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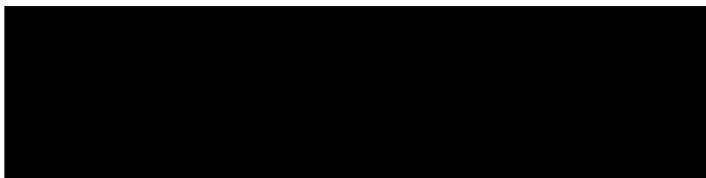
FILE: [REDACTED]
LIN 06 210 53184

Office: NEBRASKA SERVICE CENTER DATE: FEB 02 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:



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, Nebraska Service Center. On November 14, 2006, the director denied the petitioner's motion to reopen. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as a gas station supervisor. 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 2001 priority date of the visa petition. The director denied the petition accordingly.¹

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 February 26, 2007 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

¹ The AAO notes that the petitioner filed a previous I-140 petition (EAC 05 014 52611) for the beneficiary on October 21, 2004 that was also denied. The beneficiary also appears to have two A numbers.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$22.42 per hour (\$46,633.60 per year). The Form ETA 750 states that the position requires two years of work experience in the proffered position, or two years in the related occupation of retail supervisor.

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

The evidence in the record of proceeding shows that the I-140 petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in December 1, 1987 and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 30, 2001, the beneficiary claimed that he worked for the petitioner from August 2000 to the date he signed the ETA Form 750.

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).

On appeal, current counsel asserts that USCIS should consider the combined income from the tax returns submitted to the record for [REDACTED] St. James, New York, Employer Identification Number (EIN) [REDACTED] and [REDACTED] West Islip, New York EIN [REDACTED]

² 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).

Counsel asserts that the sole shareholder for both S Corporations can utilize the net income of both businesses to establish the petitioner's ability to pay the proffered wage.

Counsel also asserts that the director erroneously applied the legal standards applicable to C Corporations and cited cases with different fact patterns and evidence that are not applicable to the instant petition.³ Counsel states that the petitioner is an S Corporation and an S corporation generally pays no corporate income taxes on its profits, but rather the shareholders pay income taxes on their proportionate shares of the S corporations' profits. Counsel states that the director did not consider the income of [REDACTED], the petitioner's 100 per cent shareholder, and also the sole owner of [REDACTED], another S corporation. Counsel states that [REDACTED], as sole owner, can infuse investment when and if required by the two S corporations. Counsel further notes that the combined incomes of both corporations are relevant because both are in the same business and owned by one person. Counsel notes that the personal income of the sole owner is related directly to the petitioner, and as a result [REDACTED] personal income and income from other businesses under Schedule K-1, Form 1120S, U.S. Income Tax Returns for S Corporation, should be considered in determining the petitioner's ability to pay future wages. Counsel submits tax return documentation and a consolidated income statement as of December 2001 previously submitted to the record.

As counsel noted, the petitioner is structured as an S corporation for purposes of legal liability. While the sole shareholder of such a corporation is free to utilize his or her financial resources to fund the business, contrary to counsel's assertion, 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).

While the sole shareholder of an S Corporation may be considered for accounting purposes be considered a sole proprietor, the instant petitioner by virtue of filing IRS Form 1120S is a corporate entity, and the sole proprietor analysis does not apply. Consequently, assets of the petitioner's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

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,

³ Counsel appears to be confused on this point. The director, in his decision, referenced precedent decisions that relate directly to a shareholder's inability to pay the proffered wage for a corporate entity.

permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Further, the AAO notes that the record is somewhat confused, when considering both the evidence in the record and the tax returns submitted to the record. As stated previously, the Forms 1120S tax returns found in the record are for two S Corporations with distinct EIN numbers.⁴ However, the I-140 petition identifies the petitioner as [REDACTED], St. James, New York, and indicates a third EIN for the petitioner, namely [REDACTED]. Thus, the record is not clear as to which set of tax returns should be considered in determining the petitioner’s ability to pay the proffered wage. Nor does the record contain any tax returns for the business identified on the I-140 petition. For this reason alone, the petition can be denied.

For illustrative purposes, and to correct some figures in the director’s decision with regard to the net income, the AAO will consider the tax returns for [REDACTED] St. James, New York, with EIN of [REDACTED] in its discussion of the petitioner’s claimed net income and net current assets.

