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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



U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

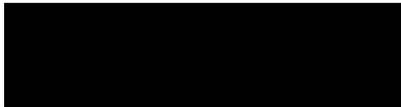
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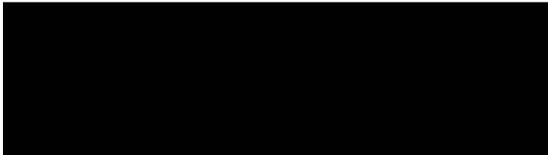
Petitioner:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a construction supervisor. 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 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 March 24, 2005. The proffered wage as stated on the Form ETA 750 is \$25.10 per hour (\$52,208.00 per year). The Form ETA 750 states that the position

requires two years of experience in the job offered or two years of experience in the related occupation specified as “supervisory experience in construction” along with additional special requirements stated in the Form 750 A, Block 15.

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 Counsel stated in his letter dated March 28, 2008, that he had attached to the appeal statements additional evidence, but no documents were attached.

Relevant evidence in the record includes the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; the petitioner’s U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2004, 2005, and 2006; letters from counsel dated January 28, 2008, and March 28, 2008; a letter from the petitioner dated January 25, 2008; copies of two legal case decisions; and an “A/R” (accounts receivables) aging summary report for the petitioner dated December 31, 2005.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claims to have been established in 1999 and to currently employ six workers. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 23, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the contents of his letter dated March 28, 2008 shows the petitioner’s ability to pay the proffered wage as of the filing date as well as unusual circumstances that existed in 2006 that affected the petitioner’s ability to pay in that year alone.

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

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).

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 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. According to the evidence, the petitioner did not employ the beneficiary.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record before the director closed on January 28, 2008, 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 2005 and 2006, as shown in the table below.

- In 2005, the Form 1120S² stated net income of \$8,391.00.³

² Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation 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, credits, deductions or other adjustments, net income is found on line 17e (2004-2005), and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). The petitioner had additional deductions and other adjustments shown on its Schedule K for 2005 and 2006. Therefore, the ordinary business income of \$76,229.00 stated on the petitioner's form 1120S, line 21, is reduced on Schedule K of that tax return by additional deductions, credits and adjustments of \$67,843.00 (Section 179 deduction), \$468.00 (Post-1986 depreciation adjustment), \$8,090.00 (Nondeductible expenses),

- In 2006, the Form 1120S stated net income⁴ of <\$10,209.00>.⁵

As already stated, the petitioner's net income for 2005 is reduced on Schedule K of that tax return by additional deductions, credits and adjustments to \$8,391.00, and therefore the AAO hereby withdraws the finding of the director that the petitioner's net income in 2005 was \$76,229.00 because it was not established by the record before the AAO. Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 and 2006, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$29,272.00.
- In 2006, the Form 1120S stated net current assets of <\$581.00>.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are another ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date.

\$16,581.00 (Property Distributions) and \$5.00 (Investment income) all totaling on Schedule K, line 17.e \$8,391.00.

³ Ordinary income (loss) from trade or business activities as reported on Form 1120S, Schedule K, line 17e.

⁴ Ordinary income (loss) from trade or business activities as reported on Form 1120S, Schedule K, line 18.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁶ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel asserts that the petitioner's net profit (Form 1120S, Line 21) in 2005 was \$76,229.00 demonstrates the petitioner's ability to pay the proffered wage. Counsel's statement is erroneous. The ordinary business income of \$76,229.00 stated on the petitioner's form 1120S, line 21, is reduced on Schedule K of that tax return by additional deductions, credits and adjustments of \$67,843.00 (Section 179 deduction), \$468.00 (Post-1986 depreciation adjustment), \$8,090.00 (Nondeductible expenses), \$16,581.00 (Property Distributions) and \$5.00 (Investment income) all totaling, on Schedule K, line 17.e, \$8,391.00.

The petitioner stated that the petitioner suffered a loss of <\$10,209.00> in 2006. According to the petitioner, this loss was due to the purchase of equipment, account receivables of \$64,826.00 in that year, and a drop in sales due to a downturn in the economy. By implication, then, the petitioner asserts that without the equipment expense and should the account receivables have been received in 2006, that the petitioner would have overcome its loss and could have had the ability to pay the proffered wage in 2006. The petitioner stated declining gross receipts for not only 2006 but in 2004 and 2005 also.

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

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.

According to counsel, the petitioner has been in business since 1999 and it has "consistently shown net income." Based upon the evidence submitted from the priority date, the petitioner suffered a loss

in 2006 of <\$10,209.00>, and in 2005 its net income of \$8,391.00 only amounted to 16% of the proffered wage. Counsel asserts that the petitioner's net profit in 2004 is proof of the petitioner's ability to pay the proffered wage, but since it was earned prior to the priority date in 2005 it can have only slight value in the determination of the petitioner's ability to pay *from* the priority date.

Counsel asserts that a drop in sales in 2006 was caused by a downturn in the economy. We note that the petitioner has stated gross receipts on its Form 1120S tax returns for 2004, 2005 and 2006 of \$973,925.00, \$805,551.00, and \$744,519.00 respectively. These figures indicate a general downturn in the petitioner's business over a three year period and not a one-time occurrence as counsel contends.

According to counsel the petitioner has paid salaries and wages of \$81,257.00 in 2004, \$110,076.00 in 2005, and \$87,377.00 in 2006, and that this demonstrates its ability to pay the proffered wage. While the tax returns show a consistent history of salary and wage payments, the information does not establish the petitioner's ability to pay the proffered wage of \$52,208.00. Wage paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080. Proof of ability to pay begins on the priority date 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 which is March 24, 2005.

We note that payment of officers' compensation is noted for the two shareholders on the petitioner's tax returns as \$53,942.00 and \$55,000.00 for 2005 and 2006 respectively. The officers have made no commitment or offer to reduce their compensation. 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel cites the cases of *Matter of Sonogawa, Id.*, and *O'Conner v. Attorney General*, 1987 WL 18243 (D. Mass. Sept. 29, 1987) for the contention that based upon the evidence submitted, the petitioner is *not* relying on its expectations of a continued increase in business or financial viability to prove its ability to pay the proffered wage. If counsel asserts that the petitioner has sufficient net income or net current assets to pay the proffered wage, or that the petitioner's gross receipts demonstrate a business increase, when in fact there are insufficient "net profits" to pay the proffered wage and an examination of gross income indicate a decrease for the three years examined, then counsel's assertion is misplaced and not supported by the evidence.

The *O'Conner* case that counsel cites is a district court decision that is not binding on the AAO. Further, the petitioner in *O'Conner* was a sole proprietorship. The personal assets of sole proprietors can be considered in considering whether a sole proprietor has the ability to pay a proffered wage. Further, the decision also noted that the petitioner had been in business for ten years with increasing profits and was well-known within the retail community in Boston. Thus, the circumstances of the

instant petitioner are not analogous to the petitioner in *O'Conner* as the petitioner here has demonstrated by the evidence submitted

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.