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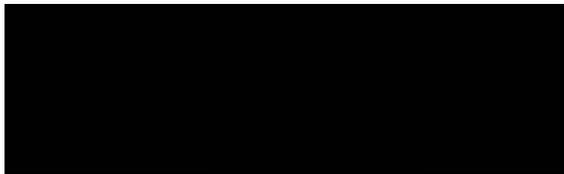
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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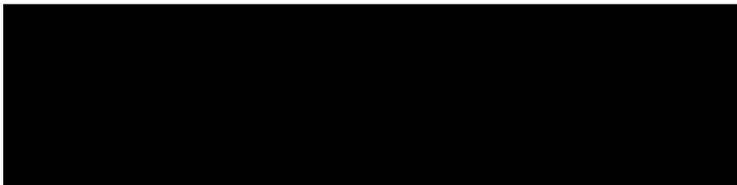
IN RE:

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).

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 consulting engineering firm. It seeks to employ the beneficiary permanently in the United States as a project engineer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (the 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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 ETA Form 9089 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 ETA Form 9089 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 ETA Form 9089 was accepted on February 13, 2006. The proffered wage as stated on the ETA Form 9089 is \$25.25 per hour (\$52,520.00 per year)¹. The ETA Form 9089 states that the position requires a bachelor's degree in electrical engineering and eighteen months experience.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On August 9, 2007, the director issued a Request for Evidence (RFE) asking for the petitioner to submit information regarding the petitioner's ability to pay the proffered wage from the priority date onward by submitting copies of the petitioner's annual reports, or prepared federal income tax returns, and/or audited financial statements for 2006. Additionally, the director requested a copy of the beneficiary's Wage and Tax Statement (W-2) and/or the beneficiary's pay stubs.

In response the petitioner submitted, the petitioner's federal income tax return for 2006, and a letter from the petitioner's "accountant" dated November 7, 2007.

Accompanying the petition, counsel submitted, *inter alia*, a letter from the petitioner dated September 14, 2006; and the petitioner's business checking account statements for the time period December 31, 2005, to October 31, 2006.

Accompanying the appeal, counsel submitted, *inter alia*, additional evidence: an undated legal brief; the petitioner's corporate documents; the petitioner's federal income tax Forms 1120 for 2004, 2005, and 2006; and W-2 statements issued by the petitioner to the beneficiary for years 2004 and 2005.³

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1988 and to currently employ 20

¹ According to the labor certification, the offered wage is \$55,700.00.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

³ Wage payments made to the beneficiary by the petitioner, and the petitioner's tax returns, dated before the priority date have slight probative value in this matter.

workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on May 15, 2006, the beneficiary did claim to have worked for the petitioner from October 10, 2003, to February 13, 2006.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. The petitioner submitted Wage and Tax Statements (W-2) issued to the beneficiary by the petitioners in 2004-\$28,959.25, and 2005-\$40,685.30.⁴ The petitioner did not submit any evidence that the beneficiary was employed and paid the proffered wage in 2006, the year of 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 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.

⁴ The petitioner's W-2 Statements are before the priority date and cannot be probative of the petitioner's ability to pay from the priority date in 2006. Even if we could consider the wages paid in 2004 and 2005, the petitioner's tax returns submitted for the same years demonstrated no net income and a loss.

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on November 9, 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 was the most recent return available. The petitioner's tax return demonstrates its net income as shown in the table below.

- In 2006, the Form 1120 stated net income of \$14,253.00.

Therefore, for the year 2006, the petitioner did not have sufficient net income to pay the proffered wage.⁵

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 return⁷ demonstrates its end-of-year net current assets as shown in the table below.

- In 2006, the Form 1120S stated net current assets of <\$633,133.00>.

Therefore, for 2006, the petitioner through an examination of its net current assets could not pay the proffered wage.

Counsel submitted a letter dated November 7, 2007, stating that the petitioner had shown a profit for every year of its existence without considering "discretionary executive bonuses," and therefore the petitioner's has established the ability to pay the proffered wage.

The AAO notes that the letter dated November 7, 2007, is from an individual identified on his letter head as an attorney and counselor at law doing business as [REDACTED] [REDACTED] credentials as an accountant, for which his statements have been submitted, have not been established in the record.

