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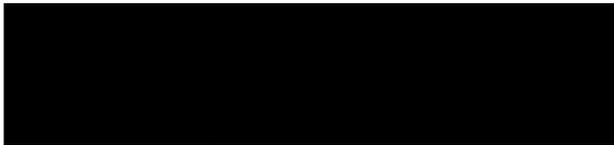
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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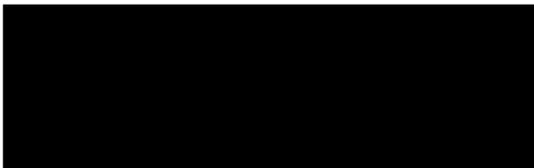
JAN 14 2011

FILE:  Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:   
Beneficiary:

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner<sup>1</sup> is a real estate management business. It seeks to employ the beneficiary<sup>2</sup> permanently in the United States as a maintenance worker. 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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).

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<sup>1</sup> The petitioner was incorporated in the State of California on October 2, 1963, as [REDACTED]. It is unclear which of these names is the official designation of the petitioner as incorporated. The petitioner uses these two names interchangeably in documents in the record. The petitioner's federal employer identification number (FEIN) is [REDACTED].

<sup>2</sup> The beneficiary is also called [REDACTED].

Here, the Form ETA 750 was accepted on April 30, 2001. The wage as stated on the I-140 petition and the Form ETA 750 is \$10.00 per hour (\$20,800.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3<sup>rd</sup> Cir. 2004).<sup>3</sup>

Accompanying the petition and labor certification, counsel submitted, *inter alia*, page one of the petitioner's federal income tax (Forms 1120) returns for 2000, 2001, 2002, 2003, and 2004.

The director issued a request for additional evidence (RFE) to the petitioner on December 4, 2008. The petitioner was requested to provide evidence that it had the financial ability to pay the proffered wage as of April 30, 2001 "and continues to have such ability." The director requested the petitioner's federal income tax returns with all schedules and attachments for 2006 and 2007, or independently audited financial statements since the priority date.

Regarding the beneficiary, the petitioner was requested to submit Wage and Tax Statements (W-2) issued to the beneficiary for the years 2001 through 2007. No W-2 Statements were submitted by the petitioner.<sup>4</sup> The director requested a detailed copy of the beneficiary's 2008 pay voucher.

In response, counsel submitted the petitioner's federal income tax return (Form 1120) for 2006, and a copy of a check, with no evidence of its cancellation,<sup>5</sup> payable to the beneficiary by the petitioner dated December 30, 2008, with a hand written notation of the beneficiary's payroll deductions.

On appeal, counsel submitted a legal brief dated March 13, 2009; investment account statements for the period April 2001 to October 2008; "Company" business checking and business money market account statements for the period January 31, 2002, to January 30, 2009; business checking account statements for the period January 31, 2003, to January 30, 2009; " investment account statements for the

<sup>3</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).

<sup>4</sup> The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

<sup>5</sup> Since there is no evidence on the copy submitted that the check was transacted, meaning received by the beneficiary, it is insufficient evidence of wage payment by the petitioner to the beneficiary in 2008.

period April 2001 to January 2009; “[REDACTED]” investment account statements for the period April 2001 to January 2009; [REDACTED] business money market account for the period January 1, 2003 through February 3, 2009; the petitioner’s federal income tax (Forms 1120) returns for 2001 (i.e. the petitioner’s fiscal year is October 1st to September 30<sup>th</sup>) through 2007; [REDACTED] unaudited financial statements dated December 31, 2004 with accounting data;<sup>6</sup> and the owner of the petitioner’s personal federal income tax returns.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1961, and to currently employ two workers. According to the tax returns in the record, the petitioner’s fiscal year begins on October 1<sup>st</sup> and ends on September 30<sup>th</sup> of the next year. On the Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary did claim to have worked for the petitioner since April 2001.

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 Sonegawa*, 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 from the priority date in 2001 or onwards.

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

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<sup>6</sup> The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant’s report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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).

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

- In fiscal year 2000\2001, the partial Form 1120 stated net income of \$12,459.00.
- In 2001\2002, the Form 1120 stated net income of \$23,792.00.
- In 2002\2003, the Form 1120 stated net income of <\$10,068>.<sup>7</sup>
- In 2003\2004, the Form 1120 stated net income of \$6,619.00.
- In 2004\2005, the Form 1120 stated net income of <\$34,480.00>.
- In 2005\2006, the Form 1120 stated net income of \$2,815.00.
- In 2006\2007, the Form 1120 stated net income of <\$6,144.00>.
- In 2007\2008, the Form 1120 stated net income of \$5,633.00.

Therefore, for the petitioner's fiscal year 2000\2001, and in fiscal years 2002\2003 through 2007\2008, the petitioner did not have sufficient net income to pay the proffered wage. In fiscal year 2001\2002, the petitioner could pay the proffered wage.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 as shown in the table below.

