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OCT 29 2010

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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:

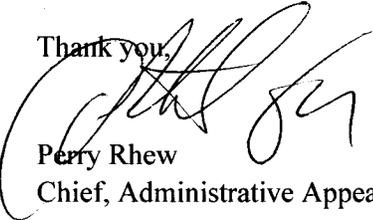
SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. 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.

  
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 [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a [REDACTED]. As required by statute, a Form ETA 750,<sup>1</sup> Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to establish that the petitioner had the continuing ability to pay the proffered wage, and denied the petition accordingly.

On appeal, the petitioner, submits additional evidence and asserts that it has employed the beneficiary as of May 1, 2009, at a salary of [REDACTED] per year.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>2</sup>

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

<sup>2</sup>The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

processing on April 23, 2001, which establishes the priority date.<sup>3</sup> The proffered wage is stated as [REDACTED] per year.

The visa preference petition was filed on January 11, 2008. Part 5 of the petition indicates that the petitioner was established on September 1, 1995, reports a gross annual income of [REDACTED]0.00 in net annual income and currently employs eleven workers. Part B of the Form ETA 750,<sup>4</sup> signed by the beneficiary on April 19, 2001, indicates that he has worked for the petitioner from October 1999 to the present (date of signing) as a software programmer.

As noted above, the petitioner states that it has employed him as of May 1, 2009. The record contains only the paystub issued in 2009 to the beneficiary for [REDACTED] claimed to be for the pay period from May 1, 2009 to May 31, 2009, and a Wage and Tax Statement (W-2) for 1999 in which the petitioner is shown to have paid him [REDACTED]. The director, in his request for evidence, instructed the petitioner to submit any W-2s for the beneficiary, however no other W-2s or evidence of wages paid have been provided to the record, either with the initial filing, in response to the director's request for evidence, or on appeal from the 2001 priority date onward.

In support of its continuing financial ability to pay the certified wage [REDACTED] per year beginning as of the priority date and in response to the director's request for additional evidence of its ability to pay, the petitioner has provided page one only of its Form 1120, U.S. Corporation Income Tax Return for 2001, 2002, 2003, 2004, 2005 and 2006.<sup>5</sup> Only in response to the director's request for evidence did the petitioner provide more complete copies of its corporate returns for 2007 and 2008. The returns indicate that the petitioner uses a standard calendar year to file its tax returns. Information contained on the copies submitted indicates the following.

Year	2001	2002	2003
Net Income <sup>6</sup>	[REDACTED]	[REDACTED]	[REDACTED]

<sup>3</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

<sup>4</sup> It is not clear why the original of Part B of the ETA 750 was not submitted until the appeal.

<sup>5</sup> The director's request for evidence requested that the petitioner submit its full tax returns, including all forms and schedules. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

<sup>6</sup> The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of

Current Assets	not provided	not provided	not provided
Current Liabilities	not provided	not provided	not provided
Net Current Assets	n/a	n/a	n/a
Year	2004	2005	2006
Net Income	[REDACTED]		
Current Assets	not provided	not provided	not provided
Current Liabilities	not provided	not provided	not provided
Net Current Assets	n/a	n/a	n/a
Year	2007	2008	
Net Income	[REDACTED]		
Current Assets	[REDACTED]		
Current Liabilities	[REDACTED]		
Net Current Assets	[REDACTED]		

Besides net income and as an alternative method of reviewing a petitioner’s ability to pay a proposed wage, USCIS will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>7</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner’s year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation’s end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>8</sup>

both the petitioner’s total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner’s taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

<sup>7</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>8</sup> A petitioner’s total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

As noted by the director, except for 2007 and 2008 where the petitioner has provided more complete tax returns, the failure to submit at least Schedule L of the 2001-2006 federal tax returns precludes review of the corporate petitioner's net current assets.

The petitioner also contends that as the petitioner's sole shareholder, [REDACTED] officer compensation could have been adjusted to show the necessary income in order to cover the proffered wage. He further asserts he has sufficient streams of personal revenue to support payment of the beneficiary's proffered wage. In support of these assertions, the petitioner has submitted partial copies of his individual Form 1040 federal tax return consisting of the first two pages for 2006; page 1 for 2007, and page 1 for 2008. To the extent shown, the petitioner's adjusted gross income has exceeded [REDACTED] in each of those years.

