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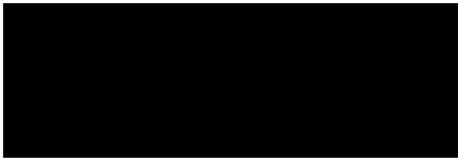
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Bz



Date:

JUL 27 2011

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

LIN [REDACTED]

IN RE:

Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a Restaurant Manager. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and 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 July 24, 2007 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 Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$17.80 per hour (\$37,024 per year). The Form ETA 750 states that the position requires two years experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, counsel submits a brief; the IRS Forms W-2, Wage and Tax Statement, issued by the petitioner (purportedly to the beneficiary) for 2001, 2002, 2003, 2004, 2005 and 2006; the beneficiary's 2007 paystubs issued by the petitioner; and, the petitioner's IRS Forms 1065, U.S. Return of Partnership Income, for 2000, 2001, 2002, 2003, 2004 and 2005.

The record indicates the petitioner is structured as a Limited Liability Company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established on March 5, 1999 and to have: a gross annual income of \$2,123,084; a net annual income of \$547,594; and, to employ eleven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 28, 2001, the beneficiary claimed to have worked for the petitioner from January 1999 to present.

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). 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 A Limited Liability Company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

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 submitted IRS Forms W-2 for 2001, 2002, 2003, 2004, 2005 and 2006 purportedly showing compensation the petitioner paid to the beneficiary. However, these Forms W-2 are not persuasive evidence of any wages having been paid to the beneficiary because information contained in these forms are inconsistent with claims made by the petitioner and the beneficiary in the Form I-140 and Form I-485 under penalty of perjury. The Forms W-2 state that the wages were paid to a person having social security number [REDACTED]. The petitioner responded "none" to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, either [REDACTED] is the beneficiary's social security number. The beneficiary also claims that he does not have a social security number in the Form I-485 and Form G-325A. Exacerbating this inconsistency, the petitioner submitted on appeal pay stubs from 2007 listing the last four digits of the beneficiary's social security number as [REDACTED], not [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms W-2 or the pay stubs as persuasive evidence of wages paid to the beneficiary. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

Regardless, assuming the persuasiveness of the Forms W-2, these forms would represent wages purportedly paid to the beneficiary as follows:

- In 2001, the Form W-2 stated compensation of \$22,935.08.
- In 2002, the Form W-2 stated compensation of \$25,434.47.
- In 2003, the Form W-2 stated compensation of \$28,888.12.
- In 2004, the Form W-2 stated compensation of \$27,304.48.
- In 2005, the Form W-2 stated compensation of \$28,123.08.
- In 2006, the Form W-2 stated compensation of \$28,912.08.

For the years 2001 to 2006, the petitioner has not established that it paid the beneficiary the full proffered wage even assuming the persuasiveness of the Forms W2.

Since the petitioner did not establish that it 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 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).

The record before the director closed on November 20, 2006 with the receipt by the director of the petitioner's Form I-140 (Immigrant Petition for Alien Worker). As of that date, the petitioner's 2004 federal income tax return was the most recent return available. However, on appeal counsel submitted the petitioner's 2005 federal income tax return which will be considered in this analysis.

The petitioner's tax returns stated its net income as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net income of \$-106,396.³
- In 2002, the petitioner's Form 1065 stated net income of \$-34,999.
- In 2003, the petitioner's Form 1065 stated net income of \$-249,981.
- In 2004, the petitioner's Form 1065 stated net income of \$-114,091.
- In 2005, the petitioner's Form 1065 stated net income of \$-120,914.

Since the Petitioner's net income for the years 2001 to 2005 show a loss, the petitioner has not established that it had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage. Therefore, USCIS will review the petitioner's net current assets.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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.

³ For an LLC taxed as a partnership, where an LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where an LLC 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.).

⁴ 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.

The petitioner's corporate income tax returns from 2001 to 2005 stated its net current assets as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net current assets of \$-27,513.
- In 2002, the petitioner's Form 1065 stated net current assets of \$10,565.
- In 2003, the petitioner's Form 1065 stated net current assets of \$-127,250.
- In 2004, the petitioner's Form 1065 stated net current assets of \$-143,542.
- In 2005, the petitioner's Form 1065 stated net current assets of \$-153,865.

For the years 2001 to 2005, the petitioner has not established that it had sufficient net current assets to pay the proffered wage.

Based on the above, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. First, counsel urges us to take into account the "Petitioner's expectations of continued increase in business and profits." Second, counsel states that "the depreciation deduction does not represent an actual loss of funds." Third, counsel states that the petitioner has been consistently paying wages for workers. Fourth, counsel states that company sales have remained consistently high.

Counsel also submits on appeal copies of the individual tax returns of one of the members of the petitioning LLC. It is noted that these tax returns, as with evidence generally pertaining to a petitioner's stockholder or member, is irrelevant to evaluating the petitioner's ability to pay the proffered wage. Because an LLC is a separate and distinct legal entity from its members and owners, the assets of its members or of other enterprises or corporations cannot be considered in determining the petitioning LLC'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 (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."

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 *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 has been in business since 1999. Its gross receipts increased from 2001 through 2005. Counsel states that the petitioner has "shown a consistent and steady increase in total income from \$442,459.00 in 2001 to \$537,154.00 total income in 2005." The Petitioner's tax returns show its total income as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated total income of \$442,459.
- In 2002, the petitioner's Form 1065 stated total income of \$527,889.
- In 2003, the petitioner's Form 1065 stated total income of \$339,125.
- In 2004, the petitioner's Form 1065 stated total income of \$547,594.
- In 2005, the petitioner's Form 1065 stated total income of \$537,154.

The Petitioner's total income increased (from the previous year total) in 2002 and 2004. However, total income decreased in 2003 and 2005. Since, the petitioner's federal tax returns do not "show a consistent and steady increase in total income," counsel's argument is unpersuasive.

Counsel's next argument is that "the depreciation deduction does not represent an actual loss of funds." However, as discussed above, the court in *River Street Donuts*, noted that adding back depreciation is without support.

Counsel further argues that the Petitioner has been consistently paying wages for workers. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, for the years 2001 to 2006, the petitioner only claims to have paid the beneficiary partial wages each year and it was not until 2007 that the petitioner started "paying the beneficiary the prevailing wage ... in a good faith effort to demonstrate his intent and ability to pay that wage"

Counsel's final argument is that company sales have remained consistently high. However, no evidence was submitted to demonstrate this will continue until the beneficiary obtains lawful permanent residence. 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)).

Furthermore, as noted above, there are serious unresolved inconsistencies in the record pertaining to the identity of the beneficiary and the petitioner's claim to have paid wages to him. The petitioner has attributed two different social security numbers to the beneficiary even though both the petitioner and the beneficiary claim that the beneficiary does not have a social security number. These inconsistencies undermine both the credibility of the Forms W-2 and the petitioner's tax and financial documentation as a whole. 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. at 591. In view of these inconsistencies, USCIS could not conclude that the totality of the circumstances weighs in the petitioner's favor.

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.

Based on the above, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.