

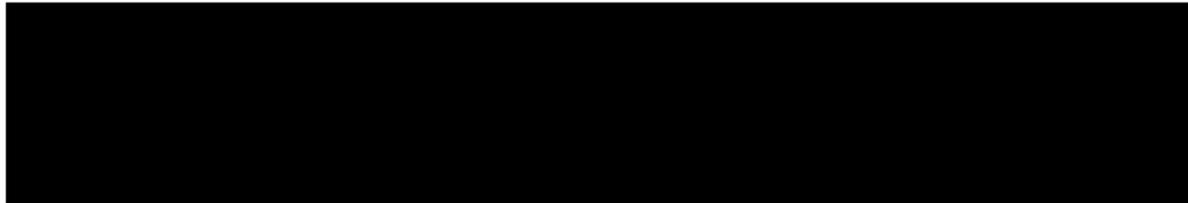
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



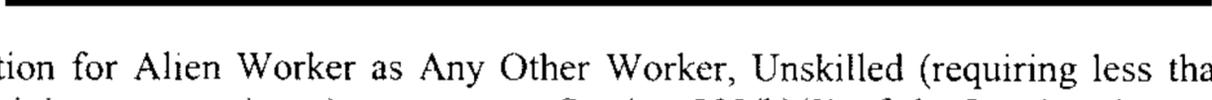
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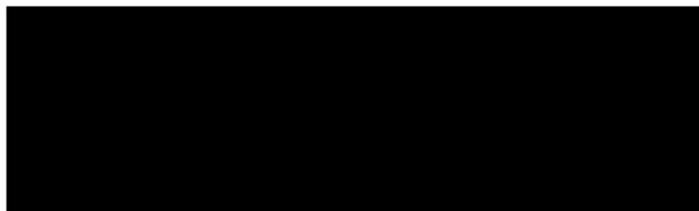
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FILE:  Office: NEBRASKA SERVICE CENTER Date: **OCT 05 2010**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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, Nebraska 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 cook. 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 denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage. The director also found that the petitioner failed to pay the full proffered wage during the qualifying period.

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 September 8, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(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. The priority date is established when the petitioner files the Form ETA 750 with 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 instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was filed by the petitioner and accepted for processing by the DOL on June 13, 2003. The rate of pay or the proffered wage specified on that form is \$12.33 per hour or

\$22,440.60 per year based on a 35-hour work per week.¹ The Form ETA 750 also states that the position requires a minimum of one year work experience in the job offered.

To show that it has the ability to pay \$12.33 per hour or \$22,440.60 per year beginning on June 13, 2003, the petitioner submitted copies of the following evidence:

- Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2002-2005 and 2007;
- IRS Forms W-2 issued by the petitioner to the beneficiary from 2002 to 2007;
- IRS Forms 1099-MISC for the years 2003 through 2005 issued to the beneficiary by the petitioner; and
- The petitioner's commercial bank statements for 2004-2007.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation with [REDACTED] and [REDACTED], as the only shareholders and officers of the corporation. On the petition, the petitioner claimed to have been established in 1975,² to have gross annual income and net annual income of \$1,488,000 and \$96,000, respectively, and to currently employ eight workers. The beneficiary in part B of the Form ETA 750 indicated that he had been employed by the petitioner since February 2001.

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.³

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 immigration 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.

¹ The total hours per week indicated on the approved Form ETA 750 is 35 hours. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

² A search of the [REDACTED] Department of State's website reveals that [REDACTED] or the petitioner was incorporated on December 13, 1973.

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).

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).

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, although the petitioner has established that it employed the beneficiary continuously from 2002, it has not established that it paid the beneficiary the full proffered wage of \$12.33 per hour or \$22,440.60 per year during any relevant time frame including the period from the priority date in 2003 or subsequently. Instead the W-2 forms submitted show that the beneficiary received the following wages from the petitioner:

- \$8,190 in 2002.⁴
- \$8,190 in 2003 (\$14,250.60 less than the proffered wage).
- \$8,347.50 in 2004 (\$14,093.10 less than the proffered wage).
- \$8,190 in 2005 (\$14,250.60 less than the proffered wage).
- \$8,190 in 2006 (\$14,250.60 less than the proffered wage).
- \$9,425 in 2007 (\$13,015.60 less than the proffered wage).

The record, as noted above, also contains copies of Forms 1099-MISC, indicating that the beneficiary was paid as a non-employee (independent contractor) by the petitioner the following amounts: \$22,625 in 2003, \$22,877 in 2004, and \$23,098 in 2005. No other documentary evidence or explanation was submitted or provided to establish the credibility of these documents, however. For instance, the payer's (employer's) federal identification number on these Forms 1099-MISC is [REDACTED], which is the same number as the beneficiary's social security number. The recipient's identification number on those forms, on the other hand, is [REDACTED] which is the same number as the petitioner's identification number or tax number. Moreover, there is no evidence from the beneficiary showing that he reported both amounts on the Forms W-2 and 1099-MISC as his combined income from 2003 to 2005. Further, the record contains no explanation why the petitioner paid the beneficiary both as an employee and an independent contractor between 2003 and 2005. For these reasons, the AAO will not consider any of the Forms 1099-MISC as evidence of the petitioner's ability to pay.

