



U.S. Citizenship
and Immigration
Services

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File:

[REDACTED]
EAC 06 054 51854

Office: VERMONT SERVICE CENTER

Date: MAY 22 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)

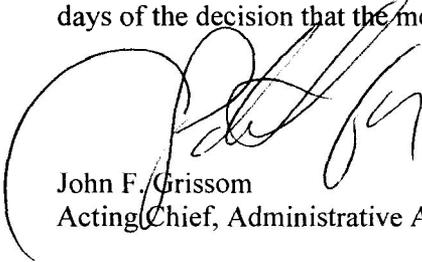
ON BEHALF OF PETITIONER:

SELF REPRESENTED

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 petition¹ was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner² is a cleaner and tailor. It seeks to employ the beneficiary permanently in the United States as a presser. As required by statute, the petition is accompanied by a Form ETA 750, 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 November 1, 2006, 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.

The director found:

The income tax returns [submitted by the petitioner] indicate your business is organized as a partnership. The income tax returns you submitted concern a business entitled "[REDACTED]" which is not the same business name as shown on your petition and on the labor certification issued by the Dept. of Labor. Additionally, the business address as shown on the tax returns also differs from the address as shown on your petition and labor certification. Despite these discrepancies, the tax returns have been reviewed accordingly.

¹ The petitioner had filed a similar petition for the beneficiary which was denied on March 24, 2004.

² The petitioner is a limited liability company (FEIN [REDACTED]) established in 1999, and according to the records of the State of Connecticut accessed at the website <http://www.concord-sots.ct.gov> on May 8, 2009, dissolved on February 19, 2008, and then noted as active on March 12, 2009. There is no evidence in the record whether the petitioner was in fact an employer, in operation, and capable of paying the proffered wage during the approximately 13 months of dissolution. If this matter is pursued, proof is demanded that the petitioner was in continuous operation from the priority date as a domestic limited liability company in the State of Connecticut. Further, if ownership has changed and the company has a new federal employer identification number, the new company would need to establish that it is the successor-in-interest to the original entity who is the petitioner. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (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.

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 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 Form ETA 750 was accepted on March 21, 2001. The petitioner filed the Form I-140 on December 14, 2005, and the petitioner identified on that form is [REDACTED] and [REDACTED], located at [REDACTED]. The proffered wage as stated on the Form ETA 750 is \$8.94 per hour (\$18,595.20 per year).³

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

³ The petitioner initially listed a wage of \$6.63 per hour, however, that was crossed out and increased to \$8.94. We note that the labor certificate has a "white-out" erasure over the section stating the months of experience required. It is unclear when this change was made, and we note that the erasure is not accompanied by a DOL correction stamp notation on the form.

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

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1065 tax return for 1999, 2000, 2001, 2002;⁵ two "Find Report" statements for [REDACTED] dated January through December, for the years 2001 and 2002; a copy of Form ETA 750, Part A for a second labor certification; the petitioner's Newtown, Connecticut, "Declaration of Personal Property;" 12 pages of checks by the petitioner to the beneficiary; and 16 of the petitioner's business checking account statements from January 31, 2002, to December 31, 2002.

The evidence in the record of proceeding shows that the petitioner is structured as a partnership. On the petition, the petitioner claimed to have been established in 1999. 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 \$329,357.00 and \$352,584.00 respectively. On the Form ETA 750 signed by the beneficiary on March 15, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that it does business in four locations, and that the beneficiary is employed at the location at [REDACTED]. The petitioner states that in 1999, the petitioner had a profit of \$4,811.00 and with the addition of its 1999 depreciation expense of \$18,770.00, had a net income of \$23,581.00.

The petitioner states a depreciation expense of \$31,660.00 may be added to its "total income" in 2000 to demonstrate the petitioner's ability to pay the proffered wage.

Similarly for year 2001, the petitioner calculates its ability to pay the proffered wage by adding a "profit" of \$8,708.00 and its depreciation expense of \$21,558.00. The petitioner asserts without substantiation (which it states will be provided if requested) that it paid the beneficiary \$12,471.00 in 2001. The unsupported statements of the petitioner on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Since the priority date year is 2001, tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date but will be examined generally.

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).

⁵ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 1999 and 2000 federal income tax returns generally.

In 2002, the petitioner asserts it has the ability to pay the proffered wage by adding depreciation expense of \$14,806.00, payments to the beneficiary of \$15,523.00, and “a negative amount of \$10,802.00.”

