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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

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

MAR 04 2011

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:

SELF-REPRESENTED

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. 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 pastry shop. It seeks to employ the beneficiary permanently in the United States as a pastry baker. 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, 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, 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 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 May 21, 2001. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour or \$16,640.00 per year. The position requires three years of high school education, no training, and no 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, the petitioner asserts that it generates more than enough annual income to demonstrate that it has the ability to pay the proffered wage since the priority date. The petitioner submits the beneficiary's Form W-2, Wage and Tax Statements, for 1998, 2000, 2002, 2004, 2005, 2006, 2007, and 2008, a Form 1099-MISC Miscellaneous Income, issued by the petitioner to the beneficiary for 2002, two of the beneficiary's earnings statements for pay periods ending May 28, 1999 and November 9, 2001, the beneficiary's Forms 1040A, U. S. Individual Income Tax Return, for 2003, 2004 (partial), and 2005, and the beneficiary's Forms 1040, U. S. Individual Income Tax Return, for 2006 and 2008 in support of the appeal. Relevant evidence in the record also includes Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2002, 2003, 2004, 2005, 2006, and 2007 of the S corporation, [REDACTED]

The evidence in the record of proceeding is not sufficient to determine whether the petitioner is structured as either a C corporation or an S corporation. On the petition, the petitioner claimed to have been established on September 1, 1996, \$2,942,869.00 in gross annual income, and to currently employ eighty workers. The petitioner's fiscal year cannot be determined as the record is absent any evidence such as the petitioner's tax returns or audited financial statements. While the Form ETA 750B, signed by the beneficiary on May 16, 2001, does not contain any indication that the beneficiary has worked for the petitioner, the record contains a Form W-2 statement that reflects the beneficiary may have been employed by the petitioner since 1998.

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).

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).

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 record contains Form W-2 statements and a Form 1099-MISC reflecting employee compensation paid by the petitioner, [REDACTED], with Federal Employment Identification Number (FEIN) [REDACTED] as follows:

- 2001 – No Form W-2 statement or Form 1099-MISC submitted.
- 2002 – \$20,825.87 (\$3,985.87 more than the proffered wage of \$16,640.00).
- 2003 – No Form W-2 statement or Form 1099-MISC submitted.
- 2004 – \$12,456.55 (\$4,183.45 less than the proffered wage of \$16,640.00).
- 2005 – \$11,578.11 (\$5,061.89 less than the proffered wage of \$16,640.00).
- 2006 – \$11,880.88 (\$4,759.12 less than the proffered wage of \$16,640.00).
- 2007 – \$12,622.39 (\$4,017.61 less than the proffered wage of \$16,640.00).
- 2008 – \$12,106.09 (\$4,533.91 less than the proffered wage of \$16,640.00).

Although the record contains Form W-2 statements provided by the petitioner to the beneficiary in 1998 and 2000, wages paid by the petitioner to the beneficiary in these years are not relevant in determining whether the petitioner has the continuing ability to pay the proffered wage as such employment occurred prior to the priority date of May 21, 2001. Furthermore, the various Forms W-2 and 1099 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 in the Form I-140 under penalty of perjury. The Forms W-2 and 1099 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, [REDACTED] is the beneficiary's social security number. The beneficiary also claims that she does not have a social security number in her Form I-485. 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 1099 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).

However, assuming the Forms W-2 are persuasive evidence, the petitioner has demonstrated the ability to pay the proffered wage in 2002, but has not established that it paid the beneficiary the full proffered wage in 2001, 2003, 2004, 2005, 2006, 2007, and 2008.

It is further noted that the record contains Form W-2 statements reflecting wages allegedly paid to the beneficiary by [REDACTED] with an FEIN ending in [REDACTED] 2000 and [REDACTED] with FEIN, [REDACTED] in 2004, 2005, 2006, 2007, and 2008. A review of the website at <http://www.kepler.sos.ca.gov/cbs.aspx> indicates that the petitioner, [REDACTED] and [REDACTED], may share common owners and shareholders. Nevertheless, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. 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 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). 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." Hence, since [REDACTED] and [REDACTED] are distinct and separate legal entities from the petitioner, these business concerns have no legal obligation to pay the wage of the beneficiary.

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. 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 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on February 17, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence (RFE) in which the director requested that the petitioner provide federal tax returns for 2001, 2002, 2003, 2004, 2006, and 2007. Although the director erroneously noted that the petitioner had previously provided a federal tax return for 2005 in the RFE, a review of the record reveals that the petitioner has failed to provide any federal tax returns. Rather, the record contains the Form 1120S tax returns of [REDACTED] with FEIN, [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2006, and 2007. Therefore, it cannot be determined whether the petitioner had sufficient net income to pay the difference between the proffered wage and wages already paid in 2001, 2003, 2004, 2005, 2006, 2007, and 2008, even assuming the Forms W-2 and 1099 are persuasive evidence.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.² A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. However, without the petitioner’s federal tax returns it cannot be determined if the petitioner had sufficient net current assets to pay the difference between

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the proffered wage and wages allegedly already paid in 2001, 2003, 2004, 2005, 2006, 2007, and 2008.

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 wages paid to the beneficiary, or its net income, or net current assets.

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. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. 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, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonogawa*. Unlike *Sonogawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in September 1996. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage. As noted above, the record is devoid of any financial evidence pertaining to the petitioner, [REDACTED] and contains unresolved inconsistencies surrounding the beneficiary's identity and purported wages paid to her.

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. 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.