The AAO notes that the company had three owners prior to 2006, and a sole owner since that date. Owners may in his/their discretion take more or less bonus compensation in responding to the need for necessary expenses incurred and in allocating the amounts of double taxes that the company and the owner(s) need to pay respectively. Shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return, Line 12. For this reason,

⁵ 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 federal income tax returns generally. In 2004, the petitioner stated \$-0-.00 net income, and stated a loss in 2005, i.e. <\$32,399.00>.

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.

⁷ In 2004 the petitioner stated net current assets of <\$271,407.00>, and in 2005, <\$558,720.00>.

the petitioner's figures for compensation of officers may be considered as additional financial resources of, the petitioner in some instances, in addition to its figures for ordinary income, assuming that officers compensation equates to counsel's "discretionary executive bonuses."

The documentation presented here indicates that one owner now holds 100 percent of the company's stock but there is no information concerning wages paid to employees that could include the owner. According to the petitioner's IRS Form 1120 Schedule E (Compensation of Officers) for 2006, the owner elected to pay himself \$380,000.00. We note here that the compensation received by the company's owner(s) during the period 2004 to 2006 was not constant being 32%, 19% and 15% of the gross receipts figure for 2004, 2005, and 2006, and are substantial sums. Based upon the information submitted, since there is no evidence that the sole shareholder now receives compensation other than through officers' compensation, it is not reasonable to assume that the sole shareholder would automatically relinquish some of his investment received as officers' compensation. The AAO notes there is insufficient evidence to demonstrate that the sole shareholder desired to relinquish his officers' compensation in order to pay the proffered wage. 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)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Further, 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.

The AAO notes that the attorney/accountant opines positively to the ultimate issue in this matter, that is, whether the petitioner has the ability to pay the proffered wage by stating that the "business has adequate cash flow to cover [the beneficiary's] salary." Counsel's reliance on [REDACTED] statement is misplaced. According to counsel, [REDACTED] statement is substantiated by the petitioner's 2006 tax return. Under generally accepted accounting principles ("GAAP"), in a cash flow statement, the sources of cash are disclosed. The general categories are cash received from operations and investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. An audited cash flow statement, used with the balance sheet and income statement, presents an analysis of the financial health of a business. The AAO notes that the director instructed the petitioner to submit audited financial statements, but there are none in the record. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). [REDACTED] statement is insufficient,

and there is no explanation how the 2006 tax return evidences an adequate cash flow. End-of-year cash is stated on Form 1120, Schedule L, Line 1 of that return as \$863.00.

Further, while counsel argues that the petitioner's cash flow shows the petitioner has the ability to pay the proffered wage, he has not provided any authority or precedent decisions to support the use of the petitioner's cash flows in determining the petitioner's ability to pay the proffered wage. Counsel argues that the November 7, 2007, letter from the petitioner's attorney, identified as an accountant, is a financial statement. 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. [REDACTED] letter is not an audited financial statement, and it was not prepared according to the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS). Assuming [REDACTED] is qualified to make such a statement, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel has submitted the petitioner's business checking account statements for the time period December 31, 2005, to October 31, 2006, as proof of the petitioner's ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account 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 was considered in determining the petitioner's net current assets.

In support of the above arguments and contentions, counsel has cited unpublished AAO decisions. 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).

Counsel contends that since the beneficiary was paid \$40,685.00, according to the USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, this is evidence of the petitioner's ability to pay the proffered wage. **Counsel's assertion must be qualified.** Since the offered wage is \$55,700.00, the proffered wage is \$52,520.00, and the wages paid for 2004 totaled \$28,959.25, and in 2005 was \$40685.00. 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 2006 or subsequently.

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 ETA Form 9089 was accepted for processing by the DOL.

According to counsel, the totality of the petitioner's circumstances as evidenced by the statement of the petitioner's "accountant," "bank and income statements," and the petitioner's 2006 federal income tax Form 1120 return demonstrates that the petitioner has the 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. 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 submitted three federal income tax Forms 1120 for two years before the priority date, and one tax return for 2006. According to the tax returns the petitioner's gross receipts were in 2004-\$1,914,654.00, in 2005-\$2,563,781.00, and in 2006-\$2,454,584.00. Despite these favorable results, the petitioner's net income for the same three year period was negative or nominal and its net current assets were substantially more negative each year.

No evidence of the petitioner's longevity of business, reputation evidence in its business sector or the total wages paid to all employees was submitted. There is no assertion that unique circumstances depressed the petitioner's profits or net current assets. As noted above, there is no evidence in the record that the officer compensation was truly discretionary. 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.