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 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.

Counsel submitted checking statements evidencing payments from the petitioner to the beneficiary for year 2002, totaling \$15,523.00. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$18,595.20 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid in 2002 and the proffered wage, which is \$3,072.20, and that it can pay the full proffered wage in each subsequent year.

The petitioner also submitted an internally generated “Find Report” statement for [REDACTED] dated January through December 2002, that listed payments amounts, dates, and check numbers as made to the beneficiary from [REDACTED] from January 4, 2002 to December 20, 2002. As noted the business banking statements and photocopies of the checks for 2002 were also submitted for 2002, substantiating that Find Report.

Another internally generated Find Report statement for [REDACTED], dated January through December 2001, was submitted without the substantiation of business banking statements and photocopies of checks. No explanation was provided for the failure to submit independent objective evidence of wage payments to the beneficiary in 2001 such as Wage and Tax (W-2), 1099-MISC statements or cancelled checks. According to the Find Report for 2001, a total of \$12,471.00 in payments was made to the beneficiary by the petitioner in 2001. We will consider the petitioner’s

2001 payments generally but there is no proof that wage/compensation payments were made to the beneficiary by the petitioner in that year.

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 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 petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. *Id.* at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. at 537. Therefore the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

The petitioner's tax return demonstrates the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1065⁶ stated net income (Line 22) of \$8,708.00.

⁶ The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her

- In 2002, the Form 1065 stated net income loss of <\$10,802.00>.⁷

Since the proffered wage is \$18,595.20 per year, the petitioner did not have sufficient net income to pay the proffered wage in 2001 and 2002, or the difference between wages actually paid and the proffered wage for 2002. The petitioner filed the I-140 petition on December 14, 2005, but failed to submit independent objective evidence of its ability to pay the proffered wage for 2003, 2004, or 2005. A petitioner must demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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 and include cash-on-hand. **Its year-end current liabilities are shown on lines 15 through 17.** 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 net current assets during 2001 were \$2,552.00.
- The petitioner's net current assets during 2002 were <\$71,280.00>.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage from the priority date even if the petitioner's net current assets are combined with compensation paid

initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

⁷ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

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.

to the beneficiary by the petitioner in 2002. Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of compensation paid to the beneficiary, or its net income or net current assets.

In addition, the petitioner has filed three other Immigrant Petitions for Alien Worker (Form I-140) for other workers as found in the electronic records of USCIS. Therefore, the petitioner must show that it had sufficient income to pay all the wages for each sponsored worker from each respective priority date, which includes the beneficiary.

The petitioner asserts in 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,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

The petitioner has submitted 16 of the petitioner's business checking account statements from January 31, 2002, to December 31, 2002, as well as two Find Report (check listings amounts) statements for [REDACTED] dated January through December 2001 and dated January through December 2002. The petitioner's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L in determining the petitioner's net current assets. In addition, the petitioner's statements would not address the time period from 2003 onwards.

On appeal, the petitioner asserts that it does business in four locations and is profitable. *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

⁹ 8 C.F.R. § 204.5(g)(2).

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.

The petitioner has submitted two income tax returns from the priority date in 2001, and for 2002. According to those tax returns, the petitioner earned a profit of \$8,708.00 in 2001, suffered a loss of <\$10,802.00> in 2002. The petitioner stated net current assets of \$2,552.00 and <\$71,280.00> in 2001, and 2002 respectively. At no time from the evidence submitted was the petitioner able to pay the proffered wage from net income or net current assets even considering compensation paid to the beneficiary in 2002. No unusual circumstances have been shown to exist in this case akin to the facts and holding of *Sonegawa*, nor has it been established that 2002 was an uncharacteristically unprofitable year for the petitioner, particularly as the petitioner asserts that it currently employs the beneficiary. Additionally, as noted above, the petitioner has filed for other beneficiaries and it must establish that it can pay the respective proffered wage for each sponsored worker.

Counsel contends, with the permanent employment of the beneficiary as a presser, she will be an asset and by implication, its business income will increase. The assertions of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a presser will significantly increase petitioner's profits. The petitioner's assertion is erroneous. Proof of ability to pay begins on the priority date, March 21, 2001, that is when petitioner's Application for Alien Employment Certification was accepted for processing by DOL. **The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. This hypothesis cannot be concluded to outweigh the evidence presented in the partnership tax return.**

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date to the instant beneficiary, or to each additional sponsored worker.

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.