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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



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Services

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File: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: JUN 01 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent 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, was 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 May 1, 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.

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 9089 Application for Permanent Employment Certification was accepted for processing by the DOL national processing center. *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 9089 Application for Permanent Employment Certification as

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 labor certification was accepted on April 28, 2001 and certified on August 8, 2006.¹ The proffered wage as stated on the Form ETA 9089 is \$13.24 per hour (\$27,539.20 per year). The Form ETA 9089 states that the position requires two years of 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.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 9089 Application for Permanent Employment Certification approved by the DOL; Franponte, Inc. Mara Bakery's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2001 to 2002 and Elimar, Inc. Mara Bakery's IRS Form 1120 tax returns for 2003 to 2005³; the beneficiary's IRS

¹ The petitioner utilized a filing date from a previously submitted Application for Alien Employment certification (Form ETA 750). Because of this continuation, it has been approximately eight years since the labor certification has been accepted and the proffered wage established. The petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

² 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).

³ On the petition, the petitioner's name is Elimar, Inc./Mara Bakery with an employer identification number of [REDACTED]. The certified labor certification is in the name of Elimar, Inc./Mara Bakery. The AAO notes that the tax returns that the petitioner submitted for 2001 and 2002 are listed under the name of Franponte, Inc. Mara Bakery with an employer identification number of 22-2850707, not Elimar, Inc. The address listed on the returns is the same as that on the petition. USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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,

Form W-2 Wage and Tax Statements for 2003 to 2005 issued by Elimar, Inc. Mara Bakery in the amounts of \$6,386.00, \$10,918.00, and \$11,192.00 respectively⁴; Franponte, Inc. Mara Bakery's New Jersey State Corporation Business Tax Returns for 2001 to 2002 and Elimar, Inc. Mara Bakery's New Jersey State Corporation Business Tax Returns for 2003 and 2005⁵; and documentation concerning the beneficiary's qualifications.

The evidence in 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 1987 and to employ three workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$173,244.00 and \$400,652.00 respectively. On the Form ETA 9089, signed by the beneficiary on September 11, 2006, the beneficiary claimed to have worked for the petitioner since December of 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for any immigrant petition later based on the Form ETA 9089, 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

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

Additionally, there is no evidence in the record of proceeding demonstrating that Elimar, Inc./Mara Bakery is a successor-in-interest to Franponte, Inc. Mara Bakery. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Accordingly, the AAO will not consider the evidence submitted regarding Franponte, Inc. Mara Bakery in its ability to pay analysis for 2001 and 2002.

⁴ The AAO notes that counsel claimed that the petitioner employed the beneficiary since December of 2000, but that the beneficiary did not report his wages until 2003. 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). 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)). Accordingly, the AAO will only analyze the beneficiary's IRS Form W-2 Wage and Tax Statements for 2003 to 2005 issued by the petitioner as evidence of the petitioner's ability to pay the proffered salary.

⁵ The AAO notes that state tax returns do not constitute regulatory-prescribed ability to pay evidence. *Supra* n. 3.

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, 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 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 paid the beneficiary the full proffered wage from the priority date.

Counsel submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2003 to 2005 issued by Elimar, Inc. Mara Bakery in the amounts of \$6,386.00, \$10,918.00, and \$11,192.00 respectively. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$27,539.20 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$21,153.20, \$16,621.20, and \$16,347.20 from 2003 to 2005, respectively. It must also demonstrate that it can pay the full proffered wage in 2001 and 2002.

If the petitioner does not establish that it 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 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.

Elimar, Inc. Mara Bakery's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the IRS Form 1120 stated net income of -\$26,773.00.⁶
- In 2004, the IRS Form 1120 stated net income of -\$5,833.00.
- In 2005, the IRS Form 1120 stated net income of -\$19,522.00.

⁶ The AAO notes that net income is listed on line 28 of the IRS Form 1120.

The petitioner did not demonstrate that Elimar, Inc. Mara Bakery had sufficient net income to pay the difference between wages actually paid and the proffered wage for 2003 to 2005.⁷

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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1120 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.

- Elimar, Inc. Mara Bakery's net current assets during 2003 were \$5,954.00.
- Elimar, Inc. Mara Bakery's net current assets during 2004 were -\$16,385.00.
- Elimar, Inc. Mara Bakery's net current assets during 2005 were -\$18,337.00.

Based on Elimar, Inc. Mara Bakery's net current assets, the petitioner cannot demonstrate its ability to pay the proffered wage for 2003 to 2005 even if net current assets are combined with wages paid to the beneficiary.⁹

Therefore, for 2001 to 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

⁷ The AAO notes that, even if it were to consider Franponte, Inc. Mara Bakery's taxes, the company's net income was \$5,229.00 in 2001 and -\$45,188.00 in 2002, so it could not demonstrate its ability to pay for those years.

⁸ 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.

⁹ The AAO notes that, even if it were to consider Franponte, Inc. Mara Bakery's taxes, the company's net current assets were \$9,119.00 in 2001 and \$9,345.00 in 2002, so it could not demonstrate its ability to pay for those years.

Accordingly, from the priority date or when the labor certification was accepted for processing by the DOL, the petitioner had not established that Elimar, Inc. Mara Bakery had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, its net income, or its net current assets.

On appeal, counsel asserts that the Nebraska Service Center should have requested additional evidence from the petitioner regarding its ability to pay the proffered salary before it denied the Form I-140 petition. As noted in the director's May 1, 2007 decision, the petitioner had already submitted ample evidence of ability to pay, which required no further clarification or elaboration. The regulation at 8 C.F.R. § 103.2(a)(8) states that the director shall deny the petition if there is evidence of ineligibility.

Counsel also references the petitioner's gross sales and profits from 2001 to 2005, which were substantially more than the proffered salary, as evidence of its ability to pay. Counsel then notes that the petitioner increased the salary amounts that it paid the beneficiary each year from 2003 to 2005 even when its gross profits decreased from 2004 to 2005. As previously stated within this decision, USCIS considers wages previously paid to an employee by a petitioner, a petitioner's net income, and a petitioner's net current assets as evidence of whether or not the petitioner has the ability to pay the proffered salary. USCIS does not consider a petitioner's gross sales or gross profits when conducting an ability to pay analysis. 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.

Counsel lastly asserts that the overall stability and financial well-being of the petitioner's company should be evaluated in USCIS' determination of its ability to pay. *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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 to 2005 were uncharacteristically unprofitable years for the

petitioner.¹⁰ The AAO notes that the tax returns submitted from 2001 to 2005 reflect low gross receipts or sales in the amounts of \$437,311.00, \$355,026.00, \$278,495.00, \$399,174.00, and \$400,000.00 respectively and low total salaries and wages paid in the amounts of \$56,364.00, \$36,550.00, \$28,461.00, \$44,065.00, and \$43,369.00 respectively.

The AAO further notes that Elimar, Inc./Mara Bakery was incorporated in 2003, which is after the priority date of April 28, 2001. If a corporation is not in existence at the time of the priority date, it may not demonstrate its ability to pay. *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

See also 8 C.F.R. § 204.5(g)(2).

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.

¹⁰ The AAO notes that the record of proceeding does not establish that the taxes submitted for 2001 and 2002 belong to the petitioner.