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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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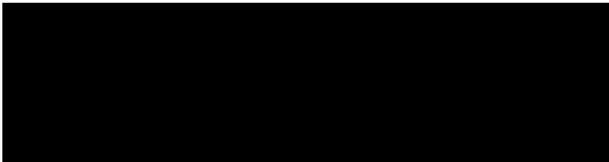
FILE:  Office: NEBRASKA SERVICE CENTER

Date FEB 02 2011

IN RE: 

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 \$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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a beauty shop. It seeks to employ the beneficiary permanently in the United States as a manager pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and 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.

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

As set forth in the director's March 20, 2009 denial, the 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.

Section 203(b)(3)(A)(iii) of 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 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.

¹ 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).

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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$488.00 per week (\$25,376 per year). The proffered position requires one year of experience in the job offered or in the related occupation of manicurist, and Illinois license. On the petition, the petitioner claims that it was established in December 2002² and has one employee. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner since June 1993.

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.

The record contains the petitioner's W-3 forms for 2001 and 2005. The petitioner's W-3 form for 2001 shows that the petitioner issued four W-2 forms in the amount of \$61,979.00 that year. However, the petitioner did not submit any W-2 forms issued to its employees for 2001. Therefore, it is not clear whether the petitioner paid any compensation to the beneficiary in 2001. With its W-3 form for 2005, the petitioner submitted two W-2 forms issued for 2005. One is issued to the alleged president and owner of the petitioner in the amount of \$19,240 and the other is issued to the instant beneficiary in the amount of \$18,870. However, the petitioner's 2005 tax return transcript submitted in response to the director's request for evidence (RFE) shows that the petitioner only paid its officers \$38,110 as the compensation of officers, but did not pay any

² The AAO notes that while the petitioner indicated July 1, 1999 as its incorporation date on its Form 1120 tax returns, the petitioner's article of incorporation shows that it was filed and the corporation was incorporated on August 11, 1999.

salaries and wages to its employees. The record does not contain any documentary evidence showing that the beneficiary is or was one of officers for the petitioner during any relevant years in the instant case. The inconsistent information raises doubts about the authenticity of the beneficiary's 2005 W-2 form. "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." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record does not contain any independent objective evidence to resolve the inconsistency between the beneficiary's W-2 form and tax return for 2005. Therefore, the AAO cannot consider the beneficiary's W-2 form issued by the petitioner for 2005 as reliable and probative evidence in determining the petitioner's ability to pay the proffered wage in this matter.

The petitioner failed to demonstrate that it paid the beneficiary the full proffered wage in any of the relevant years, and therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage of \$25,376 per year from the priority date to the present.

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*, 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 CIS, 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation and files its tax returns on the Form 1120, U.S. Corporation Income Tax Return. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. The record contains the petitioner’s Form 1120 for 2002 through 2004 and 2006, and tax return transcripts for 2005 and 2007. These tax return forms and transcripts demonstrate the petitioner’s net income as below.

- In 2002, the petitioner’s Form 1120 stated net income³ of \$2,624.00
- In 2003, the petitioner’s Form 1120 stated net income of (\$3,572.75).
- In 2004, the petitioner’s Form 1120 stated net income of (\$427.14).
- In 2005, the petitioner’s tax return transcript stated net income of \$0.
- In 2006, the petitioner’s Form 1120 stated net income of (\$10,360).
- In 2007, the petitioner’s tax return transcript stated net income of (\$2,536).

For 2002 through 2007, the petitioner did not have sufficient net income to pay the beneficiary the full proffered wage of \$25,376. Therefore, the petitioner failed to demonstrate that it had sufficient net income to pay the beneficiary the proffered wage for these years.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. Net current assets are the

³ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. A corporation's year-end current liabilities are shown on lines 16(d) through 18(d) of Schedule L. 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 Form 1120 for 2002 stated net current assets of \$12,427.24. Therefore, the petitioner failed to demonstrate that it had sufficient net current assets to pay the beneficiary the proffered wage in 2002. The petitioner did not provide any information about its assets and liabilities in Schedule L for 2003 through 2007⁵, nor did it provide any other regulatory-prescribed evidence, such as annual reports or audited financial statements, to demonstrate that it had sufficient net current assets to pay the proffered wage for these years. Therefore, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the beneficiary the proffered wage in 2003 through 2007.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. In the RFE issued on September 11, 2008, the director specifically requested the petitioner to submit its 2001, 2005 and 2007 annual reports, 2001, 2005 and 2007 U.S. tax returns, or 2001, 2005 and 2007 audited financial statements. Although specifically and clearly requested by the director, the petitioner declined to provide its annual report or audited financial statements for 2001. While the submitted letter from the Internal Revenue Services (IRS) shows that the tax return transcript for 2001 is not available, the director did not only request the tax return transcript. Instead, the director requested annual reports, tax returns or audited financial statements for these years. These documents would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. Without the requested regulatory-prescribed evidence for 2001, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage in 2001, the year of the priority date in this case which the ability to pay regulation clearly requires. *See* 8 C.F.R. § 204.5(g)(2).

⁴ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ The petitioner was not required to complete Schedule L for these years as its total receipts and total assets at the end of the tax year were never greater than \$250,000 in any of these relevant years.

Further, 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).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner failed to establish its continuing ability to pay the proffered wage with its net income or net current assets from the priority date to the present.

Counsel asserts that the owner of the petitioner had home equity of \$73,000 which can be utilized to pay the beneficiary the proffered wage and thus, can establish the petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *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). Consequently, 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. Because the petitioner in this case is structured as a C corporation and as a corporation it is a separate and distinct legal entity from its owner and shareholder, the assets of and/or her husband 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."

Counsel refers to a decision issued by the AAO , but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

As counsel asserts on appeal, USCIS may also 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 (BIA 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.

In the instant case, while counsel asserts that the petitioner has been in the business for many years, the petitioner's tax returns submitted in the record show that among the relevant six years, the petitioner's gross sales receipts are under \$100,000 for most years, and the sales have decreased from \$102,132 in 2002 to \$88,244 in 2007. The petitioner only had profits for one year at a very low level (\$2,624.00), and the business has never been profitable enough to hire a new employee. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that those six years were uncharacteristically unprofitable years for the petitioner. 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.

Counsel's assertions on appeal cannot overcome the ground of denial in the director's March 20, 2009 decision. The petitioner failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continues to the present. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

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.