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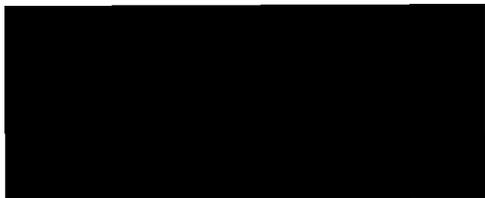
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **MAY 28 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:

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 residential care facility. It seeks to employ the beneficiary permanently in the United States as a teacher. 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 February 15, 2008 denial, the primary 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on July 18, 2002. The proffered wage, as stated on the Form ETA 750, is \$19.84 per hour, or \$41,267.20 per year.

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 On appeal, counsel submits a brief; a copy of the director's decision appealed from; a copy of a non-precedent AAO decision – *Matter of* –, 32 Immig. Rptr. B2-116 AAO Designation:B6 (Nov. 10, 2005); a copy of the beneficiary's 2003 W-2 Form issued by the petitioner; and copies of corporate bank statements.

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 1996, to have a gross annual income of \$251,861 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on July 12, 2002, the beneficiary claimed to have worked for the petitioner as a teacher from March of 2001 to the date she signed the Form ETA 750.

On appeal, counsel asserts that the petitioner has established the ability to pay the proffered wage throughout the requisite period considering the totality of the circumstances.

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, 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 2002 through 2006 show compensation received from the petitioner (with a federal employer identification number (EIN) of [REDACTED]), as shown in the table below.

- In 2002, the Form W-2 stated compensation of \$13,846.25.
- In 2003, the Form W-2 stated compensation of \$14,400.10.

¹ 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).

- In 2004, the Form W-2 stated compensation of \$15,099.55.
- In 2005, the Form W-2 stated compensation of \$17,717.41.
- In 2006, the Form W-2 stated compensation of \$19,745.03.

As previously stated, the proffered annual wage is \$41,267.20. Thus, the petitioner did not pay the proffered wage in any year of the requisite period. The petitioner did, however, pay partial wages in each year. The petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$27,420.95, \$26,867.10, \$26,167.65, \$23,549.79 and \$21,522.17 in 2002, 2003, 2004, 2005 and 2006, respectively.

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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner operated as a sole proprietorship in 2002 and submitted a Form 1040 for that tax year. From 2003 through 2006, the petitioner filed tax returns as a C corporation.

Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the petitioner supports herself, a spouse and two dependents. The petitioner did not provide a list of monthly living expenses. The petitioner's net income is reported on the member's IRS Form 1040, Schedule C at line 31, Schedule E or Schedule F. The record before the director closed on December 28, 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 is the most recent return available. The petitioner's 2002 Form 1040 states net income of \$12,203.00 in Schedule C.

A sole proprietor's adjusted gross income, assets and personal liabilities are considered as part of the petitioner's ability to pay the proffered wage. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. The petitioner's adjusted gross income for the relevant tax year was \$49,338.00. As previously stated, the petitioner did not provide a list of monthly living expenses. Thus, it cannot be determined whether the petitioner had sufficient income to support herself and dependents as well as pay the proffered wage.

For a C corporation, USCIS considers net income to be the figure shown on Line 24 of the Form 1120-A, and line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner submitted tax returns with a federal employer identification number of [REDACTED] under the corporate name of [REDACTED]. The Form I-140 lists a tax identification number of [REDACTED] with the Form I-140 listing [REDACTED] as the petitioner. As previously stated, the beneficiary's W-2 forms list an employer identification number of [REDACTED] with the employer being [REDACTED]. The relationship between [REDACTED] and [REDACTED] is not fully explained in the record. The petitioner is relying on the tax returns of [REDACTED] to establish [REDACTED]'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, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Further, the petitioner has not established that [REDACTED] is the successor-in-interest to the petitioner. A valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this 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). Even if the submitted tax returns were considered, the returns fail to establish the ability to pay the proffered wage. The tax returns demonstrate net income for 2003, 2004, 2005 and 2006, as shown in the table below.

- In 2003, the Form 1120-A stated net income of \$11,791.00.
- in 2004, the Form 1120 stated net income of \$3,118.00.
- In 2005, the Form 1120-A stated net income of \$12,030.00.
- In 2006, the Form 1120-A stated net income of (\$14,823.00).

Therefore, for the years 2003 through 2006, the submitted tax returns do not demonstrate sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L of Form 1120, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. A corporation's year-end current assets are shown on Part III lines 1 through 6 of Form 1120-A and include cash-on-hand. Its year-end current liabilities are shown on lines 13, 14 and 16. 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

²According 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.

current assets. The tax returns submitted by the separate entity () demonstrate its end-of-year net current assets for 2003, 2004, 2005 and 2006, as shown in the table below.

- In 2003, the Form 1120-A stated net current assets of \$0.
- In 2004, the Form 1120 stated net current assets of \$1,117.00.
- In 2005, the Form 1120-A stated net current assets of \$0.
- In 2006, the Form 1120-A stated net current assets of \$0.

Therefore, for the years 2003 through 2006, the returns submitted by the unrelated entity would not demonstrate sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage. The actual petitioner submitted a tax return only for the year 2002.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 1996 and only employs three workers. The petitioner has not established its historical growth since 1996. The record does not establish consistent historical growth for the petitioner during its 12 year history from 1994 until 2006. The petitioner has not established that its business was affected by any uncharacteristic business expenditures or losses, nor has it established its reputation within its industry. The record only contains one tax return for the petitioner. The remaining tax returns submitted are for an unrelated entity.

The petitioner states that the personal assets of its majority stock holder should be considered as the corporation is a closely held entity. Such personal assets may not be considered unless the petitioner is a sole proprietor. Thus, personal assets may only be considered for 2002, when the petitioner filed a tax return as a sole proprietor. 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." Likewise, corporate bank accounts will not be considered in determining the petitioner's ability to pay the proffered wage. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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.
