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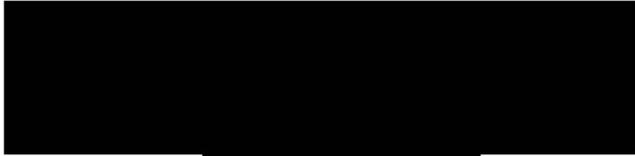
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B6



File:

SRC 07 202 51707

Office: TEXAS SERVICE CENTER

Date: SEP 28 2009

IN RE:

Petitioner:

Beneficiary:



Petition: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

The petitioner is a Montessori school. It seeks to employ the beneficiary permanently in the United States as a teacher's assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Counsel dated the appeal February 28, 2008. Although counsel checked the box on the appeal form that a legal brief and/or additional evidence would be submitted to the AAO within 30 days, no brief or additional evidence was submitted.¹ The regulation at 8 CFR §§ 103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO. Accordingly, the AAO will consider the evidence in the record before us.

As set forth in the director's denial dated February 1, 2008, an 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.

Further, beyond the decision of the director, an additional issue in this case is whether or not the petitioner has the ability to pay the proffered wages to each of the beneficiaries of its pending I-140 petitions.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is

¹ This deficiency presents an additional ground of ineligibility.

established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing by DOL on December 8, 2004, and certified on July 25, 2006. The petitioner filed the Form I-140 petition on June 22, 2006. The proffered wage as stated on the Form ETA 750 is \$18,924.00 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.²

Relevant evidence in the record concerning the petitioner's ability to pay the proffered wage includes the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; support letters from the petitioner dated May 23, 2007, and January 15, 2008; a "Construction Cost Summary;" and the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2002, 2003, 2004, 2005 and 2006. No new evidence was submitted on appeal.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage consistent with 8 C.F.R. § 204.5(g)(2), the director issued a notice to deny the petition and requested on December 17, 2007, pertinent evidence of the petitioner's ability to pay the proffered wage.

² The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the 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).

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, the petitioner submitted U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 2002 and 2003.³

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 1991 and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were "\$93,708 (2007 Proj.);" and "\$883,708 (2007 Proj.);" respectively. On the Form ETA 750, signed by the beneficiary on November 30, 2004, the beneficiary did claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in her denial of the petition by failing to adequately consider the evidence submitted in evaluating the petitioner's ability to pay the proffered wage.

Accompanying the appeal, counsel submits a letter dated January 15, 2008; a support letter from the petitioner dated January 15, 2008; a construction cost summary dated July 20, 2006; and un-audited financial statements from the petitioner for 2007.

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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Counsel submitted a Wage and Tax Statement (W-2) from the petitioner to the beneficiary for year 2006, in the amount of \$11,672.40.00 with a payroll statement dated as of December 23, 2006, for end-of-year wages paid to the beneficiary by the petitioner in the amount of \$13,458.00. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full

³ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2002 and 2003 federal income tax returns generally.

proffered wage from the priority date as noted above. As set forth above, the petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the 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 (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 that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. 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. Therefore, the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

The petitioner's tax returns⁴ demonstrate the following financial information concerning the petitioner's net income:⁵

- In 2004, \$24,551.00.
- In 2005, <\$1,450.00>⁶.
- In 2006, <\$28,404.00>.

The petitioner did not have sufficient net income to pay the proffered wage of \$18,924.00 for years 2005, and 2006, or the difference between wages actually paid and the proffered wage for year 2006. As the petitioner sponsored a second worker as found in USCIS records, (i.e. SRC 07 202 53470), the petitioner must demonstrate that it can pay the respective proffered wage for each sponsored worker from their respective priority dates until each obtains permanent residence. Therefore, although the petitioner's net income for 2004 exceeds the proffered wage, the petitioner by the evidence submitted has not demonstrated that it can pay the wages for each sponsored worker. The petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

⁴ 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, credits, deductions, other adjustments shown on its Schedule K, the petitioner's net income is found on Schedule K of its tax returns.

⁵ In 2004 and 2005, the petitioner's net incomes were stated on Form 1120S, Schedule K, Line 17e; and in 2006 on Form 1120S, Schedule K, Line 18. In 2002 and 2003, the petitioner's net income was stated on Form 1120S, Schedule K, Line 23 in the amounts of \$58,956.00 and \$27,989.00 respectively.