However, in this case, we decline to consider officer compensation paid to as applicable toward the corporate ability to pay the proffered wage. It is noted that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not ordinarily be considered to be an available source with which to pay the beneficiary. Here, it is unclear, how many additional duties performed by [REDACTED] as the sole shareholder of the corporate petitioner are going to be assumed by the beneficiary when it is claimed by the beneficiary that he had already been employed full-time, at least in 2001, as a software programmer. Moreover, it is unclear what other personal expenses the sole shareholder incurs on an annual basis in 2006, 2007 and 2008 years before considering any application of personal income paid as officer compensation to the corporate petitioner's ability to pay. Further, with respect to the other relevant years of 2001, 2002, 2003, 2004, and 2005, it is noted that no individual tax return was supplied or other documentation to confirm whether [REDACTED] was the sole shareholder during the 2001 through 2005 period, and how much of [REDACTED] officer compensation would have been reasonably available even if other factors had been established. 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). Additionally, as the petitioner failed to submit all its relevant Form 1120(s) schedules, we cannot determine the extent of the petitioner's liabilities and whether officer compensation might realistically have been directed to wages and not other liabilities.

The AAO additionally notes that where a business is structured as a sole proprietorship and reported on Schedule C, Profit of Loss from Business of an individual income tax return, the personal assets and liabilities of the sole proprietor may be considered because they are legally indistinguishable from the business assets. However, in this case, the petitioner is a corporation. 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 *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to

consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner’s net income or net current assets for a given year, then the petitioner’s ability to pay the full proffered wage for that period will also be demonstrated.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 (1<sup>st</sup> 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 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. 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).

In this case, the corporate petitioner failed to demonstrate its ability to pay the proffered wage in 2001, because its declared net income of [REDACTED] was insufficient to cover the proffered wage of [REDACTED] and the petitioner failed to provide a complete tax return that would include its Schedule L balance sheet and reveal its net current assets.

As set forth above, in 2002, the corporate petitioner's net income of [REDACTED] was not enough to cover the proffered wage. Its net current assets in the form of Schedule L of its 2002 tax return were not provided as noted above. The petitioner did not establish its ability to pay the certified salary in this year.

In 2003, the corporate petitioner's net income of [REDACTED] failed to establish its ability to pay the proffered wage in this year. Its net current assets could not be calculated as the tax return provided was incomplete and failed to include the Schedule L balance sheet. The petitioner did not demonstrate its ability to pay the proffered wage in this year.

Similarly, in 2004, its net income of [REDACTED] was not enough to cover the proffered wage of [REDACTED] and Schedule L of this tax return was not provided from which net current assets could be determined. The petitioner failed to demonstrate its ability to pay in this year.

In 2005, the petitioner did not establish its ability to pay the proffered wage because its net income of [REDACTED] was insufficient to cover the full amount of [REDACTED]. Additionally, as in 2001 through 2004, the petitioner failed to provide a complete tax return, audited financial statement, or annual report (supported by audited financial statements) from which net current assets could be calculated. It may not be concluded that the corporate petitioner demonstrated its ability to pay the proposed wage offer in this year.

In 2006, the corporate petitioner's net income of [REDACTED] failed to establish its ability to pay the proffered wage in this year. Its net current assets could not be calculated as the tax return provided was incomplete and failed to include the Schedule L balance sheet. The petitioner did not demonstrate its ability to pay the proffered wage in this year.

In 2007, neither its net income of [REDACTED] nor its net current assets of [REDACTED] was sufficient to cover the proffered wage or demonstrate the corporate petitioner's ability to pay the proffered wage. Finally, in 2008, neither the corporate petitioner's net income of \$-0-, nor its net current assets of [REDACTED] was sufficient to cover the certified salary of [REDACTED] or demonstrate the corporate petitioner's ability to pay in this year.

No conclusions may be drawn from the May 2009 paystub, because it represents both year-to-date compensation of [REDACTED] and also a one-month pay period. It is unclear if the petitioner is employing the beneficiary full-time or has another type of employment arrangement.

*Matter of Sonegawa*, is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in [REDACTED]. Her clients included [REDACTED]. The petitioner had lectured on [REDACTED] fashion shows throughout the United States and at colleges and universities in [REDACTED]. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere.

In this case, the tax returns indicate that the petitioner's gross receipts have declined from over [REDACTED]. Further, all of the corporate tax returns that were submitted to the record indicated modest net income figures that were all substantially less than the proposed wage offer. The petitioner failed to submit its full tax returns in order to fully assess its financial condition. It may not be concluded that such analogous circumstances to *Sonegawa* are present in this case that would overcome the evidence reflected in the corporate tax returns. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* that are persuasive in this matter. The AAO does not conclude that the petitioner has established that it has had the *continuing* ability to pay the proffered wage.

For the reasons explained above, the petition may not be approved. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has 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, that burden has not been met.

**ORDER:** The appeal is dismissed.