

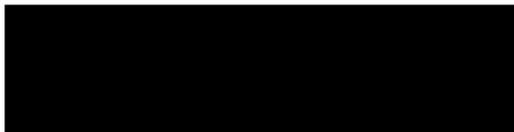
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAR 11 2011**

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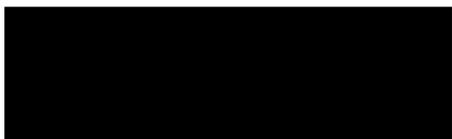
Petitioner:

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a realty corporation. It seeks to employ the beneficiary permanently in the United States as a building maintenance repairer. 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 March 28, 2008 denial, the primary issue in this case is whether 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).

In this matter, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$16.98 per hour based upon a 35 hour work week (\$30,903.60 per year). The Form ETA 750 states that the position requires 2 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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner states that it was established on March 23, 1994, and that it currently employs six workers. According to the tax returns in the record, the petitioner's tax year is based on a fiscal year from June 1 to May 31. On the Form ETA 750B, signed by the beneficiary on January 13, 1998, the beneficiary claims to have been employed by the petitioner since June 1989.

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 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. The proffered wage is \$30,903.60. Counsel asserts that the beneficiary resides in one of the petitioner's apartments, rent free, and that the value of the apartment rent should be considered in determining the petitioner's ability to pay the proffered wage. Contrary to counsel's claim, in this matter the rent value of the beneficiary's apartment is not considered wages, and therefore, cannot be used to assess the petitioner's ability to pay the proffered wage. "The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage." *See* 20 C.F.R. § 656.20(c)(3). The

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).

petitioner also claims that the beneficiary was paid approximately \$600 per month in “stipends.” In support, the petitioner did not submit Forms W-2 or 1099 to substantiate its claim. Instead, the petitioner submitted copies of statements and checks made payable to the beneficiary. However, the petitioner is not the entity which paid the beneficiary these purported amounts. The payor on the check is a limited liability company called [REDACTED]. Accordingly, as this is a separate legal entity from the petitioner, its payment of wages to the beneficiary is not evidence of the petitioner’s ability to pay the proffered wage. Likewise, even assuming the provision of free lodging to the beneficiary could be considered “wages” for purposes of evaluating the petitioner’s ability to pay the proffered wage, which it can not, it does not appear from the record, including the petitioner’s tax returns, that the petitioner is the owner of the property at [REDACTED] in which the beneficiary is living. This appears to be owned by [REDACTED]. Again, evidence of the beneficiary being compensated by a third party is not evidence of the petitioner’s ability to pay the proffered wage. 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. 1980). 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.”

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage throughout the designated period, then 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, the petitioner showing that it 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 record before the director closed on December 4, 2007, with the receipt by the director of the petitioner’s submission of evidence in response to the director’s Request for Evidence (RFE). As of that date, the petitioner’s 2007 federal income tax return was not yet due. The petitioner’s income tax return for 2006 was the most recent return considered by the director.

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

- In 1997 (June 1, 1997 to May 31, 1998), Form 1120 stated net income of \$9,118.00.²
- In 1998 (June 1, 1998 to May 31, 1999), the Form 1120 stated net income of (\$8,600.00).
- In 1999 (June 1, 1999 to May 31, 2000), the Form 1120 stated net income of (\$3,621.00).

² This date is before the priority dated and therefore, the petitioner’s 1997 tax return will not be considered other than generally.

- In 2000 (June 1, 2000 to May 31, 2001), the Form 1120 stated net income of (21,542.00).
- In 2001 (June 1, 2001 to May 31, 2002), the Form 1120 stated net income of (\$20,928.00)
- In 2002 (June 1, 2002 to May 31, 2003), the Form 1120 stated net income of (\$9,344.00).
- In 2003 (June 1, 2003 to May 31, 2004), the Form 1120 stated net income of (\$11,706.00).
- In 2004 (June 1, 2004 to May 31, 2005), the Form 1120 stated net income of (\$22,911.00).
- In 2005 (June 1, 2005 to May 31, 2006), the Form 1120 stated net income of \$12,358.00.
- In 2006 (June 1, 2006 to May 31, 2007), the Form 1120 stated net income of (\$27,235.00).

