his personal assets to pay the beneficiary's proffered wage.
- Affirmation of counsel that the petitioner's owner has the authority to reduce his compensation and the salaries of his employees.
- Summary of the petitioner's owner's bank account balances and copies of the petitioner's

¹The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

owner's bank account statements.

- Uniform Residential Appraisal Report purportedly of the petitioner's owner's home.
- Certificate of Assumed Name from the New York Department of State stating that De Souza & Coelho Restaurant Corp. is doing business under the assumed name of Ole Restaurant.
- Experience letter stating that the beneficiary was employed as a cook from November 1, 1997 to January 31, 2000.

The record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1982, to have a gross annual income of \$109,414.00, and to employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The labor certification was filed with the DOL on April 30, 2001. The proffered wage stated on the labor certification is \$18.23 per hour (\$37,918.40 per year). The labor certification states that the position requires two years of experience in the job offered. On the labor certification, signed by the beneficiary on April 18, 2001, the beneficiary claimed to have worked for the petitioner since February 2000.²

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

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

²There is no evidence in the record of the beneficiary's employment by the petitioner. The director's February 23, 2007 request for evidence (RFE) instructed the petitioner to provide evidence of the beneficiary's employment. The petitioner did not submit any evidence of the beneficiary's employment in its response to the RFE or on appeal, despite the fact that this evidence would have assisted the petitioner in demonstrating its ability to pay the proffered wage. 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). In addition, the failure to provide this evidence calls into question the representations on the labor certification. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

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 labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for the petition based on it, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed and paid the beneficiary during the required 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner is obligated to establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage. The record contains no evidence of the beneficiary's claimed employment by the petitioner.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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 wage expense is misplaced. Showing that the petitioner's gross sales 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*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.³

<u>Year</u>	<u>Net Income (\$)</u>
2001	1,997.00
2002	1,200.00
2003	1,600.00
2004	-987.00
2005	1,871.00
2006	1,243.00

³For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120 or Line 24 of Form 1120-A.

For the years 2001 through 2006, the petitioner did not have sufficient net income to pay the difference between the wage paid, if any, and the proffered wage.

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 are not considered in the determination of the ability to pay the proffered wage. 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.⁴ 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 net current assets for the required period, as shown in the table below.⁵

<u>Year</u>	<u>Net Current Assets (\$)</u>
2001	8,920.00
2002	13,363.00
2003	17,132.00
2004	0.00
2005	0.00
2006	0.00

For the years 2001 through 2006, the petitioner did not have sufficient net current assets to pay the difference between the wage paid, if any, and the proffered wage.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary

⁴According 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.

⁵On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18. On Form 1120-A, USCIS considers current assets to be the sum of Lines 1 through 6 on Part III, and current liabilities to be the sum of Lines 13 and 14.

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 that there is another way to determine the petitioner's ability to pay the proffered wage. Counsel claims that the owner of the petitioner has sufficient personal funds to pay the proffered wage. The record contains copies of the owner's bank statements, a Uniform Residential Appraisal Report purportedly of the owner's home,⁶ and an affidavit signed by the owner pledging his personal assets to pay the beneficiary's proffered wage. Counsel does not dispute 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). However, counsel claims that there is no support for USCIS's refusal to consider the assets of a corporation's owner in determining the corporation's ability to pay the proffered wage. Counsel states that the owner's personal assets should be considered if he states his willingness to pay the proffered wage.

Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), in support of the position that the resources of the petitioner's owner should be considered in determining the petitioner's ability to pay. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Further, the decision in *Full Gospel* states that USCIS should consider funds pledged to a church in determining its ability to pay the proffered wage. The relevance of that decision to the instant case, even if the reasoning were persuasive, is unclear.

Counsel also states that a DOL Board of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case also stands for the proposition that the personal assets of a corporate owner should be considered in determining the ability to pay the proffered wage. Counsel concedes in the appeal brief that the DOL precedent is not binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS 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. 8 C.F.R. § 103.9(a).

