

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

FEB 07 2011

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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,

Elizabeth McCormack

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied, reopened on motion, and again 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 masonry business. It seeks to employ the beneficiary permanently in the United States as a mason. 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 February 21, 2006 and December 6, 2007 denials, the first 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is [REDACTED] per hour ([REDACTED] per year based upon a 35 hour work week). The Form ETA 750 states that the position requires 2 years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The 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 is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1978. The petitioner does not indicate the number of workers it currently employs. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on January 6, 1998, the beneficiary indicates that he began working for the petitioner in December 1997.

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).

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 proffered annual wage in this case is [REDACTED]

The record of proceeding contains copies of IRS Forms W-2, Wage and Tax Statements as shown in the table below:²

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).

² Although the beneficiary stated under oath on the labor certification that he has been employed by the petitioner since December 1997, the petitioner did not submit any evidence demonstrating that it employed the beneficiary in 1998, 1999, 2000, or 2001.

- In 2002, the IRS Form 1099-MISC stated total wages of [REDACTED] (a deficiency of \$46,481.80).
- In 2003, the IRS Form 1099-MISC stated total wages of [REDACTED] (a deficiency of \$54,555.80).
- In 2004, the IRS Form 1099-MISC stated total wages of [REDACTED] (a deficiency of \$53,255.80).
- In 2005, the IRS Form 1099-MISC stated total wages of [REDACTED] (a deficiency of \$33,555.80).
- In 2006, the IRS Form 1099-MISC³ stated total wages of [REDACTED] (a deficiency of \$23,355.80).

Therefore, for the years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, and 2006, the petitioner has not established that it paid the beneficiary the full proffered wage.

If, as in this case, 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 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*, 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

³ The form is issued in the name of [REDACTED]

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 October 27, 2006, with the receipt by the director of the petitioner's response to the request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet due. The petitioner's income tax return for 2005 is the most recent return considered by the director in this matter. On appeal, the petitioner submitted its income tax return from 2006.

The petitioner's tax returns demonstrate its net income as shown in the table below:

- In 1998, the Form 1120S⁴ stated net income of [REDACTED]
- In 1999, the Form 1120S stated net income of [REDACTED]
- In 2000, the Form 1120S stated net income of [REDACTED]
- In 2001, the Form 1120S stated net income of [REDACTED]
- In 2002, the Form 1120S stated net income of [REDACTED]

⁴ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner's net income was taken from Schedule K.

⁵ It is noted that although the director requested in the request for evidence that the petitioner submit complete copies of its income tax returns, including all schedules, the complete tax returns were submitted on appeal.

- In 2003, the Form 1120S stated net income of [REDACTED]
- In 2004, the Form 1120S stated net income of [REDACTED]
- In 2005, the Form 1120S stated net income of [REDACTED]
- In 2006, the Form 1120S stated net income of [REDACTED]

Therefore, for the years 1998, 1999, 2000, 2002, 2003, 2004, and 2005, 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.⁶ 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 return demonstrates its net current assets as shown in the table below:

- In 1998, the Form 1120S stated net current assets of [REDACTED]
- In 1999, the Form 1120S stated net current assets of [REDACTED]
- In 2000, the Form 1120S stated net current assets of [REDACTED]
- In 2002, the Form 1120S stated net current assets of [REDACTED]
- In 2003, the Form 1120S stated net current assets of [REDACTED]
- In 2004, the Form 1120S stated net current assets of [REDACTED]
- In 2005, the Form 1120S stated net current assets of [REDACTED]

The record demonstrates that for the years 1998, 1999, 2000, 2002, 2003, 2004, and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the labor certification 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 asserts that the Labor Certification handbook indicates that the wage offer in the ETA 750 does not begin until the alien adjusts his or her status in the United States. Contrary to counsel's claims, as noted above, 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

⁶According 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.

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. *See Matter of Great Wall, supra; see also* 8 C.F.R. § 204.5(g)(2).

The petitioner submits a letter from its accountant dated December 19, 2007 indicating that, based on the current year's cash flow; the petitioner has sufficient income to support a salary of [REDACTED] to the beneficiary. The conclusion is not corroborated by a copy of the petitioner's 2007 tax return. The AAO has found that the petitioner had the ability to pay the beneficiary the proffered wage in 2006; during the years from 1998 to 2005, however, the petitioner has not established that it has sufficient net income or net current assets to pay the beneficiary's wage.

Counsel states that the petitioner's sole shareholder's financial circumstances should have been taken into consideration in evaluating the petitioner's ability to pay the proffered wage in light of the DOL decision *In the Matter of Ranchito Coletero*, 2002-INA-105 (BALCA Jan. 2004). Contrary to counsel's claim, unlike the instant petitioner, the above cited decision was based upon the financial circumstances of a sole proprietor and is not directly applicable to the instant petition, which concerns a corporation. Furthermore, counsel does not state how the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all employees in the administration of the Act, BALCA decisions are not similarly binding. *See also* 8 C.F.R. § 103.9(a).

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). The Court, in a similar case 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." *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Thus, the AAO will not consider the financial circumstances of the petitioner's sole shareholder to determine the petitioner's ability to pay the proffered wage.

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 [REDACTED]. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States

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

In this matter, the totality of the circumstances does not establish that the petitioner had the ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant case to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation or the occurrence of any uncharacteristic business expenditures or losses in 1998, 1999, 2000, 2002, 2003, 2004, or 2005. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

A second issue in the present matter is whether the petitioner has established that the beneficiary meets the qualifications set forth on the Form ETA 750. According to the Form ETA 750, the position requires two years of experience as a mason. In support of this claim, the petitioner submitted a letter dated October 2001 in which [REDACTED], stated that the beneficiary was employed by [REDACTED] a construction company, first as a laborer and then as a mason's helper, and that he was so employed from August 1992 through September 1995. The declarant claims to have been the beneficiary's supervisor. The declarant also describes the beneficiary's duties performed while employed by [REDACTED]. The director denied the petition noting that it was unlikely that the beneficiary gained the above noted experience when he was only between 12 and 15 years of age.

Counsel asserts on appeal that the petitioner has provided more than was requested concerning the beneficiary's past experience (three rather than two years experience) and that the statements contained in the letter from [REDACTED] are more than sufficient to establish that the beneficiary meets the qualifications set forth on the Form ETA 750.

Although the letter indicates that the beneficiary was employed for over two years, the petitioner has failed to address the issue raised by the director concerning the beneficiary being employed full-time at the age of 12 and through to the age of 15. It is further noted that the beneficiary stated under penalty of perjury on the ETA 750B, part 15 b. that he was employed by [REDACTED] as a mason from April 1993 through June 1995. He does not list any employment with [REDACTED] on the Form 750B. Further, as noted by the director, the beneficiary indicated at part 11 of the Form ETA 750 that he was enrolled in Ulises Chacon School from September 1988 to June 1994. The petitioner provides no explanation or

objective resolution of this discrepancy and inconsistency on appeal. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Accordingly, it has not been established that the beneficiary has the requisite two years of experience. 8 C.F.R § 204.5(g)(1) and (L)(3)(ii)(A). The appeal will be dismissed for this additional reason.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.