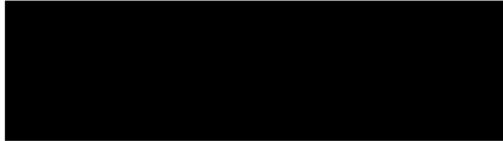


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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Date: **JUL 20 2011**

Office: TEXAS SERVICE CENTER

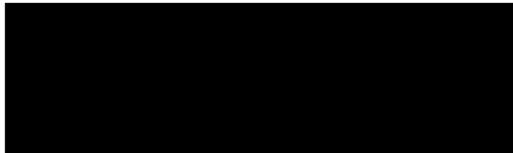
FILE: 

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 is a retail grocery and bakery. It seeks to employ the beneficiary permanently in the United States as a store manager. 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 and 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 April 8, 2009 denial, the 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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

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

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, Application for Alien Employment Certification, 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, Application for Alien Employment Certification, 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 May 4, 1998. The proffered wage as stated on the Form ETA 750 is \$18.50 per hour (\$38,480) per year. The Form ETA 750 states that the position requires

two years experience in the proffered position (or two years experience in a related occupation, “retail management – grocery”), a high school diploma or a “GED equivalent.”

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

Based on the evidence in the record of proceeding, the petitioner appears to have been structured as a sole proprietorship. The petitioner states that it was established in 1998 as a partnership, that the partnership dissolved in that year and that [REDACTED] one of the original partners, then became the sole proprietor. The petitioner then converted to a single member Limited Liability Corporation in 2007. In support of the petition, [REDACTED] Forms 1040 federal tax returns for 1998 through 2006 were submitted, and Form 1120S for the incorporated entity. On the petition, the petitioner claimed to have been established in 2007 and to currently employ 10 workers. On the Form ETA 750B, signed by the beneficiary on August 16, 2007, the beneficiary claimed to work for the petitioner since 1993.

The original partnership states a tax identification number of [REDACTED]. The new entity states a tax identification number of [REDACTED]. The record contains conflicting information regarding the petitioner’s corporate status and the date of its change. As noted, the petitioner sent tax documents reflecting sole proprietor status from 1998 to 2006. The record contains two conflicting statements from [REDACTED] a former partner of the business, regarding the dates of his partnership. In a letter dated April 29, 2009, [REDACTED] stated that he formed a partnership under which the petitioning entity was formed in the “mid-1980[s],” and that this partnership dissolved in late 1998 when [REDACTED] left to form a business of his own. In a letter dated November 27, 2007, [REDACTED] attested to the beneficiary’s employment with the petitioner from July 1998 to March 2007 as a full-time store manager. [REDACTED] states that he was an owner/partner in the business and oversaw the work of the beneficiary. [REDACTED] further states that he sold the business and that it was then incorporated in April 2007 with a new tax identification number. It is unclear how [REDACTED] could have overseen the work of the beneficiary from 1998 to 2007 as stated in his letter of November 27, 2007 if he left the business in 1998 as stated in his letter of April 29, 2009. Further, if [REDACTED] was a partner in the business until 2007 as his November 27, 2007 implies, the business tax returns would have been properly filed on a Form 1065 not the Forms 1040 submitted in this instance. This issue must be resolved in any further filings in order to properly determine what tax returns and evidence may be used to establish the petitioner’s ability to pay the proffered wage.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 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).

² USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1981) (“*Matter of Dial Auto*”) a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the

Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

Some USCIS Service Center Directors strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed "all" of the original employer's rights, duties, obligations, and assets. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor

relationship may only be established through the assumption of “all” or a totality of a predecessor entity’s rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: “One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.” *Black’s Law Dictionary* 1570 (9th ed. 2009) (defining “successor in interest”).

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.² *Id.* at 1569 (defining “successor”). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold. *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor’s ability to pay the proffered wage as of the priority date and until the

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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 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. 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 1998 onwards. The petitioner submitted W-2 Forms, however, showing wages paid to the beneficiary as follows:

- 2007 - \$27,288^{3,4}

date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. In any further filings, the petitioner should submit relevant documentation to establish the current entity is the successor-in-interest to the original business listed on the labor certification.

³ The petitioner submitted a 2007 W-2 Form showing wages paid to the beneficiary by [REDACTED] (\$6,400), a bar which the petitioner's owner claims to have owned and operated. The employer identification number on the [REDACTED] W-2 Form [REDACTED] is the same as the employer identification number on W-2 Form from the petitioner [REDACTED]. The petitioner states that it operated a grocery/bakery, a laundromat, and a bar as three separate sole proprietorships. The tax returns filed by the petitioner confirm that statement. As set forth above, the corporate formation and proper tax identification issue must be resolved before the W-2 statements can be accepted as evidence on behalf of the petitioner's ability to pay the proffered wage.

⁴ A number of the W-2 Statements contain "white out" strips, or appear to have been partially whited out. In any further filings, the petitioner should send independent evidence to confirm the amounts

- 2006 - \$24,597
- 2005 - \$21,295
- 2004 - \$20,280
- 2003 - \$19,420
- 2002 - \$18,460
- 2001 - \$17,020
- 2000 - \$15,880⁵
- 1999 - \$14,643
- 1998 - \$5,940.

