

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

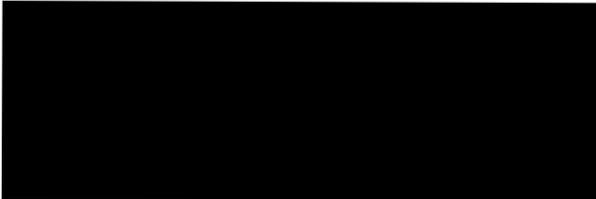
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B7c



FILE:

LIN 07 095 53637

Office: NEBRASKA SERVICE CENTER

Date: SEP 17 2009

IN RE:

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).

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 travel arrangement and reservation company. It seeks to employ the beneficiary permanently in the United States as an assistant manager, marketing. 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 dated January 10, 2008, 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 September 20, 2004. The proffered wage as stated on the Form ETA 750 is \$38,000.00 per year.

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.<sup>1</sup>

Relevant evidence in the record, including evidence submitted on appeal, 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 2005, and 2006; a letter from counsel dated August 20, 2007; a letter from the petitioner dated September 29, 2008; a letter from the petitioner's accountant dated February 14, 2008; approximately 17 pages of the petitioner's bank savings and checking statements with cancelled checks; the petitioner's compiled financial statements dated December 31, 2004, 2005, and 2006; Wage and Tax Statements (W-2) for 2004, 2005, and 2006, issued by the petitioner to the beneficiary. 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 in 1987 and to currently employ four 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 September 13, 2004, the beneficiary did claim to have worked for the petitioner since May 2004, to present (i.e. September 13, 2004).

On appeal, counsel asserts that the petitioner has current net assets greater than the proffered wage and that this is evidence of its ability to pay the proffered wage. Counsel's contention on appeal is not in accordance with the facts. In 2005, the petitioner's Form 1120S tax return (as set forth below) demonstrated net current assets of <\$259,423.00><sup>2</sup>, and in 2006, <\$328,004.00>.

According to counsel, relying upon a letter from the petitioner's accountant dated February 14, 2008, the petitioner's net current assets are the total of retained earnings and the stated value of the petitioner's capital stock. Counsel recommends the use of retained earnings to pay the proffered wage.

---

<sup>1</sup> 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).

<sup>2</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Counsel, and the petitioner in his letter dated September 29, 2008, both state that the petitioner will pay the proffered wage when the beneficiary adjusts his status to permanent resident. By implication, counsel is stating that the petitioner is not responsible to demonstrate its ability to pay the proffered wage until sometime after the priority date. This is an erroneous contention. A petitioner must establish the elements for the approval of the petition at the time of filing including the ability to pay. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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, 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 (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 submitted three W-2 statements evidencing wages paid to the beneficiary of \$7,956.00, \$25,431.00, and \$26,919.36 in 2004, 2005 and 2006 respectively. Since the proffered wage is \$38,000.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$30,044.00, \$12,569.00, and \$11,080.64 respectively. The petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 (1<sup>st</sup> 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 August 24, 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 Form 1120S<sup>3</sup> tax returns demonstrate its net income for 2005 and 2006, as shown below:**

- In 2005, the Form 1120S stated net income<sup>4</sup> of \$26,726.00.
- In 2006, the Form 1120S stated net income<sup>5</sup> of \$30,654.00.

Therefore, for the year 2005 and 2006, the petitioner did have sufficient net income to pay the proffered wage or the difference between the wage paid to the beneficiary in 2005 and 2006, and the proffered wage. However, since the priority date is in 2004, the petitioner has the burden of proof in demonstrating its ability to pay the proffered wage in 2004. The petitioner has not shown that it can pay the difference between wages paid and the proffered wage which for 2004 is \$30,044.00.

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.<sup>6</sup> 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

---

<sup>3</sup> 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.). Because the petitioner had additional income and other adjustments shown on its Schedule K for 2005 and 2006, the petitioner's net income is found on Schedule K of its tax return tax returns.

<sup>4</sup> Net income as reported on Schedule K, Line 17e.

<sup>5</sup> Net income as reported on Schedule K, Line 18.

<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 2005 and 2006,<sup>7</sup> as shown below:

- In 2005, the Form 1120S stated net current assets of <\$259,423.00>.<sup>8</sup>
- In 2006 the Form 1120S stated net current assets of <\$328,004.00>.

Therefore, for 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage but could pay the difference between the wage paid to the beneficiary in 2005 and 2006 and the proffered wage. Although the petitioner has submitted evidence of wage payment in 2004, it is less than the proffered wage and no 2004 tax return, audited financial statement or annual report was submitted for 2004. Therefore, for 2004, the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the 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 are additional ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date. *See* 8 C.F.R. § 204.5(g)(2).

Counsel has submitted approximately 17 pages of the petitioner's bank checking and savings statements and cancelled checks covering the period August 10, 2007 to November 9, 2007. Counsel's reliance on the balances in the petitioner's bank accounts 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 that will be considered below in determining the petitioner's net current assets.

Counsel has submitted the petitioner's compiled financial statements dated December 31, 2004, 2005 and 2006, as proof of its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial

---

<sup>7</sup> In 2006 the petitioner's net current assets were <\$328,004.00>.

<sup>8</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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.

We note that the petitioner has not submitted sufficient or admissible financial evidence to demonstrate its ability to pay other than a W-2 statement, for 2004.<sup>9</sup> Therefore we must examine evidence for 2005 and 2006 that has been submitted. In the instant case, the petitioner's gross receipts declined year-to-year in 2005-\$222,324.00, and 2006-\$202,381.00 which indicate a business downturn. Counsel contends, citing *Matter of Sonogawa*, that the petitioner has expectations of a continued increase in business (that is not shown by the gross receipts reported here) and increasing profits but provides no substantiation why the profits will increase. An examination of petitioner's tax returns demonstrates that its net income is flat year to year, 2005-\$26,726.00 and 2006-

---

<sup>9</sup> As noted the compiled unaudited financial statements submitted are insufficient and contrary to the express language of the regulation at 8 C.F.R. § 204.5(g)(2).

\$26,726.00 and 2006-\$30,654.00. The petitioner's net current assets have declined from <\$259,423.00> in 2005 to <\$328,004.00> in 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 ability to pay the proffered wage.

We note that payment of officers' compensation is noted for the two shareholders on the petitioner's tax returns as \$46,540.00 and \$46,433.00 for 2005 and 2006 respectively. Assuming that consideration of officers' compensation is appropriate, officer's compensation can not be considered under these circumstances. The officers have made no commitment or offer to reduce their compensation. Once paid over, the compensation becomes the corporation's shareholders to retain and it is not a cash asset of the 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."

Counsel refers to a decision issued by the AAO concerning the ability to pay, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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.