USCIS will not consider the financial resources of an owner or shareholder. In a similar case, the court in *Sitar Restaurant 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." The regulation 8 C.F.R. §

⁶It is noted that the appraisal report merely states the appraised value of the property. It does not state the equity, if any, that the owner has in the property. Therefore, this report does not provide evidence of the owner's assets that could be used to pay the proffered wage.

204.5 requires the *petitioner* to demonstrate its ability to pay the proffered wage. The owner's affidavit pledging his personal assets to pay the beneficiary's proffered wage not change the fact that the owner and the petitioner are separate legal entities nor does it create an enforceable obligation to pay the proffered wage to the beneficiary. In summary, USCIS will not consider the personal assets of the petitioner's owner in determining the corporation's ability to pay the proffered salary.

Counsel also claims that the owner is willing to reduce his compensation in order to pay the proffered wage. 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. For this reason, in limited circumstances, the petitioner's officer compensation may be considered as additional financial resources of the petitioner to pay the proffered wage. In this analysis, the AAO is not examining the personal assets of the owner, but, rather, the financial flexibility that the owner has in setting his salary. According to the petitioner's tax returns, the petitioner paid officer compensation of \$28,080.00 each year from 2001 through 2006. The lack of variability in the compensation undermines counsel's argument that the petitioner pays out its profits to the owner as a tax management strategy. If this were the case, one would expect the owner's compensation to vary from year to year. Further, even if the owner were willing and financially able to forego all officer compensation from the petitioner each year, the petitioner would still not be able to demonstrate ability to pay the proffered wage, except for 2002 and 2003.

Counsel also asserts that the petitioner can reduce the salaries that it pays its employees in order to pay the beneficiary's proffered salary. On the petition, the petitioner claims that it employs three workers. According to the petitioner's tax returns, it paid salaries of \$30,680.00 in 2001 through 2003, and \$33,680.00 in 2004 through 2006. Based on these facts, there is no basis to permit the petitioner to demonstrate its ability to pay the proffered wage by adding the wages the petitioner paid its employees to its net income or net current assets. In limited circumstances, the AAO may consider funds distributed to employees as a tax management strategy in the form of bonuses or other discretionary payments that would otherwise be available to pay the proffered wage. However, in this case, the petitioner has not established that such circumstances exist here. The petitioner's revenues are not substantial, its payroll is small, there is no variability in the wages it pays year to year, and there is no evidence of how the petitioner could feasibly reduce the salaries it pays its employees and still carry on its business. Accordingly, the salaries that the petitioner has paid its employees cannot be counted towards its ability to pay the proffered wage.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 1982 and to employ three workers. The petitioner's 2006 tax return shows gross sales of \$128,713.00. This is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. Other than its longevity, the petitioner has not established the existence of any circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence pertaining to whether the beneficiary will be replacing a former employee or an outsourced service. Without factoring in payroll taxes or other employee-related costs, the proffered wage equals almost 30% of the petitioner's gross annual sales. The proffered wage is substantially greater than the compensation the petitioner pays in officer compensation. The proffered wage is also greater than the petitioner's entire payroll, excluding officer compensation. These factors further undermine the petitioner's argument that it has the ability to pay the proffered wage.

Further, it is noted that the petitioner has filed five other petitions on behalf of four other beneficiaries.⁷ Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. at 144. The record in the instant case contains no information about the priority dates and proffered wages for the beneficiaries of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. There is also no information in the record about whether the petitioner has employed the beneficiaries or the wages paid to the beneficiaries, if any. Thus, the petitioner has not established its ability to pay the proffered wage for the beneficiary or the proffered wages to the beneficiaries of the other petitions.

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.

⁷LIN 08 220 53016 and LIN 08 046 51091 (both filed on behalf of the same beneficiary), EAC 00 048 50383, EAC 04 201 50626, and SRC 07 800 01009.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.