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's net current assets⁸ during 2004, 2005 and 2006 were <\$25,708.00>, <\$21,245.00>, and <\$60,184.00>.

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

Counsel asserts that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁹ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel has submitted unaudited financial statements but her reliance on such statements is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Further, the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner asserts in a letter dated January 15, 2008, "in the context of an S Corporation" expenses not yet expended are included on the current year's tax return and could be carried over to the next reporting year. The petitioner's statement is erroneous.

Ordinary business income, termed net income here, has already been considered above to demonstrate the petitioner's ability to pay, but not in addition to the other items mentioned above. As already stated above, depreciation and amortization expense deductions do not represent amounts

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁸ In 2002 and 2003, the petitioner's net current assets were <\$2,430.00> and <\$27,267.00> respectively.

⁹ 8 C.F.R. § 204.5(g)(2).

available to pay wages. The wage paid to the beneficiary by the petitioner in 2006 has already been considered along with the net income loss in 2006, including wages paid the beneficiary in 2006 that include the cafeteria plan contribution.

A review of the tax returns submitted indicates that because of compensation withdrawn by the two shareholders of the petitioner as officers' compensation in each year, the petitioner's net income is substantially reduced. Therefore, the petitioner's net incomes for the period for which tax returns were submitted are less than the proffered wage in 2005 and 2006. The owners may in their discretion take officers' compensation.

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.

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 has been in business since 1982. There is no substantive evidence demonstrating unusual or novel expenses, losses or costs that would have depressed the net income of the petitioner during the relevant five year time period other than general market conditions for private schools. The petitioner had one year of net income in 2004 which exceeded the proffered

wage but without considering the petitioner's ability to pay all sponsored beneficiaries. The petitioner's gross incomes were in 2002-\$534,256.00; 2003-\$531,143.00; 2004-\$615,454.00; 2005-\$578,362; and in 2006-\$516,796. The petitioner's gross income in 2006 is lower than that earned in 2002 indicating a business downturn in revenues earned for the five year period.

Further, at no time has petitioner demonstrated expectations for increased earnings from employment of the beneficiary by increasing profits. The petitioner contends, that it would be "unrealistic to expect an employer to hire only workers whose marginal contribution to the value of the company's production equals or exceeds their wages" citing *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989). In fact, *Masonry Masters, Inc.* states the opposite:

The INS's [now USCIS] interest in the income statement appears to assume that the worker will contribute nothing to income. This seems wholly unrealistic; one would expect an employer to hire only workers whose marginal contribution to the value of the company's production equals or exceeds their wages ... *Masonry Masters, Inc.* 875 F 2d. at 899.

Thus, assessing the totality of the circumstances in this individual case, the petitioner has not established that it had the continuing ability to pay the proffered wage.

Counsel contends that with renovations made to the school facility in 2006, the petitioner has "reasonable expectations of further profitable years." Counsel's assertion is misplaced since the determination of the petitioners' ability to pay is made from the priority date not from 2006. Also according to counsel, because of the construction costs the petitioner's profits were depressed in 2006. She introduced a "Construction Cost Summary" based on bid estimates, not expended costs, and unaudited financial statements for 2007 to demonstrate a profit rebound in 2007. No independent objective evidence was submitted to substantiate counsel's contention such as cash receipts or cash expenditures indicia. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel refers to three decision issued by the AAO concerning the petitioner's ability to pay, but does not provide published citations. 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).

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, BALCA 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 petitioner asserts that a documental operational loss is insufficient to disprove the petitioner's ability to pay the proffered wage. The petitioner cites a USCIS policy and procedure memorandum (i.e. Memorandum from Michael Aytes, Acting Associate Director, Domestic Operations, AFM Update

Chap. 22, Employment-based Petitions, (AD03-01), USCIS Interoffice Memorandum (HQPRD 70/23.12) September 12, 2006).¹⁰ Further, the AAO is not bound by the guidance provided to adjudicators based upon an USCIS interoffice memorandum.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date as the petitioner has sponsored multiple beneficiaries and has not demonstrated that it could pay all the sponsored workers. .

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.

¹⁰ This USCIS memorandum provides guidance on the adjudication of petitions for classification under the employment-based immigrant visa categories.