



U.S. Citizenship
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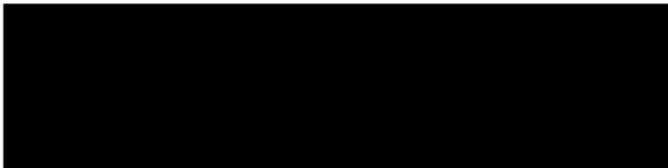
Petitioner:

Beneficiary:



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).

Perry Rhew
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 is a technology company. It seeks to employ the beneficiary permanently in the United States as a network analyst. 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 priority date of the visa petition. The director 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 July 2, 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 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 December 31, 2002. The proffered wage as stated on the Form ETA 750 is \$65,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in engineering, computer science, math, or MIS and two years of experience.

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.¹

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 1996, to have a gross annual income of \$1.6 million, and to currently employ eight workers. On the Form ETA 750B, signed by the beneficiary on November 7, 2002, the beneficiary stated that he began working for the petitioner in March 2002.

On appeal, counsel asserts that the petitioner is an umbrella corporation and that the three other corporations owned by the petitioner have additional assets that could be used to pay the proffered wage if necessary. Counsel also provided evidence on appeal of the sale of intellectual property that was expected to net the petitioner over \$1 million. Counsel urges us to accept the petitioner's "track record of successful operation" since 1997 as proof of its "stable business & future viability" in analysis of the totality of the petitioner's circumstances.

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).

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

¹ 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).

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 submitted the beneficiary's W-2 forms, which show that the beneficiary received \$23,630 in 2003, \$40,333.36 in 2004, \$43,250 in 2005, and \$60,233.35 in 2006. None of these salaries is equal to or greater than the proffered wage contained on the ETA 750. As such, the petitioner would still need to show its ability to pay the difference between the actual wage paid and the proffered wage (i.e. \$41,370 in 2003, \$24,666.64 in 2004, \$21,750 in 2005, and \$4,766.65 in 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 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., 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 and wage expense 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.

In *K.C.P. Food Co., Inc. v. Sava*, 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on June 25, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2002 through 2006, as shown in the table below.

- In 2002, the Form 1120 stated net income of \$4,341.
- In 2003, the Form 1120 stated net income of \$8,938.
- In 2004, the Form 1120 stated net income (loss) of -\$337,731.
- In 2005, the Form 1120 stated net income of \$3,970.
- In 2006, the Form 1120 stated net income of \$192,200.

Therefore, for the years 2002 through 2005, the petitioner did not have sufficient net income to pay the difference between the wage received by the beneficiary and the proffered wage. The petitioner did have sufficient net income to pay the difference between the wage received and the proffered wage in 2006.

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.

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.² A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any)

²According 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.

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 end-of-year net current assets for 2002 through 2005, as shown in the table below.

- In 2002, the Form 1120 stated net current assets (liabilities) of -\$47,576.
- In 2003, the Form 1120 stated net current assets (liabilities) of -\$70,785.
- In 2004, the Form 1120 stated net current assets (liabilities) of -\$78,567.
- In 2005, the Form 1120 stated net current assets (liabilities) of -\$108,811.

For the years 2002 to 2005, the petitioner did not have sufficient net current assets to pay the difference between the wage actually paid and the proffered wage.³

Therefore, from the date the Form ETA 750 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 asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel refers to the petitioner as "an umbrella corporation which also owns other corporations." The evidence in the record, however, does not demonstrate that the petitioner owns any of the supposedly related corporations. On Schedule K, Question 3, the petitioner indicated that it did not own "50% or more of the voting stock of a domestic corporation." The petitioner also answered in the negative to Question 4 of Schedule K on its Form 1120 indicating that it is not "a subsidiary in an affiliated group or a parent-sub subsidiary controlled group." The petitioner presented evidence of its application for an Employer Identification Number and stock issuance to establish that it is involved with the three corporations. The information contained in the Form 1120 is inconsistent with the stock certificates submitted. 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). As the petitioner failed to establish that it is an umbrella corporation, assets of other companies cannot be used to show the petitioner's ability to pay. 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.

