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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

FILE:



Office: TEXAS SERVICE CENTER

Date:

FEB 09 2011

IN RE:

Petitioner:



Beneficiary:

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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a polo club. It seeks to employ the beneficiary permanently in the United States as a horse trainer. 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 (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, an 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.93 per hour (\$28,974.40 per year). The Form ETA 750 states that the position requires two years of experience.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d at 145.<sup>1</sup>

Accompanying the petition and labor certification, counsel submitted, *inter alia*, a letter from the petitioner's accountant dated July 4, 2007, and the petitioner's federal income tax returns (Forms 1120S) for 2001 through 2005.

With the appeal, counsel submitted a legal brief dated July 11, 2008; a statement of earnings issued June 13, 2008, to [REDACTED] individually; a financial advisor's summary of accounts for month ending March 31, 2008, issued to [REDACTED], individually; two certificates of stock issued to [REDACTED] individually, by Americas United Bank; [REDACTED] joint personal income tax returns (Form 1040) for 2004, 2005, and 2006; a letter from [REDACTED] to [REDACTED] dated January 28, 2005; Wage and Tax Statements (W-2) issued to [REDACTED] and his spouse for 2007; bank statements stating both checking and savings balances for the period May 15, 2001, to June 15, 2001, April 8, 2008, and May 31, 2008 for [REDACTED] and his spouse; investment account statements for [REDACTED] dated December 31, 2007, and January 1, 2008; [REDACTED] joint personal income tax returns (Form 1040) with several W-2 Statements for 2004, 2005, and 2006; and the petitioner's federal income tax returns (Forms 1120S) for 2006.

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 1995. 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 March 2, 2006, 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 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

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<sup>1</sup> 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). 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).

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. 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 2001 or subsequently.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (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 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 petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>2</sup> of <\$54,251.00>.<sup>3</sup>
- In 2002, the Form 1120S stated net income of <\$47,709.00>.
- In 2003, the Form 1120S stated net income of <\$31,574.00>.
- In 2004, the Form 1120S stated net income of <\$16,320.00>.
- In 2005, the Form 1120S stated net income of <\$38,764.00>.
- In 2006, the Form 1120S stated net income of <\$30,124.00>.

Therefore, for the years 2001 through 2006, 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.<sup>4</sup> 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

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<sup>2</sup> Although the petitioner had additional adjustments shown on its Schedules K for the years for which tax returns were submitted, the adjustments did not affect the petitioner’s net income found on Form 1120S, Line 21 of its tax returns.

<sup>3</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>4</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.

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 2001, the Form 1120S stated net current assets of <\$463.00>.
- In 2002, the Form 1120S stated net current assets of \$7,594.00.
- In 2003, the Form 1120S stated net current assets of \$8,761.00.
- In 2004, the Form 1120S stated net current assets of \$7,471.00.
- In 2005, the Form 1120S stated net current assets of \$18,268.00.
- In 2005, the Form 1120S stated net current assets of \$26,567.00.

Therefore, for the years 2001 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Counsel contends on appeal that the director, in effect by not requesting additional evidence, violated the regulation at 8 C.F.R. § 103.2(b)(8) by failing to do so before denying the petition. The cited regulation states “[I]f all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence of eligibility or request that the missing initial evidence be submitted ....” 8 C.F.R. § 103.2(b)(8)(ii). In this matter, as the evidence did not demonstrate eligibility, the director did not err in denying the petition.

Even if had erred, the petitioner has supplemented the tax record on appeal, and that evidence is being considered in this proceeding. Accordingly, counsel's argument is not persuasive.

According to counsel on appeal, the petitioner is owned by two individuals and the personal incomes and assets of the principals and co-owners are evidence of 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 owners 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.

Counsel asserts that the beneficiary is an experienced horse trainer and his skills are necessary to make the petitioner successful “in the sense that the horses will be well trained and prepared for the polo matches.” According a letter statement dated July 4, 2007, from the petitioner's accountant, the beneficiary will be the petitioner's first employee and “replace many of the existing independent groomers and trainers.” Therefore, it is petitioner's assertion that the beneficiary will replace other contract workers and that the beneficiary's wages will be paid by their compensation. Proof of ability to pay begins on the priority date, April 30, 2001, when petitioner's labor certification was accepted for processing by the DOL. Petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. Presumably counsel is making the

assertion that in the future the petitioner will either adjust its work force to accommodate the beneficiary in its employ, or adjust the work force's wages to meet the proffered wage. The record does not, however, verify their full-time employment, or provide evidence that the petitioner will replace them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of these workers are performing the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If these employees performed other kinds of work, then the beneficiary could not have replaced them. Further, the petitioner has submitted no evidence of compensation paid to independent contractors so that the AAO is not able to analyze or review the petitioner's assertion.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner 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 \$100,000.00. 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 his 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, the petitioner was established in 1995 and has no employees. The petitioner's gross receipts were \$191,751.00 in 2001 and have increased each year to \$384,558.00 in 2006. Despite evidence of these gross receipts, the petitioner has suffered net income losses from 2001 to 2006, and its net current assets have been either negative or nominal in relation to its gross receipts for each year for which tax returns were submitted. According to the petitioner's accountant in his

additional horse drawn equipment and condition horse to perform in single or multiple hitch, using rein and oral commands. Train horses for show competition according to prescribed standards for gaits, form, manners, and performance, using knowledge of characteristics of different breeds and operating routines of horse shoes. Retrains horses to break habits, such as kicking, bolting and resisting bridling and grooming.

The Form ETA 750 states that the position requires two years of experience or two years in an unnamed occupation.

According to the Form ETA 750B, the beneficiary stated under penalty of perjury that he was employed fulltime as a polo horse trainer from December 1996, to January 1999, by [REDACTED] of [REDACTED]. The duties stated are exactly as stated in the offered job duties of the labor certification. After this job, the beneficiary stated he has been self-employed as a handy man in home service from February 1998 to "prsnt" (i.e. March 2, 2006).

There is no evidence submitted or allegation that the beneficiary's present employment experience is the functional equivalent of the offered position.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The sole statement submitted in the record concerning the beneficiary's qualifications is a statement provided by [REDACTED] dated April 19, 2001. [REDACTED] stated in pertinent part:

To Whom It May Concern:

This is to conform that [the beneficiary] worked for me as a Polo horse trainer and groom from December 7, 1996 to January 1999. He worked forty hours per week.

The above statement is insufficient evidence under the regulation at 8 C.F.R. § 204.5(1)(3) to demonstrate that the beneficiary is qualified to perform the duties of the offered position as described in detail in the labor certification. For example the letter does not state the beneficiary's work experience with saddle or draft horses. No other letters or statements according to the regulation at 8 C.F.R. § 204.5(1)(3) were submitted by the petitioner.

The beneficiary does not meet the experience requirements of the labor certification. The petition will be denied on this basis as well. *See* 8 C.F.R. § 204.5(1)(3)(ii)(B) (requiring sufficient evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.