- The petitioner did not submit a Schedule L for its fiscal year 2000\2001.<sup>8</sup>
- In 2001\2002, the Form 1120 stated net current assets of \$50,437.00.
- In 2002\2003, the Form 1120 stated net current assets of \$17,468.00.
- In 2003\2004, the Form 1120 stated net current assets of \$19,895.00.
- In 2004\2005, the Form 1120 stated net current assets of <\$35,246.00>
- In 2005\2006, the Form 1120 stated net current assets of <\$31,289.00>.

<sup>7</sup> The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

<sup>8</sup> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

- In 2006\2007, the Form 1120 stated net current assets of <\$27,055.00>.
- In 2007\2008, the Form 1120 stated net current assets of <\$22,903.00>.

Therefore, for the petitioner's fiscal years 2000\2001, and through 2002\2003 through 2007\2008, the petitioner did not have sufficient net current assets to pay the proffered wage. In fiscal year 2001\2002, the petitioner could pay the proffered wage.

Therefore, from the date the Form ETA 750 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 its net income or net current assets except for fiscal year 2001\2002.

On appeal, counsel asserts that the petitioner has substantial liquid assets available in which to pay the prevailing wage. Counsel identifies statements of a brokerage firm, [REDACTED] and an account in the name of [REDACTED] with its account number, [REDACTED]<sup>9</sup> and states that the fund value never fell below \$148,225.11 from 2001 through 2008, and this is evidence of the petitioner's ability to pay the proffered wage. Counsel identifies other accounts (i.e., [REDACTED]) as sources from which the petitioner could pay the proffered wage. Some of the accounts mentioned are either trust accounts or personal accounts of the petitioner's owner. Therefore, counsel's statements must be qualified.<sup>10</sup>

Counsel refers to the above account and other named accounts as "liquid assets." Based upon the corporate tax returns submitted, there is no evidence that funds shown in the accounts are current assets. 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. Further, counsel has not specifically identified the assets in the various accounts referred to in the statements in general categories, so the AAO cannot analyze or review them to determine if they meet the criteria of liquid assets and are also current assets mentioned in the tax returns (and not long term investments). Counsel has not explained why such funds are not stated on the tax returns submitted as current assets.

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<sup>9</sup> The account number is obscured for privacy purposes.

<sup>10</sup> 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. 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."

Further, counsel's reliance on these "liquid assets" without taking into consideration all the petitioner's liabilities is misplaced and is duplicative of the petitioner's resources.

Counsel has submitted evidence of at least four kinds of brokerage and banking statements for a trust, a retirement account of an individual, an individual, and what may be the petitioner, all without identifying FEIN or Social Security numbers. This identification information could be used to determine if the accounts are personal to the owner, a trust's property, or are the petitioner's corporate accounts, and whether the stated interest, dividends, or capital gains/losses appear on either a petitioner's, the petitioner's owner, or a trusts' tax return. According to counsel, some accounts are not the petitioner's assets, but counsel's assertions on appeal are not evidence. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

No Form 1099-Div statements evidencing interest or dividend receipts were submitted with either the corporate or personal income tax returns to connect the named accounts to the petitioner, to the petitioner's owner, or a trust. There is no statement from the petitioner that it would utilize any brokerage or bank account to pay the proffered wage. Likewise, the petitioner's owner has made no statements to provide funds to support the petitioner's obligation to pay the proffered wage. A perusal of the petitioner's, the owner of the petitioner's, and a trust's account statements, the corporate and personal income tax returns, and other evidence, fails to demonstrate other assets held by the petitioner (not identified in the tax returns as current assets) available to pay the proffered wage in any year. Since for fiscal years 2001<sup>11</sup> through 2007, the petitioner reported an average negative net current asset deficit of <\$4,099.00>, the petitioner must demonstrate that it can not only pay the proffered wage but overcome the deficit. Counsel has not explained, if there were substantial liquid assets available, why the petitioner's current net assets were depressed for the period in which tax returns were submitted.

According to counsel, the beneficiary has been paid at the prevailing wage or higher but the petitioner "did not have proof of that." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. The AAO notes that despite a statement by counsel that the beneficiary has been employed by the petitioner since 2001, no W-2 or 1099-MISC Form statements or cancelled pay checks were introduced into evidence to show salary, wage or compensation payments to the beneficiary, although W-2 Statements were requested by the director.

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

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<sup>11</sup> Only page one of the petitioner's fiscal year 200\2001 was submitted. No Schedule L was submitted for that tax year.

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 *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 the instant case, the petitioner was established in 1961 and currently employs two workers. The petitioner's gross receipts for the eight years for which tax returns were submitted have been steadily rising from \$80,000.00 in 2000 to \$120,000.00 in 2007. Officer compensation has been modest relative to the gross receipts over the years for which tax returns were submitted. Despite these facts, net income has been only nominal and net current assets on average negative.

Counsel asserts on appeal, that the petitioner could look to other assets, not stated on Form 1120, Schedule L as current assets, to pay the proffered wage, but as already stated, this has not been demonstrated or proven to be the case. Counsel has not asserted the occurrence of any uncharacteristic business expenditures or losses, or contended that the beneficiary is replacing a former employee or an outsourced service. No payroll information such as W-2 or 1099-MISC statements were submitted by the petitioner evidencing wages paid to the beneficiary which could have been utilized to prove the petitioner's ability to pay the proffered wage. 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.

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.