³ Additionally, USCIS records indicate that the petitioner has filed for a second beneficiary with a 2002 priority date. The petitioner must show that it has the ability to pay the proffered wage for both beneficiaries from each sponsored workers' respective priority date onward.

Additionally, the statement provided from [REDACTED] the plaintiff's certified public accountant, states that the Chief Operating Officer and principal stockholder of the petitioner "has substantial income and liquid assets with no outstanding debts" and would be willing and able to "subsidize the corporate cash accounts." Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of other corporations or the company's shareholders to satisfy the petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Accordingly, the assets of other companies, the Chief Operating Officer, and principal shareholder cannot be used to demonstrate the petitioner's ability to pay.

On appeal, the petitioner provided an asset purchase agreement for intellectual property developed by one of its allegedly owned corporations. Counsel argues that this sale "will be worth over one million dollars" (emphasis omitted). As expressed above, counsel provides no evidence that the assets of this sale would be made available to the petitioner to pay the proffered wage or that any profit would otherwise affect the petitioner. This agreement is dated 2006, so has no bearing on the petitioner's ability to pay the proffered wage prior to this date. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As noted above, the petitioner previously established its ability to pay the proffered wage in 2006, but not in any prior year. In addition, the petitioner provided no evidence that this contract reflects the usual state of business as opposed to a one time influx of cash. Counsel also uses this agreement as an example of the type of business done by Cyber Technologies (one of the companies allegedly affiliated with the petitioner), i.e. capital is invested and no profit is realized until years later when the concept, technology, or intellectual property is sold. 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)). Even accepting this business model as an accurate representation, which we do not as the evidence presented only concerns one such arrangement, the petitioner has not shown that the business model is successful or that, again, any success realized by one of the allegedly related corporations affects the petitioner's assets or its ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns, which fail to demonstrate that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

As urged by counsel, 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 *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.

As opposed to *Sonegawa*, the petitioner has not demonstrated that the year in which the labor certification was filed was an unusual year, but instead, the tax returns show that the petitioner's business did not vary from 2002 to 2005 in that it had low net income or negative net income each of the years. As such, 2006 was the only year that was different, that being the year in which the petitioner demonstrated its ability to pay the proffered wage. The petitioner presented no evidence to show that its business was profitable prior to 2002, so we are unable to conclude that the factors in *Sonegawa* apply. The petitioner showed overall declining gross receipts from 2002 to 2006 and not that its business historically has grown. It failed to show that it enjoys a positive reputation within its industry, or other evidence that the losses sustained in 2002-2005 were unusual. Instead, the tax returns show substantially declining gross receipts between the years 2004 and 2005. Salaries paid to employees similarly declined overall from 2002 to 2006. 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.

On appeal, counsel also cites *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (D.D.C. 1988), and *Masonry Master's Inc. v. Thornburgh*, 875 F.2d 898 (D.C.Cir. 1989), in support of the petitioner's claims. The portion of *Full Gospel* cited by counsel in the brief on appeal states that the Church in that case submitted financial records demonstrating sufficient revenue and working capital to pay the alien's proffered wage and that the prospect of the Church's increased business should be positively considered in the analysis. In the instant case, the petitioner submitted no evidence of increased business or that its overall revenue was on the upswing. In fact, the petitioner's tax returns demonstrate significantly declining gross receipts. The petitioner presented no evidence of business contracts or agreements that would lead us to conclude that its business was on the upswing such as the increase in congregants and business shown by the Church in *Full Gospel*. The court in *Masonry Master's* chided the service for using only a balance sheet to determine the company's ability to pay the proffered wage and stated that such a method did not include the expected contribution of the alien. As opposed to the company in *Masonry Master's*, the beneficiary here already works for the petitioner so his contribution to its revenue has already been realized. This case supports our examination of the petitioner's overall financial situation as opposed to solely relying upon one document. In this case, the AAO has undertaken an overall financial review based

on the evidence provided and found that none of that evidence indicates that the petitioner is capable of paying the proffered wage. The petitioner has pointed to no document that shows otherwise.

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.