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



U.S. Citizenship
and Immigration
Services

B6

FILE:

SRC 07 116 53126

Office: TEXAS SERVICE CENTER

Date: FEB 25 2010

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant manager. 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 2004 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 December 21, 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. The AAO will also examine whether the beneficiary has the qualifications to perform the duties of the proffered position.

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).

Here, the Form ETA 750 was accepted on August 9, 2004. The proffered wage as stated on the Form ETA 750 is \$31.05 an hour, (or \$56,511 per year).¹ 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 "Manager another business w/similar responsibilities."²

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.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 January 15, 2003, to have a gross annual income of \$681,134, a net annual income of \$466,342 and to employ twelve workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on June 28, 2004, the beneficiary did not claim to have worked for the petitioner.

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, counsel asserts that the director ignored the two statements submitted to the record by

¹ The AAO notes that the petitioner states on the ETA Form 750 that the beneficiary will work 35 hours a week. Based on a 35 hour week, the beneficiary would work 1820 hours a year (52 weeks times 35 hours). Her yearly salary would be \$56,511. At a 40 hours a week work schedule, the beneficiary's proffered wage would be \$64,064.

² The ETA Form 750 also indicates that the beneficiary's work schedule is for 35 hours a week, working the night shift from 12:00 AM to 7:00 AM, Wednesday through Sunday.

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).

██████████ the petitioner's owner, president and manager. In these two letters, ██████████ stated that she was retiring to Greece and, while not working at the petitioner, would still be the owner. She also stated that her salary that would no longer be paid to her would be utilized to pay the beneficiary. Counsel also submits a W-2 Form for ██████████ that indicates she was paid wages, tips or other compensation of \$46,800 in tax year 2007.

Counsel submits deeds to the property in which the petitioner is located, to demonstrate that ██████████ is the property's sole owner. He also submits a document entitled Investment Value with a ██████████ letterhead that estimates the investment value of the property at ██████████ as \$7,920,267. Another set of documents submitted by counsel appears to describe how ██████████ acquired the property identified in one document as ██████████. Counsel submits copies of three legal documents signed by ██████████, ██████████ and ██████████ conveying the property to ██████████ at various times. Counsel states that the petitioner's business income before operating loss and its net current assets can not be the only basis for the evaluation of the petitioner's financial viability.

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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. On appeal, counsel reiterates that the petitioner's owner has stated that her salary can be utilized to pay the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 the Service 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 July 7, 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 2006 federal income tax return was due. On appeal, the petitioner submits its 2006 Form 1120. The petitioner’s tax returns demonstrate its net income for tax years 2004 to 2006, as shown in the table below.

- In 2004, the Form 1120 stated net income of -\$48,206.47.
- In 2005, the Form 1120 stated net income of -\$34,034.43.
- In 2006, the Form 1120 stated net income of -\$8,403.

Therefore, for the years 2004 to 2006, the petitioner did not have sufficient net income to pay the proffered wage of \$56,511.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds

available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 through 2006, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of -\$11,813.99.
- In 2005, the Form 1120 stated net current assets of -\$11,850.
- In 2006, the Form 1120 stated net current assets of \$4,747.

Therefore, for the years 2004 to 2006, 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.

On appeal, counsel asserts that the property where the petitioner is located in Manhattan is owned by the petitioner's owner. Counsel appears to suggest that the assets of the petitioner's owner can be considered when examining the petitioner's ability to pay the proffered wage. However, United States Citizenship and Immigration Services (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.

⁴According 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.

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.

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 owner has stated several times that she is retiring and her salary can be utilized to pay the proffered wage to the beneficiary. The AAO notes that these same wages are also identified as officer compensation in the petitioner's 2004 to 2006 federal tax returns, at Schedule E. In response to the director's RFE dated April 28, 2007, counsel submitted a copy of the petitioner's Form NYS-45-ATT 2007 Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return-Attachment. This document lists the petitioner's employees, including the petitioner's owner, and their quarterly and total annual wages. Counsel on appeal also provides a W-2 Form with the petitioner's owner's 2007 wages. Based on these documents, the petitioner's owner earned wages or received officer compensation during 2004 to 2007 of the following sums: \$35,100 in 2004; \$31,800 in 2005; \$44,400 in 2006 and \$46,800 in 2007. As stated previously, the proffered wage based on the hourly salary identified on the ETA Form 750 is \$56,511 per year for a 35 hour work week. Thus, the owner's salary/compensation is not sufficient to pay the entire proffered wage during the relevant period of time in question.

