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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE:



Office: TEXAS SERVICE CENTER

Date: **SEP 13 2010**

IN RE:

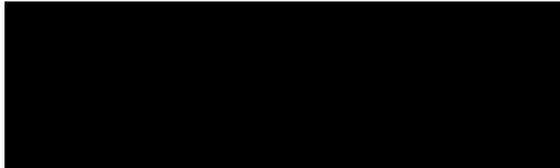
Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a fast food restaurant. It seeks to employ the beneficiary¹ permanently in the United States as a manager. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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 denial, a primary 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.

Additional issues, beyond the decision of the director, are whether the petitioner may now include other entities to join with it as the petitioner, and then to demonstrate by submission of the other entities' tax returns, the other corporations' joint ability to pay the proffered wage, and whether the petitioner may materially amend the petition on appeal.

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 unavailable.

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).

¹ The beneficiary is also known as [REDACTED]

Here, the Form ETA 750 was accepted on April 5, 2004. The proffered wage as stated on the Form ETA 750 is \$56,763.00 per year.

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.

Accompanying the petition and labor certification, prior counsel submitted a support letter dated May 14, 2007, from the petitioner; an employment reference dated June 4, 2001, from the president of [REDACTED], of [REDACTED]; an employment reference dated May 11, 2003, from the president of Restaurants of [REDACTED]; and a 1099-MISC Statement and a Wage and Tax Statement (W-2) from [REDACTED] to the beneficiary, both for 2006.

On July 28, 2008, the director issued a Request for Evidence (RFE) asking the petitioner to submit information regarding its ability to pay the proffered wage from the priority date onward. Specifically, the director instructed the petitioner to submit copies of either annual reports, prepared federal income tax returns with all pages, or audited financial statements for 2004 through 2007. Further, the director requested evidence of any wages the petitioning entity paid the beneficiary for the years 2004, 2005, 2006, and 2007. Additionally, the director stated that he would consider additional evidence for the above years such as bank account statements, payroll records or profit-loss statements.

In response, counsel submitted the petitioner's Form 1120S federal income tax returns for 2004, 2005, 2006 and 2007.

On appeal, counsel submitted a letter from counsel dated December 5, 2008; a letter from the petitioner's accountant dated November 18, 2008; W-2 Statements and/or 1099-MISC Statements from [REDACTED], to the beneficiary for 2004, 2005, 2006, 2007; a [REDACTED] Shareholder Summary entitled "Shareholder's Distributive or Pro Rata Share" for 2007 from [REDACTED] to the beneficiary that identifies the beneficiary as a 40% shareholder in [REDACTED]; 1099-MISC Statements from [REDACTED], to the beneficiary for 2004 and 2005; a W-2 statement from [REDACTED], to the beneficiary for 2003; a payroll record, no year given, for a W-2 "ACCT:" stating "Amount Reported to IRS by Others" from [REDACTED] to the beneficiary in the amount of \$5,000.00; and a payroll record, no year given, for a W-2 "ACCT:" stating "Amount Reported to IRS by Others" from the petitioner to the beneficiary in the amount of \$5,000.00, and a W-2 Statement from the petitioner to the beneficiary in 2003.² Additionally counsel submitted the Forms 1120S federal income tax returns of [REDACTED] for 2002 through 2007; the Forms 1120S federal income tax returns of [REDACTED], for 2004 through 2007; and the Forms 1120S federal income tax returns of [REDACTED], for 2004 through 2007, as well as the tax returns of the petitioner already submitted.

² A W-2 Statement submitted for a year prior to the priority date has little probative value in the determination of the petitioner's ability to pay from the priority date.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently. Wages paid to the beneficiary by other business entities, even those sharing shareholders or officers, may not be used to establish the petitioner's ability to pay the proffered wage. *See intra*.

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) (*quoting* *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 August 29, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. 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 was the most recent return available. The petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2004, the Form 1120S stated net income³ of \$17,740.00.

³ 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

- In 2005, the Form 1120S stated net income of \$23,653.00.
- In 2006, the Form 1120S stated net income of <\$5,210.00>.⁴
- In 2007, the Form 1120S stated net income of \$8,449.00.

Therefore, for the years 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2004, the Form 1120S stated net current assets of <\$62,505.00>.
- In 2005, the Form 1120S stated net current assets of <\$61,318.00>.
- In 2006, the Form 1120S stated net current assets of <\$112,209.00>.
- In 2007, the Form 1120S stated net current assets of <\$97,116.00>.

Therefore, for years 2004, 2005, 2006, and 2007, the petitioner through an examination of its net current assets could not pay the proffered wage.

