

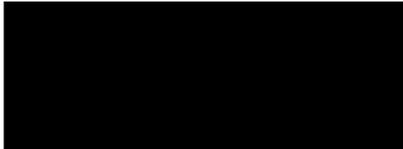
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

DATE: DEC 28 2011 Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE:

Petitioner: 

Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an 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 \$630. 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. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is a car wash. It seeks to employ the beneficiary permanently in the United States as a car wash attendant. 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 and 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 9, 2007 and April 15, 2010 decisions, the 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. It is noted that the AAO determined that the petitioner had failed to demonstrate its ability to pay the proffered wage since the priority date in 2001. Counsel asserts that the petitioner has established its ability to pay the proffered wage. Therefore, on motion the issue is whether or not the petitioner has established its ability to pay the proffered wage for the relevant years. The AAO also noted that the petitioner had filed multiple immigrant petitions.

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 nature, for which qualified workers are not available in the United States.

The regulation 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.67 per hour based upon a 35 hour work week (\$17,599.40 per year). The Form ETA 750 states that the position does not require any training or experience.

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.¹

The evidence in the record of proceeding shows that the petitioner indicates on the Form I-140 that it was established on September 1, 1997 and that it currently employs 30 workers. On the Form ETA 750, signed by the beneficiary, 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 a Form ETA 750 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On motion, counsel asserts that the petitioner in interest is [REDACTED] and that it does business as [REDACTED]. Contrary to counsel's claim, the labor certification and the I-140 petition was filed by [REDACTED] with Federal Employer Identification Number [REDACTED]. As noted in the AAO's decision, this EIN corresponds to [REDACTED]. Based on this entity's Form 1065 in the record, its address is [REDACTED] Sterling, Virginia, which is the same address listed by the petitioner in the Form I-140 and Form ETA 750. [REDACTED] is more likely than not the petitioning entity in this matter. It is noted that [REDACTED] has an EIN number [REDACTED]. In addition, the address listed on the Forms 1120 tax returns for [REDACTED] was [REDACTED]. Counsel also asserts that [REDACTED] is a subsidiary of [REDACTED] and that [REDACTED] annually files a combined IRS Form 1120 income tax return. Contrary to counsel's claim, the 2000, 2001, and 2002 Forms 1120 submitted as evidence shows on the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

consolidated schedule that [REDACTED] and [REDACTED] are the only subsidiaries included in [REDACTED] consolidated tax return. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). 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). 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 record of proceeding does not contain any tax returns, audited financial statements, or annual reports from [REDACTED]. Although the regulation at 8 C.F.R. § 204.5(g)(2) permits USCIS to accept a letter from a financial officer as evidence of the petitioner's ability to pay the proffered wage in a case where the petitioner employs 100 or more workers, USCIS is never obligated to accept this evidence in lieu of tax returns, audited financial statements, or annual reports. In this matter, as the record contains inconsistencies pertaining to whether the petitioner employs more than 100 workers, the director properly requested tax returns, audited financial statements, or annual reports. The petitioner, however, has chosen not to submit any of this required evidence for [REDACTED] except for the first page of its 2005 Form 1065.

Counsel claims that USCIS is allowed to accept a statement from an officer of an organization that employs 100 or more workers, and therefore, credence should be given to the statement made by the president of [REDACTED] who indicated in a letter that the company employed over 100 workers. Contrary to counsel's claim, the petitioner [REDACTED] stated on the Form I-140 petition that it currently employed 30 workers, and there is no evidence in the record to establish that [REDACTED] is responsible for the petitioner's payroll. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988)(which indicates that in general the petitioner may not make material changes to the petition and accompanying documentation in an effort to make a deficient petition conform to USCIS requirements).

Although counsel asserts on motion that the status of the additional beneficiaries is irrelevant in that the business now employs them and pays their wages, there is insufficient evidence in the record to substantiate this claim. USCIS records show that the petitioner has filed six immigrant petitions subsequent to the priority date of the instant petition; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to

the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

Regardless, the petitioner has not provided tax returns or audited financial statements to demonstrate that [REDACTED] i.e. [REDACTED] had the ability to pay the proffered wage since the priority date of April 30, 2001. Even if the AAO were to take into consideration the tax returns submitted by [REDACTED] and [REDACTED] this evidence is insufficient to demonstrate the petitioner's ability to pay the proffered wage during the relevant years, to the present.

The assertions and the evidence presented on motion cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Finally, the petitioner has failed to address the issues involving the multiple petitions it had pending during the pendency of this case. Overall, the record is not persuasive in establishing that the job offer was realistic from 2001 to the present. The petitioner's affiliation with other entities and stockholders is irrelevant in these proceedings. The petitioner must establish its ability to pay the proffered wage. It cannot rely on the financial strength of other entities which have no obligation to pay the wage. As noted above, other than the first page of a 2005 tax return showing \$892.00 in net income, the record is entirely devoid of evidence of [REDACTED] ability to pay the proffered wage.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.