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. Although the beneficiary indicated he began working for the petitioner in 2000, the petitioner only provided the beneficiary’s W-2 Form for tax year 2005 that indicates the petitioner paid the beneficiary \$3,816.⁵ 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 2001 or subsequently. The petitioner thus has to establish its ability to pay the entire proffered wage of \$46,633 in the tax years 2001 to 2004, and the difference between the beneficiary’s actual wages in 2005 and the proffered wage.

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*

⁴ [REDACTED] St. James, New York, Employer Identification Number (EIN) [REDACTED], and [REDACTED] West Islip, New York, EIN [REDACTED]

⁵ The AAO notes that in tax year 2005, the petitioner filed W-2 Forms for 19 claimed employees, twelve more employees than claimed on the I-140 petition. Only four employees were paid more than \$10,000 per annum with the highest wages being \$33,531.

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).

The record before the director closed on April 16, 2007, the date of the director's decision. As stated previously, on appeal, counsel state that the combined incomes of two S corporations should be considered in determining the petitioner's ability to pay the proffered wage. However, the AAO does not find counsel's assertion to be persuasive. Further the AAO notes that the I-140 petitioner has a different EIN number than either set of tax returns submitted to the record. In the instant matter, for illustrative purposes the AAO will only consider the Form 1120S tax returns for the [REDACTED] with EIN [REDACTED]. Finally the AAO notes that the petitioner did not submit Schedules K for the tax returns submitted with the instant petition. However, more complete tax

returns are found in the record, and the AAO will use the Schedules K of the tax returns submitted in these earlier petitions to examine the petitioner's net income. The petitioner's tax returns demonstrate its net income for 2001 to 2005, as shown in the table below.

- In 2001, the Form 1120S stated net income⁶ of -\$21,956.
- In 2002, the Form 1120S stated net income of -\$30,989.
- In 2003, the Form 1120S stated net income of -\$3,210.
- In 2004, the Form 1120S stated net income of -\$40,853.
- In 2005, the Form 1120S stated net income of -\$54,012.⁷

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net income to pay the proffered wage.

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.⁸ 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 returns demonstrate its end-of-year net current assets for 2001 to 2005, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$23,455.
- In 2002, the Form 1120S stated net current assets of -\$21,094.
- In 2003, the Form 1120S stated net current assets of -\$18,446.

⁶ 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 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income or deductions shown on its Schedule K for tax years 2001 to 2005, the petitioner's net income is found on Schedule K of its tax returns.

⁷ Based on the 2005 tax return for the business with EIN _____ this business relocated to Bay Shore, New York.

⁸ 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.

- In 2004, the Form 1120S stated net current assets of -\$18,499.
- In 2005, the Form 1120S stated net current assets of -\$48,035.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

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

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. As previously stated, the AAO will not consider the combined income of two distinct S corporations in its examination of the petitioner'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's circumstances are not similar to the petitioner in *Sonogawa* that had an uncharacteristically unprofitable year buttressed by two profitable years. The petitioner, whose tax returns are examined in these proceedings, had an unprofitable year in terms of net income and net current assets every year from the 2001 priority year and onward.

The record contains information with regard to wages paid to employees in the relevant years in question; however, this evidence does not identify the positions held by these employees, or their fulltime or part-time status. Counsel makes no specific reference to this evidence in his brief. The record indicates increased number of employees from tax year 2001 to 2005; however, it does not appear reasonable that all nineteen employees for whom the petitioner submitted W-2 Forms in 2005 worked at the petitioner, a gas station. This raises a question then of whether all claimed employees worked at the gas station. The AAO further notes that even those employees whose W-2 Forms indicated wages over \$10,000 all earned significantly less than the proffered wage of \$46,633. Thus the W-2 Forms submitted to the record are not sufficient to document any overall totality of circumstances.

The record also contains no further evidence as to the petitioner's profile within the gas station industry, or any extraordinary circumstances that would have caused the petitioner's negative net income and net current assets. While the record indicates that the I-140 petitioner and both S Corporations, for which Forms 1120S were submitted to the record, have been in business since either 1987 or 1988, this fact alone would not be sufficient to overcome the petitioner's lack of positive net income or net current assets during any of the relevant years in question. Similarly, the fact that the petitioner has had gross receipts over \$4,000,000 each relevant year in question would not be sufficient to overcome the evidence in the record. 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 2001 priority date. The AAO notes that the petitioner has submitted previous petition and a motion to reopen with the same evidence asserting that the petitioner can utilize the assets of all [REDACTED] businesses to establish the petitioner's ability to pay the proffered wage. Any further submissions with similar evidence and statements will be dismissed without review as frivolous.

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.