Since the petitioner paid partial wages to the beneficiary as set forth above, it must establish only the ability to pay the difference between the proffered wage and wages actually paid to the beneficiary. Those sums are as follows:⁶

- 2007 - \$11,492
- 2006 - \$13,883
- 2005 - \$17,185
- 2004 - \$18,200
- 2003 - \$19,060
- 2002 - \$20,020
- 2001 - \$21,460
- 2000 - \$22,600
- 1999 - \$23,837
- 1998 - \$32,540

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.

paid, as the W-2s contain partial alterations. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁵ The petitioner did not submit a W-2 Form for the year 2000. It did submit, however, a pay stub showing year end wages for 2000 totaling \$15,880.

⁶ In order for the wages to be accepted in all years, the petitioner must resolve the issues stated above regarding the petitioner's change in corporate status, successorship, and the relevant tax identification number that should, therefore, be reflected on the W-2 Forms.

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).

The petitioner states that it was a sole proprietorship until 2007 when it incorporated.⁷ A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner submitted two separate estimates of his monthly living expenses and those of his dependents. In response to the director's January 15, 2009 request for evidence, the petitioner submitted a list of recurring monthly living expenses for the sole proprietor and his wife.⁸ The expenses submitted at that time total \$25,836 per year (\$2,153 per month). Thus, based upon those expenses, it would be necessary for the petitioner to establish that it has the ability to pay the difference between wages paid to the beneficiary⁹ and the proffered wage, plus his normal recurring living expenses and those of his dependents. Those sums are as follows:

- 2007 - \$37,328
- 2006 - \$39,719
- 2005 - \$43,021
- 2004 - \$44,036
- 2003 - \$44,896
- 2002 - \$45,856
- 2001 - \$47,296
- 2000 - \$48,436
- 1999 - \$49,673
- 1998 - \$31,776

⁷ As set forth above, the record contains discrepant information regarding whether the petitioner was structured as a partnership or as a sole proprietorship, which must be resolved in any further filings.

⁸ While the estimated expenses state that they cover the sole proprietor and his wife, the 1998 tax returns shows that the sole proprietor supported three other dependents in that year. The 1999 through 2006 tax returns show that the sole proprietor supported a wife and two other dependents. As previously noted, the petitioner states that it incorporated in 2007 and individual living expenses are not relevant for that year.

⁹ The following would represent the total amounts required to be paid if the wages paid can be accepted for all years as wages paid by the petitioner pending resolution of the proper corporate status as set forth above.

It is noted that counsel submitted a list of monthly recurring expenses signed by [REDACTED] on April 6, 2009 which lists monthly living expenses of \$1,033. Without explanation, counsel asked that the previous statement of living expenses (\$2,153 per month) be withdrawn. The unexplained discrepancy between the two sets of living expenses is material to the case as the expenses have a direct bearing on the sole proprietor's ability to pay the proffered wage from 1998 through 2006. Under the circumstances, it cannot be determined what the regular recurring living expenses of the sole proprietor and any dependents are and whether the sole proprietor had the ability to pay the difference between the proffered wage and wages paid to the beneficiary plus the regular recurring expenses from 1998 through 2006. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The sole proprietor's adjusted gross income is shown on its tax returns as follows for years 1998 through 2006:

- 2006 - \$88,707
- 2005 - \$60,620¹⁰
- 2004 - \$55,321
- 2003 - (\$132,782)
- 2002 - \$22,689
- 2001 - \$24,525
- 2000 - \$18,504
- 1999 - \$17,514
- 1998 - \$30,205

The tax returns submitted by the petitioner do not state sufficient adjusted gross income to pay the difference between wages paid to the beneficiary and the proffered wage in years 1998, 1999, 2000 or 2003. Additionally, we cannot determine the necessary living expenses of the petitioner and any dependents in any applicable year because of the unexplained discrepancy in estimated monthly

¹⁰ As the result of an Internal Revenue Service audit, the petitioner filed an amended tax return (1040X) for 2005. The petitioner's 2004 tax return shows adjusted gross income of \$55,321. A spread sheet submitted by the petitioner's certified public accountant shows adjusted gross income for 2004 to have increased to \$81,655 as the result of a 2003 and 2004 tax audit. An amended tax return for 2004 was not submitted. The accountant's spread sheet also shows an increase in adjusted gross income for 2003 from a pre-audit figure of (\$132,782) to \$270,309. An amended tax return of 2003 was not provided. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

living expense figures submitted by the petitioner discussed above. The record is also unclear about the correct adjusted gross income figure for the petitioner in 2003 and 2004 because of a discrepancy in adjusted gross income stated on the 2003 and 2004 tax returns and statements from the petitioner's certified public accountant. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592.

