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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:

Office: TEXAS SERVICE CENTER

Date:

IN RE:

Petitioner:
Beneficiary:

NOV 16 2010

PETITION: Immigrant petition for Alien Worker as a Other Worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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
Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner engages in landscaping design and installation. It seeks to employ the beneficiary permanently in the United States as a foreman. The petition was electronically filed on behalf of the beneficiary on January 11, 2008. As required by statute, the petition is now accompanied by a Form ETA 750¹, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not complied with the instructions for electronic filing² by not submitting the required initial evidence which includes evidence of the prospective employer's ability to pay the proffered wage, evidence that the beneficiary meets the educational, training, experience and any other requirements and an approved labor certification issued by the DOL. Absent the required evidence, the director denied the petition accordingly.

The record shows that the appeal is properly filed and timely. Counsel states that the individual labor certification application certified by the DOL shows the priority date issued by the State of Florida as February 5, 2001 and the final determination notice lists the priority date as February 19, 2002.³ Counsel states that she will provide additional evidence within 30 days of the appeal. To date, no additional evidence has been received by the AAO. Therefore, a decision will be rendered based on the evidence of record.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO will consider all pertinent evidence of record, including any new evidence properly submitted upon appeal.⁴

¹ The applicant was required to obtain a labor certification from the DOL prior to e-Filing Form I-140. The original labor certification, signed by the filer and certified by the DOL must be submitted with supporting documentation to the Service Center that has jurisdiction over the case. The petitioner did not submit a copy of the approved labor certification until the appeal.

² The instructions for electronic filing a Form I-140 specifically state that the required initial evidence must be received by the Service Center within seven business days of e-Filing the form. If the required initial evidence is not submitted within the requisite time period, the petitioner will not establish a basis for eligibility. See Instructions for Electronically Filing Form I-140 (www.uscis.gov). Therefore, the director is not obligated to issue a request for evidence when the instructions clearly and explicitly informed the petitioner of this requirement.

³ Counsel states that the priority date is critical to the beneficiary, because he will not be eligible for Section 245(i) relief on adjustment with a priority date of February 19, 2002. This issue is not within the AAO's jurisdiction and will not be addressed further.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I290B, 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 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 October 9, 2008 denial, the issues in this case are 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; whether the beneficiary meets the educational, training, experience and any other requirements; and whether an approved labor certification was issued by the DOL. The record before the director did not include the original approved labor certification. This document is now in the record. The director's decision to deny the petition, in part, on the lack of an approved labor certification is withdrawn.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 evidence in the record of proceeding shows that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established on March 17, 1994 and to currently employ one worker. The Form ETA 750 was accepted on February 19, 2002. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour which equates to \$27,040 per year based on a 40-hour week.

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). Further, the job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10).

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 claimed on his Form ETA 750 that he was employed 40 hours per week by the petitioner as a foreman from August 2000 to the date that the labor certification was signed by the beneficiary, December 10, 2001. The petitioner has not presented any evidence of the beneficiary's employment or evidence of any wages paid. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any wages, from the February 2002 priority date and onwards.

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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 873, 881 (E.D. Mich. 2010) (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 January 23, 2008, within seven business days of e-filing the Form I-140. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s 2002 tax return demonstrates its net income as shown below.⁵

- In 2002, the petitioner’s Form 1120S stated net income of -\$7,593.⁶

⁵ The 2001 Form 1120S is for a time period before the priority date. Accordingly, the net income would not show the petitioner’s ability to pay from the time of the priority date, February 19, 2002, and onwards. Thus, the 2001 tax return will not be considered.

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> (accessed as of October 27, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

The petitioner did not include a full copy of each federal income tax form, including all schedules for the years 2003 through 2007. No initial evidence of ability to pay in the form of an audited financial statement, or annual report was submitted upon filing the petition. *See* 8 C.F.R. § 204.5(g)(2). The petitioner has not established its ability to pay the proffered wage of \$27,040 from its net income in 2002 through 2007 and onwards.

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. 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 as shown in the table below.

- In 2002, the petitioner's Form 1120S stated net current assets of \$0.

The petitioner did not provide a full copy of each federal income tax form, including all schedules for the years 2003 through 2007. Therefore, the petitioner's net current assets do not demonstrate the petitioner's ability to pay the proffered wage for the beneficiary for the years 2002 through 2007 and onwards.

The petitioner's sole shareholder provided his 2001 and 2002 Form 1040 U.S. Individual Income Tax Returns as evidence of the company's ability to pay the proffered wage. In the instant case, the petitioner is a corporation⁷ and the shareholder of the corporation is 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

⁷ 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.

ability to pay the proffered wage. Therefore, the individual tax returns of the owner cannot be considered when assessing 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 2002 tax return has shown negative net income and no current assets for that year. The petitioner has not provided any other tax returns or any other financial evidence to establish its ability to pay the proffered wage. The petitioner has not submitted any evidence of any occurrences that created uncharacteristic business expenditures or losses. The petitioner must demonstrate that it can pay the proffered wage from the priority date until the beneficiary obtains permanent residence. The petitioner has not provided its historical growth, its reputation within the landscaping business, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage.

Thus, in assessing the totality of the evidence submitted, the petitioner has not established that it had the ability to pay the proffered wage for the instant beneficiary.

The director also found that the petitioner had not established that the beneficiary was qualified to perform the duties of the position at the time of filing, February 19, 2002.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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 labor certification application was accepted on February 19, 2002.

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 "Language (Spanish) used when additional employees are needed for conversing with trades people at nurseries (suppliers). Ability to read and understand blueprints. Discipline to complete job upon deadlines." It is also noted on Form ETA 750, item 17, that the beneficiary will supervise two employees.

The petitioner must submit evidence that the beneficiary obtained the required special requirements stated in the job offered before February 19, 2002. The regulations at 8 C.F.R. § 204.5(g)(1) state in pertinent part that evidence relating to qualifying experience shall be in the form of letter(s) from the current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties. The petitioner has not provided a letter or any other evidence to show the beneficiary had the requisite special requirements at the time of filing the labor certification on February 19, 2002. Therefore, the petitioner did not establish that the beneficiary had the required special requirements listed on Form ETA 750, item 15, before the priority date.

In conclusion, the petitioner has not established its continuing ability to pay the proffered wage and has not established that the beneficiary met the other special requirements of the labor certification at the time the labor certification was accepted for processing, February 19, 2002. Therefore, the petition may not be approved.

Accordingly, 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.