The AAO also notes that wages paid to employees, even including an officer of the business, are not viewed as discretionary expenses. Significant officer compensation that varies from year to year and is discretionary is more favorably viewed as a possible source of additional funding for the beneficiary's proffered wages.

The AAO also notes that based on the ETA Form 750 the beneficiary would be paid the proffered wage for her work during the night shift. This specific description of time of employment suggests that the petitioner would employ other managers during other shifts. The record does not establish whether such additional managers presently exist or will exist. The New York State documentation for wages paid in 2007 does not indicate any other employee paid at the wage level of the petitioner's owner, so the record does not establish that other individuals paid by the petitioner presently serve as manager during the remaining shift. If the petitioner employs additional managers, the record does not establish how these additional wages are presently paid or would be paid in the future.

The record indicates that the petitioner has been in business since 2006, and has 12 employees. The petitioner has provided no further evidence as to the petitioner's reputation within the restaurant industry. While the record reflects that the petitioner has a payroll and has positive gross receipts, these two factors within the petitioner's totality of the circumstances are not sufficient to conclude that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. The AAO affirms the director's decision with regard to the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the AAO finds that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. It also questions whether a familial relationship exists between the petitioner's owner and the beneficiary. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *off's.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO will first examine the beneficiary's qualifications for the instant position and then examine the issue of familial relationship.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 21, 1997. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered, or two years as a "manager another business with similar responsibilities".

The certified ETA Form 750 states the job duties for the proffered position as follows: "Manage/coordinate food service activities, hire/discharge and assignment of personnel, resolve food quality and service complaints; keep financial records and be responsible for cash collections."

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she has worked for [REDACTED], identified as a tourist, commercial and hotel company, as a manager/supervisor from June 2002 to the date she signed the ETA Form 750, June 28, 2004. Her duties for the position with [REDACTED] are described as "responsible for supervising 25 people, including hiring and firing, keeping financial records; Responsible for payment collection, including cash. Duties also include speaking English."

She also represented that she had worked as a manager at [REDACTED], from 1995 to May 2002. The duties for her earlier position are described as "Responsible for supervising personnel, including hiring, firing and assignment of personnel, keeping financial records; responsible for payment collection, including cash." She does not provide any additional information concerning her employment background on that form.

The AAO notes that the petitioner is a restaurant⁵ and the job duties described on the certified ETA Form 750 are pertinent to food establishments, namely, "manage/coordinate food service activities," and "resolving food quality and service complaints." While the beneficiary's wording of her previous work duties with regard to hiring, and firing and keeping financial records is identical to the job duties outlined on the ETA Form 750, the beneficiary's actual previous work experience focuses on tourism and travel,⁶ while the proffered position is very specifically described as a restaurant manager. The record does not reflect that the beneficiary has any management or supervisory experience in the restaurant business. The AAO does not find that the beneficiary's supervision and managing experience as outlined on the ETA Form 750, Part B, is similar to the duties of the proffered position. It would also question whether the stated duties of hiring and firing personnel, and cash collections would be primary duties for the beneficiary in the proposed night shift managerial position.

With regard to any existing familial relationship between the petitioner's owner and the beneficiary, under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). The AAO notes that the petitioner's owner's address is identified on Form NYC-4S,

⁵ The Internet in its descriptions or review of the petitioner's business, describes it as a 24 hour neighborhood diner.

⁶ The letter of work verification from [REDACTED] written by [REDACTED] and dated June 28, 2004, describes her company's business as world wide travel bookings, including tours, hotel and airplane tickets.

submitted in response to the director's RFE, as [REDACTED] while the ETA Form 750, Part B, identifies the beneficiary's address in the United States where she will reside at [REDACTED]. If the petitioner pursues this matter further, it needs to explain whether any relationship through blood, financial, marriage or friendship exists between the petitioner's owner and the beneficiary. If such a relationship does exist, the petitioner would need to submit documentation that it made this relationship known to the Department of Labor (DOL) at the time it filed the instant ETA Form 750.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.