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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JAN 04 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.

Elizabeth McCormack

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 an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's wage.

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 May 16, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(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 ETA Form 9089 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 ETA Form 9089 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 ETA Form 9089 was filed and accepted for processing by the DOL on June 16, 2006. The proffered wage stated on that form is \$18.15 per hour or \$37,752 per year. The ETA Form 9089 also states that the position requires two years work experience in the job offered or as an automobile mechanic.

To show that it has the ability to pay \$18.15 per hour or \$37,752 per year beginning on June 16, 2006, the petitioner submitted the following evidence:

- Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2006 and 2007;
- Copies of two checks from the petitioner to the beneficiary dated May 31, 2008 and June 14, 2008, both in the amounts of \$584.75;
- A copy of a statement of financial condition of [REDACTED] as of December 31, 2007 and a letter by [REDACTED] certified public accountant, who states that he has compiled the financial statement in accordance with Statements on Standards for Accounting and Review Services;
- A printout of [REDACTED] personal bank account statement as of March 11, 2008; and
- A letter from [REDACTED] stating that he has been the petitioner's accountant since 1999 and that the net loss in the petitioner's 2006 tax return was due to deduction of employees' salaries and wages, depreciation, inventory adjustment, and loans from shareholders.

The evidence in the record of proceeding shows that the petitioner is an S Corporation with two shareholders. [REDACTED] equally own the corporation. On the petition, the petitioner claimed to have been established in 1996, to currently employ seven workers, and to have a gross annual income and net annual income of \$493,627 and \$242,270, respectively.

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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an

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).

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.

Here, the checks dated May 31, 2008 and June 14, 2008 reflect that the beneficiary was paid by the petitioner in May and June 2008. It is not clear, however, whether the petitioner paid the beneficiary the full proffered wage. The amounts stated on the checks do not indicate, for instance, at what rate per hour the beneficiary was paid and how many hours per week he worked. The copies of the checks are not evidence of the petitioner's ability to pay the proffered wage in 2008.

When 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 USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[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 March 21, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE). As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net income (loss)² of (\$21,050) (line 21 of page one).

² 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), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). In this case, there is no additional income, credit, or deduction on the petitioner’s schedule K and thus, the

- In 2007, the Form 1120S stated net income (loss) of \$40,406 (line 21 of page one).

Based on the information above, the petitioner had sufficient net income to pay the beneficiary's wage of \$37,752 in 2007 but not in 2006.

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.³ 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 returns demonstrate its end-of-year net current assets (liabilities) for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net current assets (liabilities) of (\$117,983).

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary's wage in 2006.

Based on the net income and net current asset analysis above, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date.

On appeal, counsel for the petitioner maintains that the petitioner has the ability to pay the proffered wage. Specifically, counsel contends that USCIS should consider [REDACTED] personal wealth and assets as shown in his most recent statement of financial condition and bank account statement.

Counsel essentially wants the AAO to pierce the corporate veil and look into the personal assets of the corporation's shareholder. However, because a corporation such as the one in this case is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises 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.

petitioner's net income is found on line 21.

³ 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.

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.” It is important to note that [REDACTED] is the shareholder of petitioning corporation but not the petitioner. Therefore, the AAO cannot accept and consider any evidence of [REDACTED] personal assets. His bank statement and financial statement are both irrelevant in determining the petitioner’s ability to pay.

On appeal, the petitioner’s accountant, [REDACTED] states that the petitioner had net loss in 2006 only after it deducted \$106,935 to pay salaries and wages of employees. He also asserts that other non-cash items such as depreciation and inventory adjustment contributed to the net loss in 2006. [REDACTED] notes that had the petitioner not deducted the non-cash items and salaries and wages from its total gross income, the petitioner would have net income instead of net loss.

[REDACTED] assertions are without support. It would be improbable for the petitioner not to pay salaries and wages of employees. Salaries and wages of employees, if paid, are an expenditure that any company including the petitioner must account for in its tax returns. There is no evidence in the record indicating that any of the employees were willing to sacrifice their salaries or wages to pay for the beneficiary’s wage.

As for depreciation, the court in *River Street Donuts, supra* has held that a depreciation expense is a real expense, and thus, it should not be added back to boost or reduce the company’s net income or loss. By the same token, annual depreciation expense should not be added back to net assets.

Inventory adjustment affects the petitioner’s net current assets instead of net income or loss. The change in the value of inventory between the beginning of the year and the end of the year can be caused by multiple reasons, *i.e.* whether the petitioner uses first-in-first-out method or last-in-first-out method in its inventory counting, whether the inventory has become obsolete at the end of the year, or whether damages reduced the inventory value. [REDACTED] has not provided any reasons and corroborating evidence to explain why the petitioner should not adjust its inventory at the end of the year. Merely stating that the adjustment of inventory is the reason the petitioner does not have positive net current assets is not sufficient. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

[REDACTED] also states that loans from shareholders in the petitioner’s balance sheet (line 19, schedule L) are not in reality a liability but an asset.

We disagree. Loans from shareholders are a long-term liability account. The petitioning corporation is obligated to pay those loans back at some point in time in accordance with the agreement between the corporation and the shareholders, if any. No detailed explanation has

been provided as to why loans from shareholders are an asset to the corporation. If the petitioner wishes to rely on loans from shareholders as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that such loans will augment and not weaken the petitioner's overall financial position. Additionally, the AAO gives less weight to loans and debt as a means of paying the beneficiary's salary since the debts will increase the corporation's liabilities and will not improve its overall financial position.

Though not raised on appeal, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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, the record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage particularly in 2006. The company also does not reflect a large compensation package for its shareholders that could have been dedicated to paying the proffered wage. The tax returns do not show that the shareholders or officers of the corporation received any compensation in 2006 and 2007.

Unlike *Sonogawa*, the petitioner in this case has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1996. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

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.