Therefore, for the fiscal years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net income to pay the proffered wage to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-fiscal year net current assets as shown in the table below.

- In 1997 (June 1, 1997 to May 31, 1998), Form 1120 stated net current assets of \$5,745.00.⁴
- In 1998 (June 1, 1998 to May 31, 1999), the Form 1120 stated net current assets of \$00.00.
- In 1999 (June 1, 1999 to May 31, 2000), the Form 1120 stated net current assets of \$00.00.
- In 2000 (June 1, 2000 to May 31, 2001), the Form 1120 stated net current assets of \$00.00.

³According 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.

⁴ This date is before the priority dated and therefore, the petitioner's 1997 tax return will not be considered other than generally.

- In 2001 (June 1, 2001 to May 31, 2002), the Form 1120 stated net current assets of \$18,260.00.
- In 2002 (June 1, 2002 to May 31, 2003), the Form 1120 stated net current assets of \$10,372.00.
- In 2003 (June 1, 2003 to May 31, 2004), the Form 1120 stated net current assets of \$6,811.00.
- In 2004 (June 1, 2004 to May 31, 2005), the Form 1120 stated net current assets of \$00.00.
- In 2005 (June 1, 2005 to May 31, 2006), the Form 1120 stated net current assets of \$1.00.
- In 2006 (June 1, 2006 to May 31, 2007), the Form 1120 stated net current assets of \$21,167.00.

The evidence demonstrates that for the fiscal years 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage to the beneficiary.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner did not establish that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of the petitioner's net income or net current assets.

On appeal, counsel asserts that the director erred in not properly assessing the totality of the circumstances which demonstrated the petitioner's ability to pay the proffered wage. Counsel further asserts that when taken into consideration, other sources of income such as the petitioner's shareholder's real estate holdings and other assets demonstrate the petitioner's ability to pay the proffered wage. The petitioner submits a copy of the shareholder's IRS Forms 1040 for 1998 through 2006 as evidence of his assets.

Contrary to the claims made on appeal, USCIS rejects the idea that the shareholder's assets, including their income, should have been considered in the determination of the ability to pay the proffered wage. USCIS (legacy INS) has long held that it 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. As noted above, 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, and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders, including real estate values, rental income, or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel asserts that the sole shareholder's income from compensation to officers should be considered in determining the petitioner's ability to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable

income. Compensation of officers is an expense category explicitly stated on the Form 1120, U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that according to the petitioner's IRS Form 1120, first page at line 12 (Compensation of Officers), the petitioner elected to pay in officer compensation \$27,300.00 in 1998, 1999 and 2000; \$35,180.00 in 2002; and \$31,200.00 in 2003 through 2006, respectively. The shareholder's IRS Forms 1040 list the same amounts noted above. However, there is no evidence in the record of proceeding e.g. sworn affidavits by the shareholder to show that the shareholder agreed to forego his compensation from the priority date until the beneficiary obtains lawful permanent residence status in the annual amount of \$30,903.60, the proffered wage in this matter. Without such proof, the AAO may not consider the officer's compensation to determine the petitioner's ability to pay the proffered wage. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). Regardless, it is not credible that the petitioner's owner would have foregone virtually all of his salary for nine consecutive years, and, if he could, that these funds would have been shunted to the beneficiary when the petitioner had net income loss in 1998, 1999, 2000, 2001, 2002, 2003, 2004, and 2006.

Regarding the shareholder's real property, they are not readily liquefiable assets. Further, it is unlikely that a shareholder would sell such a significant personal asset to pay the beneficiary's wage. Finally, it is speculative to claim that funds from the sale of real property would be available specifically to be used to pay the proffered wage. *See Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Regardless, as explained above, the assets of shareholders may not be considered in evaluating the petitioner's ability to pay the proffered wage.

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record 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 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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 1998 through 2006. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in 1998 through 2006. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary has two years experience in the job offered or in a related occupation. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a janitorial manager. The petitioner submitted a letter of employment dated August 24, 2006 from the vice president of [REDACTED] who stated that the company employed the beneficiary as a maintenance building repairer from April 1987 through June 1989, and that during that time period, the beneficiary performed a variety of maintenance and repair work for the department building. However, this employment letter does not include a specific description of the job duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 14, 1998. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. For this additional reason, the petition may not be approved. 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 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.