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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

[Redacted]

FILE: [Redacted]

Office: TEXAS SERVICE CENTER

Date: **AUG 04 2010**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a pizza baker. 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 and 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 September 16, 2008 denial, the 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)(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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation 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 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 May 21, 2002. The proffered wage as stated on the Form ETA 750 is \$12.13 per basic hour (\$25,230.40 per year based on a 40 hour work week), and \$18.20 per

hour for overtime.¹ The Form ETA 750 states that the position requires one year of experience in the job offered as a pizza baker.

The petitioner on the Form I-140 is [REDACTED] with a stated IRS tax number of [REDACTED]. The employer listed on the Form ETA 750 is [REDACTED]. In support of the Form I-140, the petitioner submitted copies of Schedule C of federal tax returns for [REDACTED] for years 2004 through 2007. The employer identification number on each Schedule C is [REDACTED]. The record does not explain these inconsistencies nor does it explain how [REDACTED] are related, if, in fact, they are. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

On appeal, counsel states “we are attempting to comply with the requirements of Title 8 Code of Federal Regulation[s], part 204.5(g)(2),” and are appealing the director’s denial. In support of the appeal counsel submitted the 2001 tax return of [REDACTED] and bank statements for [REDACTED] for two months (December 2007 and July 2008).

The evidence in the record of proceeding shows that the petitioner was structured as a single-member limited liability company from 2004 through 2007.⁴ The priority date established by the Form ETA 750 is May 21, 2002. The record does not establish how the petitioner was structured in 2003. The only

¹The Form ETA 750 states that the basic workweek is 35 hours per week with overtime being worked “as needed.”

² We note, however, that the ETA 750 coversheet was addressed to [REDACTED] in care of counsel. No amendments, however, are reflected on the Form ETA 750 to the employer in box 4. If the petitioner established a successor relationship, or submitted such information to DOL, the petitioner should submit any relevant correspondence with any further filings.

³ 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).

⁴ Limited liability companies with a single member are generally “disregarded” for the purpose of filing a federal tax return. See Internal Revenue Service, Tax Issues for Limited Liability Companies, Publication 3402 (Rev. 7-2000), at 2, available at <http://www.irs.gov/pub/irs-pdf/p3402.pdf>. If the only member of an LLC is an individual, as indicated by the record in the instant case, the income and expenses of the LLC are reported on the member’s IRS Form 1040, Schedule C, E, or F. The director treated the petitioner as a sole-proprietor and issued his decision on that basis. A review of the New Jersey Department of State (<https://accessnet.state.nj.us/home.asp>) database exhibits that the petitioner is registered as an LLC and, therefore, the owner’s assets and personal expenses would not be considered here since the company is a limited liability entity.

evidence submitted in regard to that year is a federal tax return for [REDACTED] (Employer Identification Number (EIN) [REDACTED]). The relationship of that company to [REDACTED] with a different tax identification number, as hereinafter discussed, is not explained in the record. On the petition, the petitioner claimed to have been established on February 1, 2004⁵ and to currently employ five workers. The beneficiary does not claim to have previously worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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, United States Citizenship and Immigration Services (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 beneficiary does not claim to have been previously employed by the petitioner.

The petitioner did submit a W2 form for the year 2003 showing that the beneficiary was employed by [REDACTED] has the same tax identification number [REDACTED] as that listed for the petitioner on the Form I-140. Again, the relationship of that entity to the present petitioner is not explained in the record. The petitioner also submitted a 2005 W2 form which shows that the beneficiary was paid \$23,564.71 by [REDACTED] in that year. The petitioner is registered with the State of New Jersey under the name of [REDACTED] (filing number [REDACTED]). The petitioner has submitted no evidence that it does business under an assumed name such as [REDACTED] as set forth on the 2005 W2 Form. The W2 Form is, therefore, of little evidentiary value unless the petitioner sufficiently establishes a successor-in-interest relationship. Even assuming that the record established that the 2005 wages were wages paid to the beneficiary by the petitioner, the wage paid (\$23,564.71) is less than the proffered wage of \$25,230.40 per year. Were those wages attributed to the petitioner, it would be necessary for the

⁵ This conflicts with the priority date of 2002 and that the job offer was bonafide from the time of the priority date in 2002. The petitioner must resolve this inconsistency in any further filings. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

petitioner to establish the ability to pay the difference between the proffered wage and the wage paid for that year (\$1,665.69). Likewise, the 2003 wages paid by [REDACTED] (\$22,354.00) is less than the proffered wage by \$2,876.40.