On appeal, counsel contends that the financial documentation submitted by the petitioner was misconstrued by the director, and the petition should be approved based upon a review of documentation to be submitted on appeal showing the "history and structure of various corporate entities owned" by the shareholders of the petitioner. Counsel references a letter from the petitioner's accountant.

on line 17e (2004-2005), and line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 2, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions, and other adjustments shown on its Schedules K, the petitioner's net income is found on Schedule K of its tax returns.

⁴ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁵ 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.

In the accountant's letter dated September 18, 2008, the accountant states that an individual [REDACTED] owns and operates other franchised businesses established as separate corporate entities with or through family members under the brand name "[REDACTED]." According to the accountant, as an operating procedure, an employee of a [REDACTED]-owned corporation could be "loaned" from one corporation to another, but "in essence, all of [REDACTED]'s employees, including the beneficiary ..., were paid by the same corporate owner or family interest." Following this business practice, the beneficiary worked for and received compensation from the petitioner and three other corporations ([REDACTED]) from 2003 through 2007. The accountant states that all the compensation received by the beneficiary should be treated as payment from one closely held "group of businesses." Insofar as the accountant's contention in this matter is offered to establish the petitioner's ability to pay the proffered wage, the contention is not supported by statute or regulation, and is misplaced.

The Identity of the Petitioner and Employer

The regulation at 20 C.F.R. § 656.3 states in pertinent part:

"Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

* * *

"Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. For purposes of this definition an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

The regulation at 20 C.F.R. § 656.3 states, in part, that an "employer" means a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States and possesses a valid Employer Identification Number (EIN).

The petitioner is identified in the petition by the EIN, [REDACTED]. According to 20 C.F.R. § 656.17 (5)(i), "the term "Employer" means an entity with the same Federal Employer Identification Number (FEIN or EIN)." The EIN is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. See <http://www.irs.gov/businesses/small/article/0,,id=169067,00.html> (accessed November 19, 2009). According to the labor certification, the petitioner is offering the beneficiary a permanent fulltime job at its location at [REDACTED]. According to the petitioner's accountant's letter dated November 18, 2008, the petitioner moves its employees at

will among four corporate employers and has done so with the beneficiary since 2004. The record of proceeding does not demonstrate that the petitioner intends to offer the beneficiary a fulltime and permanent job according to regulation. This is an additional reason for ineligibility.

Other Entities' Assets

Counsel contends that the financial resources of other corporations, ([REDACTED] and the petitioner, collectively demonstrate that the petitioner has the ability to pay the proffered wage. Counsel's contention is misplaced. Counsel has submitted the petitioner's, and the three other corporation tax returns, as well as the four entities' 1099-MISC and W-2 Statements, and their payroll records as evidence of their joint ability to pay the proffered wage and their joint wage and/or compensation payments to the beneficiary from the priority date.⁶ There is no assertion in the record that [REDACTED] are the successors-in-interest⁷ to the petitioner, or evidence that the labor certification pertains to other entities. [REDACTED] have no standing in this matter.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). *Matter of Ho* also states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

By implication, counsel states financial information was initially only submitted for the petitioner when the petitioner should also have submitted financial information for three other entities.⁸ It is clear that counsel is attempting to amend the petition at this late date to include other entities and at the same time introduce another entities' resources, (i.e. [REDACTED], or [REDACTED] federal tax returns and wage/compensation payment information) as proof of the four corporations' joint ability to pay the proffered wage. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. at 49. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 176.

⁶ There was no evidence submitted that the beneficiary was ever employed by the petitioner from the priority date.

⁷ See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁸ A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel is requesting that this matter should be re-examined, after the director's review, because new evidence has been submitted on appeal for other entities. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The AAO may reject such evidence.

The petitioner may not include other entities to undertake its obligations to employ the beneficiary fulltime, or use other entities' assets to demonstrate its ability to pay the proffered wage. Because 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 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." The petition will be dismissed for this additional reason.

Totality of Circumstances

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, there is sufficient information concerning the finances of the petitioner to demonstrate that it did not have the ability to pay the proffered wage from the priority date. From

2004 through 2007, the petitioner's net income was negative or nominal in relation to its gross receipts of \$620,469.00, \$616,099.00, \$606,281.00, and \$658,970.00, respectively. In all years its net current assets were negative. Based upon the petitioner's accountant's statement that employees are moved at will among the four corporations identified, it is clear that there is no intent to employ the beneficiary fulltime according to the terms of the labor certification. There is not sufficient evidence to establish that the business has met all of its obligations in the past or to show its historical growth.

The petitioner is contending that four corporations, the petitioner and three other corporations, are responsible to pay the proffered wage. Other than this assertion, there is insufficient evidence submitted of the petitioner's financial solvency and viability since 2004, and no allegation of any temporary and uncharacteristic disruption in the petitioner's business activities to account for its poor financial returns. 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.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.