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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

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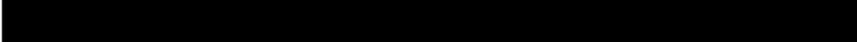
U.S. Citizenship
and Immigration
Services



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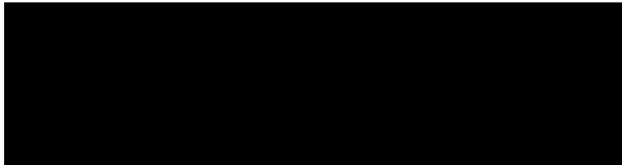
FILE:  Office: NEBRASKA SERVICE CENTER

MAR 29 2011
Date:

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an 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:

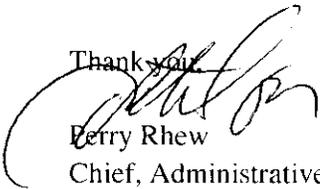


INSTRUCTIONS:

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 your 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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will affirm the previous decisions of the director and the AAO. The petition remains denied.

The petitioner, [REDACTED] is a restaurant. It sought to employ the beneficiary permanently in the United States as a Mexican specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.¹

The director denied the petition on August 16, 2007, concluding that the petitioner had failed to establish its continuing financial ability to pay the proffered wage. On May 12, 2008, the AAO dismissed the appeal² and affirmed the director's denial, determining that the petitioner had failed to demonstrate that it has had the continuing ability to pay the proffered wage.³

On June 11, 2008, the petitioner, through current counsel, has filed a motion to reconsider and to reopen. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other

¹ Counsel states on motion that the current beneficiary is the nephew of one of the corporate petitioner's 50% shareholders. Under previous policy permitting substitutions, the beneficiary had been substituted for the original beneficiary specified on the approved labor certification. DOL amended the administrative regulations at 20 C.F.R. part 656 through a final rulemaking published on May 17, 2007, which took effect on July 16, 2007(71 FR 27904). The regulation at 20 C.F.R. § 656.11 prohibits the alteration of any formation contained in the labor certification after the labor certification is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. For individual labor certifications filed with [DOL] prior to March 28, 2005, a new Form ETA 750 (sic), Part B signed by the substituted alien must be included with the preference petition. For individual labor certifications filed with the DOL on or after March 28, 2005, a new ETA Form 9089 signed by the substituted alien must be included with the petition. USCIS continued to accept Form I-140 petitions that request labor certification substitution that were filed prior to July 16, 2007. This petition was filed on May 7, 2007.

² The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

³ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits new evidence related to the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act 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 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 approved labor certification, 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 overall 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).⁴

The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, as shown on the Form ETA 750, the priority date is April 23, 2001. The

⁴ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

proffered wage is \$11.87 per hour, which amounts to \$24,689.60 per year. The record does not indicate that the petitioner has employed or paid compensation to the beneficiary.⁵

In its previous decision the AAO explained the process of reviewing a petitioner's ability to pay a proposed wage offer to a beneficiary. In that case, it reviewed the 2001- 2006 corporate tax returns that were provided, as well as other materials, and determined that the corporate petitioner had not demonstrated that it had the continuing ability to pay the proffered wage of \$24,689.60 beginning as of the April 23, 2001 priority date. Specifically, the AAO noted that no corporate petitioner's ability to pay had not been established for 2001, 2002 and 2003 and that neither the 2006 change of filing status to a C corporation or the omissions in Schedule L had been adequately explained.

The AAO also noted that USCIS records reflected that [REDACTED] had filed at least 32 other I-140 petitions including at least six in 2007 and, if filed by the petitioner, the petitioner would need to establish its ability to pay for each sponsored worker from each respective priority date onward.

On motion, current counsel does not address the petitioner's ability to pay in 2001, 2002 or 2003 or the change in filing status, or address the multiple sponsored workers, but emphasizes that there were four [REDACTED] restaurants when the petitioner filed the labor certification application and now there are four more [REDACTED] and that all should be collectively considered in reviewing this corporate petitioner's ability to pay the proffered wage. Counsel provides partial copies of some of these other corporate entities' tax returns in order to illustrate the petitioner's ability to pay the proffered wage. Seven other businesses' tax returns are submitted. They are identified by seven different federal employer identification numbers consisting of: 1) 52-xxxx873; 2) 52-xxxx307; 3) 52-xxxx189; 4) 54-xxxx260; 5) 42-xxxx395; 6) 20-xxxx609. It is noted that the petitioner's FEIN is 52-xxxx674.

Counsel's assertions are unpersuasive. Pursuant to the regulation at 20 C.F.R. § 656.3, "An employer must possess a valid Federal Employer Identification Number (FEIN)." If the two companies have separate tax identification numbers, they would be separate employers. In this case, regardless of any affiliation because of common ownership or related individuals acting as agents, officers or directors, the tax returns filed by entities with different FEINs will not be considered in reviewing the petitioner's ability to pay the proffered wage because they are separate entities. 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

⁵ On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on May 7, 2007, the petitioner states that it was established on August 1, 2001, currently employs sixty workers, reports a gross annual income of \$3,316,529 and an annual net income of \$211,117. The petitioner apparently used the establishment date as the date that it elected to become an S Corporation as reflected on its tax return. The date of incorporation is given as August 28, 2000.

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). 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."

It remains that the named employer certified on the ETA Form 750 is a corporation and must establish its own continuing ability to pay the proffered salary. Counsel cites no legal authority compelling USCIS to view the value of other corporations' resources as indistinguishable from that of the petitioner's. Further, it is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

As noted in the AAO's previous decision (page 6), the petitioner failed to establish that it has had the *continuing* ability to pay the proffered wage in 2001, 2002 or 2003 through either its net income or net current assets.⁶

⁶ The petitioner failed to provide a tax return for tax year 2000 that covered the priority date of April 23, 2001 onward until August 1, 2001. The tax return submitted for 2001 also failed to show that either its net income of -\$126,379 or its net current assets of -\$426,095 could pay the proffered wage. In 2002, neither its net income of -\$6,065 nor its net current assets of -\$380,443 could cover the proffered wage. Additionally, in 2003, neither its net income of \$17,631 nor its net current assets of -\$218,475 could cover the proffered wage. Finally, although we note that counsel has submitted copies of the petitioner's corporate tax returns of 2007 and 2008 on motion, which both show sufficient net income to cover the proffered wage of the instant

In some cases, USCIS may consider the overall circumstances 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.

In the instant case, while the petitioner has shown increasing gross sales since 2001, it is also noted that it filed a labor certification application less than a year after it was established and also, as noted above, posted negative or very modest net income for the first three years and substantial negative net current assets for the first three years. No unique business circumstances, including reputational factors analogous to those in *Sonogawa*, have been submitted in this case that would support eligibility for approval on this basis. The petitioner has also failed to account for the multiple beneficiaries that it sponsored, and must show that it can pay the proffered wage for each sponsored worker.

Based on the foregoing, the petitioner has failed to establish that it has had the *continuing* ability to pay the beneficiary the required wage from the priority date until the time of adjustment.

The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated May 12, 2008, is affirmed. The petition remains denied. The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated May 12, 2008, is affirmed. The petition remains denied.

beneficiary, until the petitioner provides information as to which preference petitions it has filed for other beneficiaries, including proof of employment and wages paid if applicable, it is unclear if the remaining years of tax returns from 2004, 2005, 2006, 2007 and 2008 would be sufficient to cover multiple petitions.