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



**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED]
LIN 08 031 54311

Office: NEBRASKA SERVICE CENTER

Date:

AUG 19 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

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

As set forth in the director's April 2, 2009 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)(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).



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.¹

The petitioner is incorporated but, the evidence in the record of proceeding fails to show specifically how the petitioner is structured whether it is a S or C corporation. On the petition, the petitioner claimed to have been established in 1981 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. The Form ETA 750 was accepted on July 15, 2002. The proffered wage as stated on the Form ETA 750 is \$13.60 per hour which equates to \$28,288 per year based on a 40-hour week.² The Form ETA 750 states that the position requires two years of experience in the job offered.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's IRS Forms W-2 for the years 2001 through 2008 stated compensation of \$14,560,³ \$16,548.50, \$13,510.96, \$16,582.39, \$13,611.00, \$12,253, \$11,202.50, and \$6,613, respectively. None of these figures equal or exceed the proffered wage. Therefore, for the years 2002 through 2008, the petitioner must show that it can pay the remaining \$11,739.50 in wages in 2002, \$14,777.04 in wages in 2003, \$11,705.61 in wages in 2004, \$14,677 in wages in 2005, \$16,035 in wages in 2006, \$17,085.50 in wages in 2007 and \$21,675 in wages in 2008 out of its net income or net current assets.

¹ 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).

² The petitioner lists an overtime rate of one and one-half times the regular rate on the labor certification but does not state that overtime is regularly required.

³ The figure for 2001 is not directly relevant to the instant petition, as the priority date is in 2002.



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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on March 19, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. Specifically, the director requested the petitioner's annual report, United States tax return, or audited financial statement for



2002, 2003, 2004, 2005, 2006, or 2007, as well as the beneficiary's W-2 statements. The request for evidence (RFE) also noted that the petitioner could submit "profit and loss statements, bank records, and/or personnel records. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. However, the petitioner did not choose to include a full copy of each U.S. Corporation Income Tax Return, including all schedules. Instead, the petitioner, who asserts he is the president and sole owner of the petitioning entity, [REDACTED] submitted his personal Form 1040 U.S. Individual Income Tax Returns for the years 2004, 2005, 2006 and 2007 as evidence of its ability to pay the proffered wage. The petitioner states that the company's tax returns were not readily available to be submitted within the time frame given by USCIS and asserts that the submission of his personal tax returns instead of the company's tax return is not prohibited but rather sanctioned and allowed by regulation 8 C.F.R. § 204.5(g)(2). The regulation is referring to the submission of *personnel* records as evidence and not *personal* records, which counsel concludes would allow submission of personal tax returns. Personnel would relate to employee or personnel records, such as evidence of payroll. Considering counsel's analogy, the regulation states that federal tax returns are acceptable evidence. In the instant case, the petitioner is a corporation⁴ and the shareholder(s) of the corporation are provided legal liability protection. Unlike a sole proprietorship, a corporation exists as an entity apart from the individual owner(s). See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). USCIS 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. Therefore, the individual tax returns of the owner(s) cannot be considered when assessing the petitioning corporate entity's ability to pay the proffered wage. The director is correct in citing and following *Matter of Aphrodite Investments, Ltd.* in the instant case.

The petitioner states that if USCIS pierces the corporate veil, it will show that the company and the petitioner are one and the same because there is only one shareholder or stockholder in the corporate entity. The petitioner states that piercing the corporate veil is allowed and liberally construed in the State of California. The petitioner also states that the corporate veil can be pierced when the following two requirements are met:

⁴ An artificial person or legal entity created by or under the authority of the laws of a state or nation, composed, in some rare instances, of a single person and his successors, being the incumbents of a particular office, but ordinarily consisting of an association of numerous individuals. Such entity subsists as a body politic under a special denomination which is regarded in law as having a personality and existence distinct from that of its several members, and which is, by the same authority, vested with the capacity of continuous succession, irrespective of changes in its membership, either in perpetuity or for a limited term of years, and acting as a unit or single individual in matters relating to the common purpose of the association, within the scope of the powers and authorities conferred upon such bodies by law. *Black's Law Dictionary*, Fifth Edition, p. 307.



- Unity of interests - The shareholders have treated the corporation as their “alter ego” rather than as a separate entity; and
- Inequitable result - Upholding the corporate entity and allowing for the shareholders to dodge personal liability for its debts would sanction a fraud or promote an injustice. *Automotriz del Golfo de California v. Resnick*, 47 Cal. 2d 792 (1957).

Contrary to the petitioner’s assertions, USCIS 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. Again, 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). 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.” The premise of *Sitar* lies in the regulation at 8 C.F.R. § 204.5(g)(2), which is binding on USCIS. The regulation clearly states that the “prospective United States employer” must show it has the ability to pay the proffered wage. Consequently, any 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.

Counsel also states that whatever wages the sole shareholder earns can be used to determine the ability to pay the proffered wage. The sole shareholder of a corporation has 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 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

██████████ asserts that he holds 100 percent of the company’s stock. The petitioner has not provided any of its corporate tax returns to exhibit what was paid in officer compensation. USCIS will examine the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their personal service corporation or medical practice. While the shareholder’s Form 1040 does state wages on page 1, line 7, which could include his salary and officer compensation (the figure on line 7 additionally includes his spouse’s wages), without the full corporate tax return, we cannot assess that the petitioner’s shareholder exercises a large degree of financial flexibility in setting employee salaries, or that the petitioner easily fulfills its salary obligations. Additionally, the petitioner did not submit the owner’s tax returns for 2002 or 2003.

On appeal, the petitioner submitted a statement signed by ██████████ tax accountant. The letter states that ██████████ does not have an annual report or audited financial statements but the 2002 and 2003 tax returns will be requested from the Internal Revenue Service (IRS). Upon receipt, the documents will be provided to ██████████ so he can submit the tax returns to the USCIS. The record, as it is presently constituted does not contain such documentation. In the letter, Mr. Lau



states that the petitioner has the financial ability to pay the prevailing wage offered in the amount of \$28,288 because his business is very lucrative with a lot of receivables, coupled with his personal assets of over \$3 million and continuing financial viability. The statement has not been audited and is not supported by any verifiable information. 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. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate 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 (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 states that it was established in 1981 and currently employs four individuals. The petitioner has not provided any of its U.S. Corporation Income Tax Returns for any relevant year to demonstrate the petitioning entity's ability to pay the proffered wage despite the director's RFE and the director's note of this omission in his decision.⁵ On appeal, counsel states that the petitioner's individual tax returns and confirmed declaration from his accountant show that he individually has at least \$3 million in assets. As previously stated, any assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In the instant case, the petitioner has not provided its federal corporation tax returns, evidence of its historical growth, its reputation within the dental industry, a

⁵ Additionally, despite the petitioner's seeking to rely on the sole shareholder's personal tax return, which we do not accept, the record lacks the sole shareholder's 2002 and 2003 returns. Therefore, we cannot determine whether the petitioning entity paid the sole shareholder any officer compensation.



prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the petitioner had uncharacteristically unprofitable year(s). 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.

While the personal returns of the petitioner's owner exhibit substantial income, without receipt of the actual petitioning entities financial information, the AAO cannot properly assess the actual petitioner's ability to pay, or whether the petitioner has offered a realistic job offer. *Matter of Great Wall, supra*. The beneficiary's W-2 forms reflect what may be part-time employment. The job offer must be for full-time employment. Without the corporation returns, the AAO cannot fully assess the totality of the circumstances.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date, July 15, 2002, through the present.

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.