In order for the evidence of [REDACTED] to have any relevance to these proceedings, the petitioner must establish that it is the successor-in-interest to the original company on the Form ETA 750. 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 [REDACTED] has a different tax identification number than [REDACTED] and is a separate company, its assets could not be used unless a successor relationship is established.

Based on precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The petitioner has not established [REDACTED] ability to pay the proffered wage. Nor has it documented the transfer and assumption of ownership to [REDACTED]

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).

In 2004, 2005, 2006 and 2007 the petitioner submitted returns for [REDACTED] (tax identification number - [REDACTED]) which was organized as a single-member limited liability company. Therefore, the petitioner's net income is reported on the member's IRS Form 1040, Schedule C at line 31. The record before the director closed on August 28, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return is the most recent return available. The tax returns demonstrate net income for 2004 - 2007 as shown in the table below.

- In 2004, the Form 1040 Schedule C stated net income of \$15,493.00.
- In 2005, the Form 1040 Schedule C stated net income of \$17,020.00.
- In 2006, the Form 1040 Schedule C stated net income of \$4,727.00.
- In 2007, the Form 1040 Schedule C stated net income of (\$2,783.00).

The petitioner's net income was insufficient to pay the proffered wage (\$25,230.40) in 2004, 2005, 2006 and 2007.

The petitioner submitted tax returns for [REDACTED] (tax identification number [REDACTED] for 2001, 2002 and 2003. [REDACTED] was taxed as a C corporation in those years. As previously stated, in order for these tax returns to be relevant to these proceedings, the petitioner must establish that it is the successor-in-interest to [REDACTED]. As noted above, the petitioner has failed to submit any evidence, or establish that it is the successor-in-interest to [REDACTED]. Even if a successorship interest had been established, the tax returns do not demonstrate an ability to pay the proffered wage in each applicable year.

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 submitted tax returns demonstrate net income for 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120 stated net income of (\$21,196.00).
- In 2002, the Form 1120 stated net income of (\$27,770.00).
- In 2003, the Form 1120 stated net income of \$27,902.00.

Therefore, for the years 2001 and 2002, the submitted tax returns do not demonstrate sufficient net income to pay the proffered wage. The 2003 tax return does demonstrate sufficient net income to pay the proffered wage of \$25,230.40.

If the net income available during 2001 and 2002, 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. Total assets include depreciable assets used in 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 total assets must be balanced by any liabilities shown. Otherwise, they cannot properly be considered in the determination of the 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.

Net current assets are the difference between current assets and current liabilities.⁶ 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, a petitioner is expected to be able to pay the proffered wage using those net current assets. The submitted tax returns demonstrate end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of (\$53,477.00).
- In 2002, the Form 1120 stated net current assets of (\$58,563.00).

Therefore, for the years 2001 and 2002, the submitted tax returns do not demonstrate sufficient net current assets to pay the proffered wage.⁷

⁶According 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 The Form 1040 Schedule C does not contain the same information as Schedule L. Therefore, we cannot calculate the net current assets for 2004, 2005, 2006, and 2007.

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 Form I-140 indicates that the petitioner had a gross annual income of \$498,000.00, that it employed five workers, and was established on February 1, 2004 (after the priority date). The record contains financial information for two separate companies and nothing establishes that [REDACTED] is the successor to [REDACTED]. As set forth above, the information provided does not establish the ability to pay the proffered wage from 2002 through 2007. Further, the record does not establish that the overall magnitude of the petitioner's business activities establish the petitioner's ability to pay the proffered wage during the years in question. The petitioner has exhibited modest profits or losses during each relevant tax year. The petitioner has submitted no evidence of its reputation in the industry which would lead to the conclusion that its standing in the industry makes it more likely than not that it would have the ability to pay the proffered wage despite its inability to establish that factor through the use of its tax returns. The record does not establish that there were any uncharacteristic business expenditures or losses during the requisite period which adversely affected its financial standing.

It must also be noted that USCIS records indicate that the petitioner sponsored another Form I-140 petition [REDACTED]. The Form I-140 petition was received on June 21, 2006 and approved on September 19, 2006. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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 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.