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date, the petitioner must be able to

⁴ The payment in 2002 will not be considered since the petitioner is only required to show its ability to pay from the priority date or June 2003.

pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is:

- \$14,250.60 in 2003,
- \$14,093.10 in 2004,
- \$14,250.60 in 2005,
- \$14,250.60 in 2006, and
- \$13,015.60 in 2007.

The petitioner can pay the difference between the two wages through its net income or net current assets.

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*, --- F. Supp. 2d. at *6 (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 118. "[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 June 23, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). 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 tax returns demonstrate its net income for 2003-2007, as shown in the table below.

- In 2003, the Form 1120S stated net income (loss)⁵ of (\$2,160).
- In 2004, the Form 1120S stated net income (loss) of (\$2,631).
- In 2005, the Form 1120S stated net income (loss) of \$767.
- The 2006 tax return is not in the record – no information is available as to the petitioner's 2006 net income.
- In 2007, the Form 1120S stated net income (loss) of \$727.

Therefore, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage as of the priority date.

⁵ 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-prior/i1120s--2006.pdf> (accessed on September 1, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, because the petitioner did not have any additional income, credits, deductions, and other adjustments shown on its Schedule K, the petitioner's net income is found on line 21 of its tax returns.

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.⁶ 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 (liabilities) for 2003-2007, as shown in the table below.

- In 2003, the Form 1120S stated net current assets (liabilities) of \$9,915.
- In 2004, the Form 1120S stated net current assets (liabilities) of \$7,284.
- In 2005, the Form 1120S stated net current assets (liabilities) of \$8,051.
- The 2006 tax return is not in the record – no information is available as to the petitioner's 2006 net current assets.
- In 2007, the Form 1120S stated net current assets (liabilities) of \$9,800.

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in any of those years.

Based on the net income and net current assets analysis above, it is concluded that 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.

In response to the director's request for additional evidence, the petitioner offered its bank statements as evidence of its ability to pay. The director, according to the petitioner, should treat the funds shown on the bank statements as funds available to pay the beneficiary's proffered wage during the qualifying period. However, the director declined to accept the bank statements as evidence of ability to pay. The director stated:

Bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2), as acceptable evidence to establish a petitioner's ability to pay a proffered wage. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

In addition, even though the regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept or the petitioner to submit additional evidence, such as bank statements, such evidence is supplementary in

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for the years 2003 through 2005 and 2007. No evidence, however, has been submitted to demonstrate that the figures reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns or in the cash entry on Schedule L. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay. The AAO agrees with the director that the bank statements are not evidence of the petitioner's ability to pay the proffered wage.

On appeal, to show that the petitioner has the ability to pay the proffered wage, counsel for the petitioner submits copies of [REDACTED]'s individual tax returns for the years 2003 through 2007. [REDACTED] is a 50% owner of the petitioning corporation. By submitting one of the owner's individual tax returns, counsel essentially wants the AAO to consider this owner's total income, including his income from other sources.

USCIS (legacy INS), however, has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners 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). 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."

In addition, upon review of the petitioner's tax returns the AAO observes that the company does not reflect a large compensation package for its owners that could have been dedicated to paying the proffered wage. The overage in the shareholders or officers compensation may not be sufficient to cover the beneficiary's wage from the priority date. The record contains no information about Salvatore Lauritas's personal monthly expenses to demonstrate that it is realistic for him to give up part or all of his compensation from the business to pay the proffered wage of \$22,440.60 per year. Without a more fully developed record concerning both owners' income and expenses in relation to the officers' compensation, the AAO cannot determine whether the petitioner is making a realistic offer to pay the beneficiary's wage or that it has the overall financial ability to satisfy the proffered wage by withholding officers' compensation.

Finally, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence, reflecting the company's reputation or historical growth since its inception in 1973. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

The AAO acknowledges that the petitioner has been in a competitive business since 1973 and, as of the date of filing the Form I-140, claimed to have eight employees. However, the tax returns do not reflect a pattern of historic growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage as of the filing date and continuing through the present.

On appeal, counsel also provides copies of Forms W-2 of [REDACTED] another employee of the petitioner, from 2003 to 2007 to demonstrate that the petitioner is and has been capable of paying the beneficiary's salary.

The AAO notes that [REDACTED] was paid more than the proffered wage from 2003 to 2007; however, the record is devoid of evidence concerning [REDACTED] position or duties in the corporation. The beneficiary's position in this case is for a cook. There is no evidence in the record to show whether the payments that [REDACTED] received during those years were for the position of cook, and that the beneficiary will replace [REDACTED]. Thus, the wages paid to [REDACTED] cannot be considered to establish the petitioner's ability to pay the beneficiary.

In determining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other relevant evidence, the record does not establish that the petitioner has the ability to pay the salary offered as of the priority date and continuing to present. 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.