

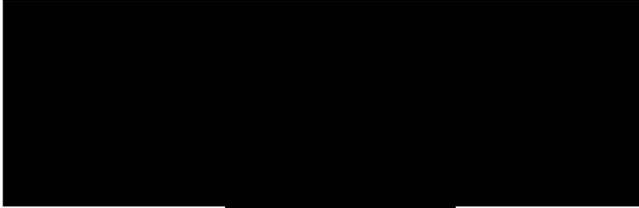
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

PUBLIC COPY



U.S. Citizenship  
and Immigration  
Services



Bj

FILE: [Redacted]  
SRC 07 084 51364

Office: TEXAS SERVICE CENTER Date: JUL 30 2009

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 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 petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook of Italian cuisine.<sup>1</sup> As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 2001 priority date of the visa petition, and denied the petition accordingly.

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.

As set forth in the director's June 20, 2007 denial, 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.

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 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 its Form ETA 750, Application for Alien Employment Certification, as certified

---

<sup>1</sup> The petitioner filed a previous I-140 petition (EAC 05 208 53784) for the same beneficiary which was denied on December 23, 2005 because the petitioner did not establish its ability to pay the proffered wage.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.72 per hour (\$30,617.60 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position.

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.<sup>2</sup> On appeal, counsel submits a brief. Relevant evidence in the record includes the petitioner's IRS Form 1065, U.S. Tax Return of Partnership Income, for tax year 2001. The petitioner also submitted a IRS Form 1040 Individual U.S. Tax Return for the same tax year. This joint return is for [REDACTED] and [REDACTED] New Jersey 08753. The record also contains copies of the individual tax returns for the [REDACTED] for tax years 2002 and 2003, submitted with the petitioner's previous I-140 petition for the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the director should have considered the petitioner's totality of circumstances in his decision. Counsel states that the petitioner's 2001 partnership tax return combined with the [REDACTED] 2001 individual tax return clearly demonstrates the petitioner's ability to pay the proffered wage. Counsel states that [REDACTED] should have had her individual tax returns considered in examining the petitioner's ability to pay the proffered wage. Counsel states that the personal 2001 Form 1040 tax return indicates that she is a 95 percent shareholder of the petitioner, and had a total joint income of \$836,737.

Counsel notes that the petitioner's owner does not claim that she will be liable for the petitioner's debts, but rather claims that as a 95 percent shareholder, her individual assets must certainly be taken into account. Counsel states that [REDACTED] may choose to reduce her own salary in order to cover the proffered wage, and that [REDACTED] clearly has the financial means to compensate for any year in which the petitioner did not make an adequate profit. Counsel also states that the realities of a workplace cannot be ignored. Counsel states that the petitioner is a successful business with a total earned income of \$297,320 in tax year 2001, and that it paid out more than \$100,000 in salaries and wages. Counsel notes that a petitioner may choose to let other employees go or reduce their salaries so that they may pay a different wage to another employee. Counsel concludes that the proffered wage of \$30,617.60 could be easily been included in the \$100,000 paid out in wages and salaries in

---

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

tax year 2001. Counsel concludes that had the proffered position been accepted more than six years ago when the application for a labor certification was initially filed, the petitioner has demonstrated that sufficient resources were available to pay the proffered wage.

The record indicates the petitioner is structured as a domestic limited liability company and filed its tax return on IRS Form 1065.<sup>3</sup> On the petition, the petitioner claimed to have been established in May 18, 1998. It did not identify its gross or net annual income, or how many workers it currently employs. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

---

<sup>3</sup> The record is not clear as to how many partners are in the claimed limited liability company. A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. The AAO notes that the record does not indicate the number of the petitioner's partners. On appeal, counsel describes Ms. [REDACTED] as a 95 percent shareholder, but the record does not further substantiate this assertion, or identify the shareholder of the remaining five percent. No other remaining partners are identified in the record. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, identified on Schedule B of its 2001 tax return as a domestic limited liability company, is considered to be a partnership for federal tax purposes.

On appeal, counsel states that the petitioner's owner's assets described in the joint Form 1040 tax returns can be utilized to determine the petitioner's ability to pay the proffered wage. While a sole proprietorship may use its adjusted gross income to determine its ability to pay a proffered wage, the same concept is not available to petitioners structured as partnerships or limited liability companies.<sup>4</sup>

Contrary to counsel's 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. 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.

Further, 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 [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel also states that wages may be reduced in order to establish the petitioner's ability to pay the proffered wage; however, the petitioner has provided no evidence that the petitioner provided with either wages or officer compensation. Thus, counsel's assertion with regard to wages is irrelevant.

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 stated that it employed the beneficiary since 1998; however, because he did not possess a social security number, the petitioner could not produce any evidentiary documentation such as W-2 Forms or Forms-1099-MISC to establish any wages paid to the beneficiary. Thus, the petitioner has to establish its ability to pay the entire proffered wage of \$30,617.60 from 2001 to 2006.

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

---

<sup>4</sup> The only numerical connection between the petitioner's tax return and the petitioner's shareholder's individual tax return is the figure \$16,922. On the petitioner's shareholder's Form 1040, Schedule E, Part II, Income or loss from Partnership and S Corporation, this figure is listed as non-passive income from Schedule K-1. The same figure is found on the petitioner's Form 1065 tax return at Schedule K as item 15a, net earnings from self-employment.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 record before the director closed on July 20, 2007 with the director's decision. As of that date, the petitioner's federal income tax returns for 2002 to 2006 would have been available. However, the petitioner's 2001 federal income tax return is the only tax return submitted to the record. The petitioner provides no explanation for why it did not submit the other relevant tax returns to the record. Thus, the AAO cannot determine whether the petitioner has the continuing ability to pay the proffered wage in tax years 2002 to 2006. Failure to provide initial required evidence is sufficient grounds for denial of a petition.

With regard to the 2001 tax return, the document stated the petitioner's net income<sup>5</sup> was \$3,833. Therefore, for the 2001 priority year, the petitioner did not establish that it had sufficient net income to pay 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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 2001 tax return states its net current assets are \$8,583. Therefore, for tax year 2001, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 9089 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's remaining assertions on appeal with regard to reducing salaries to pay another salary, or letting go employees to hire someone else are not persuasive. The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the record contains no information with regard to the petitioner's numbers of employees in tax years 2001 to 2006, or any wages and salaries paid to these employees. The record contains no documentation to substantiate whether any employee was let go when the beneficiary began working with the petitioner, and if such an employee was let go, the duties and wages performed by any such employee. In the petitioner's

---

<sup>5</sup> For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedule K for tax year 2001 has a relevant entry for an additional deduction, and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

<sup>6</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.

previous I-140 petition submission, the petitioner stated that its Italian cook stayed with the petitioner for several months to train the beneficiary in his cooking duties; however this assertion is not sufficient to establish that the beneficiary replaced a specific employee, or that the wages paid to the prior employee as cook were available to pay the proffered wage to the beneficiary. Of more probative weight would be copies of any wages paid to the previous cook in 1998 when the petitioner and beneficiary stated the beneficiary started working for the petitioner. Further evidence would be needed to establish that the former cook performed the same duties as the beneficiary, and that the former cook left the employment of the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

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 (BIA 1967). 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. As in *Sonogawa*, 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 record reflects little information with regard to the petitioner's business operations in tax year 2001 and no information with regard to the business operations in tax years 2002 to 2006. There is no evidence that the petitioner had a profitable year at any time in the relevant period of time in question. 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 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.