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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
and Immigration
Services

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FILE:

[REDACTED]
LIN 07 093 52246

Office: NEBRASKA SERVICE CENTER

Date:

SEP 11 2009

IN RE:

Petitioner:

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:

[REDACTED]

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 is a jewelry business. It seeks to employ the beneficiary permanently in the United States as a jeweler (diamond setter). 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 April 14, 2008 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.

Counsel stated that a brief and/or additional evidence would be submitted to the AAO within 30 days. The appeal was filed on May 9, 2008, and the AAO received the appeal on May 12, 2008. As of this date, more than 15 months later, the AAO has received nothing further.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) states in pertinent part:

Additional time to submit a brief. The affected party may make a written request to the AAO for additional time to submit a brief. The AAO may, for good cause shown, allow the affected party additional time to submit one.

The regulation at 8 C.F.R. § 103.3(a)(2)(viii) states in pertinent part:

Where to submit supporting brief if additional time is granted. If the AAO grants additional time, the affected party shall submit the brief directly to the AAO.

Counsel, here, did not request any additional time beyond the 30 days listed on Form I-290B. Therefore, a decision will be determined based on the record, as it is currently constituted.

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 November 19, 2004. The proffered wage as stated on the Form ETA 750 is \$15.52 per hour (35 hour week) or \$28,246.40 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of jeweler.

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 submitted a statement on appeal. Other relevant evidence in the record includes copies of the petitioner's 2004 through 2006 Forms 1120S, U.S. Income Tax Returns for an S Corporation, a statement from one of the petitioner's owners, and copies of the 2006 and 2007 Forms 1120S for TNS On Line, Inc., a company separate from the petitioner. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on August 25, 1993 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based

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).

on a calendar year. On the Form ETA 750B, signed by the beneficiary on September 30, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts:

- 1) The Center Director erred as a matter of law and abused his discretion in failing to consider the sales and business income of the online aspect of petitioner, TNS Diamond, Inc. which earned \$72,830 in 2007 and \$86,340 in 2006.
- 2) The Center Director erred as a matter of law and abused his discretion in failing to consider the petitioner, TNS Diamonds, Inc.'s, ability to pay from its salaries and compensation of officers \$110,600 [in 2006] and 2007 salaries and compensation of officers of \$121,550.
- 3) The Center Director concluded the petitioner does have the proven ability to pay as of 2006, but not in 2007 when salaries and compensation was \$11,000 higher.
- 4) The Center Director erred as a matter of law and abused his discretion in failing to conclude 2007 did not establish ability to pay since salaries and compensation of officers were \$121,550 and its associated online entity sales were \$1,033,898 and net profit of \$72,830 and \$0 compensation and salaries of officers, with the officers and employees of petitioner operating the online company.
- 5) Petitioner, having just retained counsel herein, requests thirty days to submit evidence and legal authority in support of this appeal and further asks the appeal be first treated as a Motion to Reconsider.

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 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 during any relevant timeframe including the period from the priority date in 2004 or subsequently through 2007.

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.

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 USCIS 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).

The record before the director closed on March 19, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The petitioner’s tax returns demonstrate its net income for 2004 through 2007, as shown in the table below.

- In 2004, the Form 1120S stated net income² of \$21,061.
- In 2005, the Form 1120S stated net income of \$44,803.
- In 2006, the Form 1120S stated net income of \$2,730.
- In 2007, the Form 1120S stated net income of -\$10,014.

Therefore, for the years 2004, 2006, and 2007, the petitioner did not have sufficient net income to pay the proffered wage. In 2005, the petitioner did have sufficient net income to pay the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage of \$28,246.40 in 2005 from its net income.

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.³ 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

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 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2004, the petitioner’s net income is found on Schedule K of its 2004 tax returns. Because the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2005 through 2007, the petitioner’s net income is found on line 21 of page one of its 2005 through 2007 tax returns.

³According 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.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, 2006, 2006, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$39,879.
- In 2006, the Form 1120S stated net current assets of \$50,288.
- In 2007, the Form 1120S stated net current assets of \$10,073.

Therefore, for the years 2004 and 2006, the petitioner did have sufficient net current assets to pay the proffered wage. However, in 2007, the petitioner did not have sufficient net current assets to pay the proffered wage of \$28,246.40.

Counsel asserts on appeal that the petitioner has established its ability to pay the proffered wage of \$28,246.40 based on its salaries, compensation of officers, and on the business income of an online entity, TNS On Line, Inc.

Counsel is mistaken. Compensation of officers is an expense category explicitly stated on the Form 1120S. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that the petitioner has two owners. According to the petitioner's 2004 through 2007 IRS Forms 1120S Schedule K-1 (Shareholder's Share of Income, Credits, Deductions, etc.), the owners elected to pay themselves \$70,200, \$70,200, \$70,200, and \$64,350, respectively. These figures are not supported by any Forms W-2. We note here that the compensation received by the company's owners during fiscal years 2004 through 2006 was a fixed salary and not a flexible amount based on the profitability of the corporation. Instead, the fixed amount of the compensation of officers would indicate that it is a set salary, and wages already paid to others cannot be used to establish the petitioner's ability to pay the proffered wages in the pertinent years. USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In addition, counsel has not submitted any evidence (i.e., affidavit, etc.) from the petitioner's owners stating that they could or would be willing to forego their salaries in order to pay the wages of the beneficiary.⁴

⁴ The assertions of counsel 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). 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)).

With regard to the salaries the petitioner paid out in 2004 through 2007, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. There is no evidence in the record of proceeding that establishes that any of the wages paid out in 2004 through 2007 was paid to the beneficiary.

On appeal, counsel claims that the income from the separate online entity, TNS On Line, Inc., should be considered when determining the petitioner's ability to pay the proffered wage. However, as noted above, the petitioner is a corporation. 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."

As the two companies have separate tax identification numbers, the income from TNS On Line, Inc. cannot be used to demonstrate the petitioner's ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's tax returns indicate it was incorporated on August 25, 1993. The petitioner has provided its tax returns for 2004 through 2007, with the 2007 tax return not

establishing the petitioner's ability to pay the proffered wage of \$28,246.40. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. The tax returns do not show significant wages paid to other workers. The petitioner claims to employ three employees. However, its tax returns show wages paid of only \$8,500 in 2004, \$26,000 in 2005, \$40,400 in 2006, and \$57,200 in 2007. While the wages paid to the petitioner's employees have increased over the years, the beneficiary's wage alone would be approximately ½ of the highest wages paid out (2007). Furthermore, the AAO notes that along with a negative income in 2007, the petitioner has had a steady decline in gross receipts from \$666,667 in 2004 (the priority date) to \$314,559 in 2007. 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.