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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

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 0 4 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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 construction business. It seeks to employ the beneficiary permanently in the United States as a construction carpenter. 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 from the priority date onwards. Therefore, the director denied the petition.

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

As set forth in the director's April 22, 2009 notice of decision, at issue in this case is whether 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 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 as certified by the DOL and submitted with the petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 19, 2003. The proffered wage as stated on the Form ETA 750 is $23.70 per hour ($49,296 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in an unspecified related occupation.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). This office considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

The evidence in the record shows that the petitioner is structured as a (LLC). Its taxes are filed on the Form 1065, U.S. Return of Partnership Income.

On the petition, the petitioner claimed to have been established in 2002. It did not list how many workers it currently employs. 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 an unspecified date, the beneficiary claimed to have worked for the petitioner during an unspecified period.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that form, 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 Sonegawa*, 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. Here, the 2003 Form W-2, Wage and Tax Statement, in the record demonstrates that the petitioner paid the beneficiary $16,512.50 in 2003, or $32,782.50 less than the proffered wage. The 2004 Form W-2, Wage and Tax Statement, in the record demonstrates that the petitioner paid the beneficiary $24,590 in 2004, or $24,706 less than the wage. The 2005 Form W-2, Wage and Tax Statement, in the record demonstrates that the petitioner paid the beneficiary $24,216.37 in 2005, or $25,079.63 less than the wage. The 2006 Form W-2, Wage and Tax Statement, in the record demonstrates that the petitioner paid the beneficiary $23,229.52 in 2006, or $26,066.48 less than the wage. The 2007 Form W-2, Wage and Tax Statement, in the record demonstrates that the petitioner paid the beneficiary $29,195.63 in 2007, or $20,100.37 less than the wage. The petitioner has not established that it paid the beneficiary the full proffered wage during any part of the relevant period.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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).

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Showing that the petitioner paid wages in excess of the proffered wage is also not sufficient.

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).

At the outset, the AAO withdraws any suggestion made in the director's April 22, 2009 decision that the petitioner need only show an ability to pay a prorated amount of the proffered wage during the priority date year. USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Also, any suggestion that this office should consider the net income and net current assets reflected on the tax returns and Schedules K of a separate LLC in the record which has a member/owner in common with the petitioner is not correct. USCIS (legacy INS) has long held that it 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. In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated that "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, the AAO withdraws any suggestion made by the director in his April 22, 2009 denial that USCIS would consider the unencumbered, liquefiable personal assets of the owners of a multi-member LLC, such as the petitioner, as being funds available to pay the instant wage.

The record before the director closed on April 3, 2008 with the receipt of the petition and supporting documents. As of that date, the petitioner's 2007 income tax return was not yet due. However, on appeal, the petitioner submitted its tax returns through 2007. For an LLC, USCIS considers net income to be the figure shown on page 1, line 22 of the Form 1065, U.S. Return of Partnership Income, or on Schedule K, line 1, page 4 (2003-2007). That is, where the Schedule K, line 1, page 4 of the petitioner's tax returns (2003-2007) indicates that the LLC has other relevant income or deductions beyond that listed on page 1, Line 22, the amount on that line represents the petitioner's net income. Here, the Schedules K do not include other relevant income or deductions beyond that listed on page 1, line 22 of the petitioner's tax returns. Thus, the petitioner's net income is found at page 1, line 22 of its returns. The petitioner's net income is as follows:

- The 2003 Form 1065 states a net income of $2,847.
- The 2004 Form 1065 states a net income of $32,393.
- The 2005 Form 1065 states a net income of $22,699.
- The 2006 Form 1065 states a net income of $16,668.
- The 2007 Form 1065 states a net income of $15,561.

In 2003, the petitioner did not have sufficient net income to pay the difference between the actual wage paid the beneficiary that year and the proffered wage ($32,782.50). Thus, the petitioner has not shown the ability to pay the wage out of its net income in 2003.

In 2004, the petitioner did have sufficient net income to pay the difference between the actual wage paid the beneficiary that year and the proffered wage ($24,706). Thus, the petitioner has shown the ability to pay the wage out of its net income in 2004.

In 2005, the petitioner did not have sufficient net income to pay the difference between the actual wage paid the beneficiary that year and the proffered wage ($25,079.63). Thus, the petitioner has not shown the ability to pay the wage out of its net income in 2005.

In 2006, the petitioner did not have sufficient net income to pay the difference between the actual wage paid the beneficiary that year and the proffered wage ($26,066.48). Thus, the petitioner has not shown the ability to pay the wage out of its net income in 2006.

In 2007, the petitioner did not have sufficient net income to pay the difference between the actual wage paid the beneficiary that year and the proffered wage ($20,100.37). Thus, the petitioner has not shown the ability to pay the wage out of its net income in 2007.

Therefore, for the years 2003, 2005 through 2007, the petitioner has not demonstrated that it had sufficient net income to pay the balance of the proffered wage. The petitioner has shown the ability to pay the balance of the wage in 2004 using its net income.

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.[2] An LLC's year-end current assets are shown on the Form 1065, Schedule L, lines 1(d) through 6(d) and include cash-on-hand. Its year-end current liabilities are shown on the Schedule L, lines 15(d) through 17(d). If the total of an LLC'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 has demonstrated an ability to pay the wage in 2004. The petitioner's 2003, 2005 through 2007 tax returns in the record reflect end-of-year net current assets as listed below.

- The 2003 Form 1065 states net current assets of $1,360.
- The 2005 Form 1065 states net current assets of $6.
- The 2006 Form 1065 states net current assets of $149.

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[2]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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The 2007 Form 1065 states net current assets of $11,583.

In 2003 and 2005 through 2007, the petitioner did not have sufficient net current assets to cover the balance of the proffered wage.

Therefore, the petitioner has not shown that it had the continuing ability to pay the wage from the priority date onwards through an examination of wages paid to the beneficiary, its net income or net current assets. It has only shown an ability to pay the wage in 2004.

On appeal, counsel and the petitioner indicated that the petitioner has shown an ability to pay the wage in that it has been in business since April 2002, it has never had a year in which it took a financial loss, and each year it provided raises to each of its employees.[3] First, the petitioner did not provide documentary evidence to support each of these assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (*citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Unsupported assertions are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, it is not sufficient for the petitioner to show that it has always paid its employees or that it has always paid total wages in excess of the proffered wage. The petitioner must show an ability to pay the instant wage from the priority date onwards. Also, having been in business for approximately eight years does not overcome the information on the tax returns in the record which indicate that the petitioner did not have funds available to pay the instant 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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

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[3] Counsel indicated that to support this assertion she is relying, at least in part, upon a nonprecedent decision of the AAO, which she did not submit into the record. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all USCIS employees in the administration of the Act. The regulation at 8 C.F.R. § 103.9(a) also indicates that precedent decisions must be designated and published in bound volumes or as interim decisions. Nonprecedent decisions of the AAO, however, are not binding on USCIS employees. *See R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated).

and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in 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.

Here, the petition indicates that the petitioner was incorporated in 2002 and has an unstated number of employees. The petitioner has not established any marked historical growth since incorporating. It gross receipts have not markedly increased, but have fluctuated as follows: $17,657 in 2002; $53,703 in 2003; $105,548 in 2004; $94,920 in 2005; $85,815 in 2006; and $137,469 in 2007. Also, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. 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.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.