According to the petitioner, it changed its status from that of a sole proprietor in 2007 to a multi-member limited liability corporation and submitted a Form 1120S tax return in that regard. Ordinary income is shown on Line 21 of Form 1120S, or on line 18 of Schedule K for 2007 if entries are made on the Schedule K. Here, the petitioner had additional entries on Schedule K of its return and shows a net income on line 18 of its Schedule K of \$62,152. That sum would be sufficient to pay the difference between the proffered wage and wages paid to the beneficiary in 2007.¹¹

On appeal, counsel states that the petitioner has established the ability to pay the proffered wage based on the totality of circumstances and that the director failed to properly consider all of the evidence.

The petitioner states that it had a line of credit throughout the applicable period and that the line of credit should have been considered in determining its ability to pay the proffered wage. The AAO does not agree. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See* John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit were available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans would be reflected in the balance sheet provided in the tax return or audited financial statement and would be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit 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 the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts

¹¹ If net income is deemed insufficient to pay required wages, the petitioner's net current assets may be considered. Net current assets are determined by adding Lines 1 through 6 of Form 1120S Schedule L and then subtracting Schedule L Lines 16 through 18. In this instance the petitioner's 2007 net current assets would be \$148,736.

will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). The same rationale would apply to statements of family members in this instance who indicated that they would have loaned the petitioner sufficient sums to pay the proffered wage if needed. Further, there is nothing in the governing regulation, 8 C.F.R. § 204.5, which permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

The petitioner makes reference to the personal bank accounts of the sole proprietor and his wife stating that the funds in those accounts should be considered in determining the petitioner's ability to pay the proffered wage. Again, as stated above, the personal funds of the petitioner's owners could not be considered from 2007 onward because the petitioner incorporated in that year.¹² *See Sitar v. Ashcroft*, 2003 WL 22203713. The record contains a letter from the [REDACTED] which states that the petitioner's owner, and former sole proprietor, had a savings account which opened June 4, 1990 and had the following year-end balances from 1998 through 2008.

- 1998 - \$4,075
- 1999 - \$660.53
- 2000 - \$3,162
- 2001 - \$417
- 2002 - \$8,637
- 2003 - \$6,368
- 2004 - \$7,307
- 2005 - \$2,784
- 2006 - \$1,443
- 2007 - \$1,947
- 2008 - \$3,506

As in the instant case, where the petitioner has not established its ability to pay the difference between the proffered wage and the wages paid to the beneficiary plus the necessary living expenses of the sole proprietor and any dependents in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's bank statements must show an initial average annual balance, in the year of the priority date, exceeding the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the difference between the proffered wage and the wages paid to the beneficiary. The average annual balances in all years

¹² Similarly, the petitioner would need to resolve the issue related to its corporate status as set forth in this decision and resolve the conflicting statements regarding the dates of partnership with Josh Gelstein in order to determine definitively whether the sole proprietor's personal assets might be properly used before 2007.

for which bank balances were provided are not sufficient to cover the difference between the proffered wage and the wages paid to the beneficiary and the sole proprietor's undetermined living expenses. Thus, the sole proprietor's cash assets as reflected in his savings account do not establish the petitioner's continuing ability to pay the proffered wage.

The petitioner states that it kept several thousand dollars in cash which was used in the petitioner's check cashing business which could have been used to pay the proffered wage if needed, and that those sums were not reflected on its tax returns. While those sums may not have been specifically noted on any tax return, the funds were certainly considered as they were used to generate business income which would have been ultimately reflected on the sole proprietor's Form 1040 Schedule C. Further, there is no record of the amount of cash held or the source of any such funds. 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)).

The petitioner's owner's brother submitted a statement indicating that he would have personally provided funds to pay the proffered wage of the beneficiary if it had been necessary. 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'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 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."

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 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the

beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, we cannot conclude that the petitioner's 1998 through 2006 tax returns show sufficient adjusted gross income to pay the difference between wages paid to the beneficiary and the full proffered wage plus the necessary living expenses of the sole proprietor and any dependents, in any year from the 1998 priority date through 2006 as the necessary living expenses cannot be determined from the record based on the conflict in statements set forth above. The record does not establish that the petitioner's reputation in the community is such that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the 1998 priority date onward. The record as currently constituted contains numerous inconsistencies regarding the dates and change in corporate status, as well as the sole proprietor's personal expenses and would not warrant a favorable finding based on the totality of the circumstances. Considering the totality of circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the 1998 priority date onward.

Beyond the decision of the director, the petition may not be approved because the petitioner requested that the Form I-140 petition be adjudicated for an unskilled worker when the Form ETA 750 was certified with requirements of at least two years of experience and would reflect requirements for a skilled worker.

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

Here, the Form I-140 was filed on March 4, 2008. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for "Any other worker (requiring less than two years of training or experience)."

The regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

- (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification states that the offered position requires two years of experience in the proffered position or two years in the related occupation of "retail management – grocery." However, the petitioner requested the unskilled worker classification on the Form I-140. There is no

provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification once a decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The evidence submitted establishes that the petition requires at least two years of training or experience as stated on the labor certification. The labor certification will not support a petition for an unskilled worker. For this additional reason, the petition must be denied.

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 (9th 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).

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.