

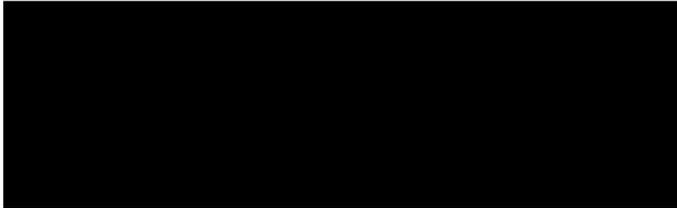
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



B6

Date: **APR 18 2011**

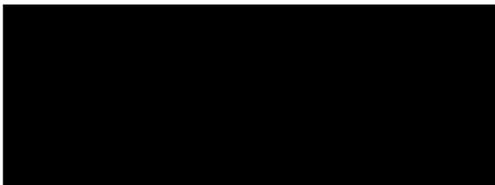
Office: NEBRASKA SERVICE CENTER

FILE:   
LIN 07 263 58426

IN RE:           Petitioner:   
                  Beneficiary: 

Petition:       Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to  
                  § 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.

Thank you,

*Keiana S. Poulos for*

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 sustained. The petition will be approved.

The petitioner is a medical practice specializing in cosmetic surgery. It seeks to employ the beneficiary permanently in the United States as a skin care specialist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage 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 April 3, 2009, 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 other 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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$9.85 per hour (\$20,488 per year). The Form ETA 750 states that the position requires eight years of grade school, four years of high school, six months (1800 hours) of training in cosmetology, one year of experience in the offered job and a State of California Cosmetology License.<sup>1</sup>

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.<sup>2</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a personal service corporation. On the petition, the petitioner claimed to have been established in 1980, to have a gross annual income of over \$467,000, and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year runs from August 1 through July 31. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, 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 an ETA 750 labor certification application establishes a priority date for any immigrant 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'l Comm'r 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'l Comm'r 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 claimed to have employed and paid the beneficiary since the priority date of April 24, 2001.

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

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<sup>1</sup> The petitioner provided sufficient evidence of the beneficiary's qualifications for the proffered job.

<sup>2</sup> 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).

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*, 696 F. Supp. 2d 873 (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*, 696 F. Supp. 2d at 881 (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 January 14, 2009, with the receipt by the director of the petitioner's response to the director's December 3, 2008, Request for Evidence (RFE). As of that date, the petitioner's federal income tax return for fiscal year 2008 was not yet due. Therefore, the petitioner's income tax return for 2007<sup>3</sup> is the most recent return available in the record of proceedings. The petitioner's income tax returns reflect its net income as shown below:

- 2000 = \$1,134<sup>4</sup>
- 2001 = \$3,220
- 2002 = \$0
- 2003 = \$0
- 2004 = \$0
- 2005 = \$-13,672
- 2006 = \$9,670
- 2007 = \$-17,700

Therefore, because the petitioner's net income was less than the proffered wage, the petitioner did not have sufficient net income to pay the proffered wage for any of these years.

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.<sup>5</sup> A corporation's year-end current assets are shown on Form 1120, Schedule L, lines 1 through 6.<sup>6</sup> Its year-end current liabilities are shown on lines 16 through 18.<sup>7</sup> 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 below:

- 2000 = \$3,854
- 2001 = \$3,942
- 2002 = \$10,366

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<sup>3</sup> August 1, 2007, through July 31, 2008.

<sup>4</sup> As reported on Line 26 of Form 1120-A, U.S. Corporation Short-Form Income Tax Return, for fiscal years 2001, 2002, 2003 and 2006 and on Line 28 of Form 1120, U.S. Corporation Income Tax Return, for fiscal years 2000, 2004, 2005 and 2007.

<sup>5</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>6</sup> Form 1120-A, Part III, Lines 1-6.

<sup>7</sup> Form 1120-A, Part III, Lines 13 and 14.

- 2003 = \$-12,552
- 2004 = \$4,759
- 2005 = \$-7,580
- 2006 = \$2,296
- 2007 = \$-13,616

For these years, the petitioner did not have sufficient net current assets to pay the proffered wage of \$20,488.

The petitioner provided copies of statements of numerous investment and IRA accounts belonging to the petitioner's sole shareholder. However, 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'r 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."

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 as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel cites the petitioner's "international reputation in the field as one of the country's top plastic surgeons." Counsel asserts that the petitioner intended to hire the beneficiary as a full-time employee to perform work that had previously been done by outsourced personnel, and that the beneficiary's wages would be paid out of funds that had previously been designated for staff leasing.

As noted by counsel on appeal, 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 (Reg'l Comm'r 1967). 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.

The petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Sonegawa*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. *Id.* A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock and performs the personal services of the medical practice. According to the petitioner's tax returns, the owner elected to compensate himself \$19,500, \$5,100, \$4,000, \$4,000, \$10,000, \$12,924, \$12,327, and \$8,414 from 2000 through 2007, respectively. We note here that the compensation received by the company's owner during these years was not a fixed salary, but did not exceed the proffered wage in any relevant year.<sup>8</sup>

In the present case, the petitioner has been in business since 1980 and employed three workers when the petition was filed. Among his many professional achievements, [REDACTED] serves as past President and Chair of the Strategic Planning Commission of the California Society of Plastic Surgeons, is a director of the American Board of Plastic Surgeons, is a past president of the American Society of Plastic Surgeons, is a past President of the American Association for the Accreditation of Ambulatory Surgery Facilities, is a former staff member at the UCLA Medical

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<sup>8</sup> In the present case, USCIS is not examining the personal assets of the petitioner's owner, but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of his personal service corporation medical practice.

Center, has been certified by the American Board of Plastic Surgery since 1981, is [REDACTED] and has been cited as an authority in his field by *Newsweek* magazine, the *Los Angeles Times*, *Allure* magazine and *In Touch Weekly*, among others.

The petitioner also indicated that the hiring of the beneficiary would reduce its dependency upon staff leasing. In a letter dated January 9, 2009, written by the petitioner's owner, [REDACTED] confirmed that the petitioner's personnel are provided by a staff leasing company, that the role of skin-care specialist would be best served with a non-rotational employee, and that he plans to reallocate a portion of the annual funds spent on leased personnel to pay the beneficiary's wage. The letter is corroborated by the petitioner's tax returns, which show specific sums paid for staff leasing from 2001 through 2007.<sup>9</sup>

In examining 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*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977). Accordingly, after a review of the petitioner's federal tax returns, the longevity of the petitioner's business, its status as a personal service corporation, the outstanding reputation of the petitioner's owner, the petitioner's desire to reduce its dependence on leased personnel, and all other relevant evidence, we conclude that the petitioner has established that it had the ability to pay the salary offered as of the priority date of the petition 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 met that burden.

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

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<sup>9</sup> \$162,402, \$133,889; \$112,571; \$109,137; \$136,095; \$140,691; \$130,694; and, \$151,566 in fiscal years 2000, 2001, 2002, 2003, 2004, 2005 2006 and 2007, respectively; as indicated on Line 22 of its Form 1120-A tax returns for fiscal years 2001, 2002, 2003 and 2006, and line 26 of its Form 1120 tax returns for fiscal years 2000, 2004, 2005 and 2007.