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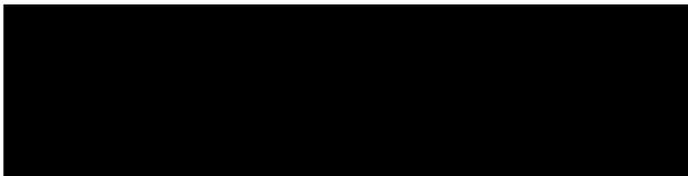
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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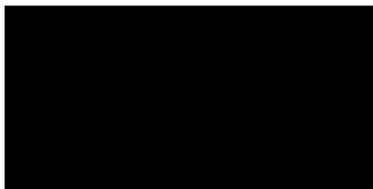
FILE:  Office: NEBRASKA SERVICE CENTER

SEP 01 2010
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:

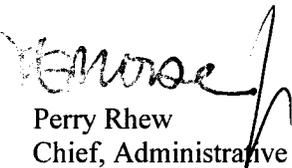


INSTRUCTIONS:

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: A preference visa petition was filed for the beneficiary on December 7, 2004 was denied by the Director, Vermont Service Center (VSC) on September 14, 2005. The instant preference visa petition for the beneficiary was filed on August 31, 2006 and was denied by the Director, Nebraska Service Center (NSC). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a corporation which seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The NSC director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

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.

Section 203(b)(3)(A)(i) of 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 above regulation sets forth the requirement that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. See 8 C.F.R. § 204.5(d). The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 30, 2001. The Form ETA 750 lists the proffered wage as \$17.16 per hour based on a 40 hour workweek, which equates to \$35,692.80 per year. The position requires two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner is structured as an S corporation, was established in 1984 and employed six workers when the Form I-140 was filed. The petitioner's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, reflects it operates on a calendar year basis. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on April 30, 2001, she stated she began employment with the petitioner as a bookkeeper in April 2001.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. The petitioner has provided no evidence to establish that it employed and paid the beneficiary the full proffered wage during 2001 through 2006. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 30, 2001 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 next examines the net income figures reflected on the petitioner's federal income tax returns 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 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.

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 petitioner's IRS Form 1120S tax returns demonstrate its net income for the years of the requisite period below:¹

<u>Year</u>	<u>Net Income</u>
2001	\$5,467
2002	-\$16,404

¹ 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 (2001-2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. Because the petitioner had additional income and/or deductions shown on its Schedule K for 2001 through 2006, the petitioner's net income is found on Schedule K of its tax returns for those years.

2003	-\$34,131
2004	\$33,214
2005	\$9,829
2006	\$32,912

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net income to pay the proffered wage of \$35,693.

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 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 net current assets for the required period, as shown in the table below:

Year	Net Current Assets (\$)
2001	\$78,250
2002	-\$36,845
2003	-\$61,433
2004	-\$27,683
2005	-\$34,104
2006	-\$67,762

For the year 2001, the petitioner had sufficient net current assets to pay the proffered wage. For the years 2002 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the USDOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for 2001.

On appeal, counsel states the NSC director's decision is incorrect in that he did not take into consideration the entire financial situation of the petitioner which is part of a larger financial group. Counsel further states that the owner of the petitioning corporation has the ability to transfer funds

²According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

among the 23 gas stations in the financial group. Counsel submits an article from [REDACTED] MIT Enterprise Forum, [REDACTED] printed on August 25, 2007 to explain there is a close financial tie to the owner who is taxed directly on the earnings of the corporation. Counsel also submits a letter from [REDACTED] dated September 10, 2007 who states that it is not uncommon for [REDACTED], as co-owner of both [REDACTED] [REDACTED] to make inter-company loans between these enterprises. Counsel forwards a bank statement from [REDACTED] showing transfers to the [REDACTED] account to demonstrate, that in practice, there is movement of funds between companies. Counsel forwards a list of businesses with their corporate names listed and argues that the combined payrolls for these businesses constitutes an affiliated group with over 100 employees. Counsel also states that the petitioner's tax returns show undistributed income on Schedule M-2 which, in all but one year, were in excess of the proffered wage. Schedule M-2 is an analysis of a corporation's accumulated adjustment accounts, other adjustments account and shareholders' undistributed taxable income previously taxed. Counsel fails to provide evidence as to how amounts listed in a corporation's Schedule M-2 accumulated adjustment accounts would be available to pay the beneficiary the proffered wage during any year.

Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). In this case, the petitioner is not shown to be treated as a member of a controlled group for tax purposes. The petitioner and [REDACTED] are separate entities. It is noted an S corporation is a separate and distinct legal entity from its owners and shareholders. Therefore, USCIS does not "pierce the corporate veil" and look to the assets of the corporation's owner or shareholders or the assets of other corporations in determining the petitioning corporation's ability to pay the proffered wage. 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). Although requested by the NSC director in his request for evidence dated March 15, 2007, the petitioner failed to provide evidence that confirms [REDACTED] is legally responsible for the liabilities of the petitioner. While it may not be uncommon for [REDACTED] [REDACTED] to make intercompany loans between the two companies, the petitioner has not established a legal responsibility for him to do so.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the USDOL.

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, supra*. The petitioning entity in *Sonogawa* had been in business for over 11 years. 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, the petitioner has been in business since 1984. While it only employs six workers, it had substantial gross receipts in 2001, 2002, 2003, 2004, 2005 and 2006.³ Based on the totality of the circumstances, including the longevity of the petitioner's business and its history of substantial gross receipts, the petitioner has established its ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.

³ Gross receipts: (2001, \$2,874,495), (2002, \$2,287,422), (2003, \$2,865,596), (2004, \$2,999,821), (2005, \$3,450,698), (2006, \$3,835,145).