

(b)(6)

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



DATE: **JUL 09 2012**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a company which produces financial management software for automobile dealerships. It seeks to employ the beneficiary permanently in the United States as a computer software engineer. 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 4, 2009 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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on July 30, 2004. The proffered wage as stated on the Form ETA 750 is \$80,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in computer science, one year and six months of training in the automobile dealership industry and either two years of experience in the job offered or one year of experience in the field of accounting.

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; an affidavit dated April 3, 2009 from [REDACTED] copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2005, 2006, 2007 and 2008; copies of pay statements which the petitioner issued to the beneficiary in 2009; an unaudited profit and loss statement for the petitioner for 2008; copies of the petitioner's federal income tax returns for 2004, 2005, 2006 and 2007; copies of the petitioner's bank statements for all 12 months of 2004, all 12 months of 2005, February, March and May through December of 2006, January through November of 2007, January, February and July through November of 2008, and January and February of 2009; copies of investment account statements for [REDACTED] for 2004, 2005 and 2006; copies of checking account and money market account statements for [REDACTED] for 2007; a proposal dated January 30, 2009 for the provision of services by the petitioner to [REDACTED] and an undated memorandum of understanding between the petitioner and [REDACTED]

The evidence in the record of proceeding shows that from at least 2004 until 2006 the petitioner was structured as an S corporation. From 2007 onward, the petitioner has been structured as a C corporation.² On the petition, the petitioner claimed to have been established in 1997 and currently to employ eight 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 July 22, 2004, the beneficiary claimed to have worked for the petitioner, on different projects, from August 2002.

On appeal, counsel asserts that in making a determination regarding the petitioner's ability to pay, United States Citizenship and Immigration Services (USCIS) should consider the personal assets of the petitioning corporation's major shareholder and that such consideration is allowed as articulated

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The petitioner did not provide an explanation describing precisely why or on what date it underwent its corporate restructuring. Rather, for 2004, 2005 and 2006, the petitioner supplied copies of its U.S. Income Tax Return for an S Corporation (Form 1120S). However, for 2007, the petitioner provided a copy of its U.S. Corporation Income Tax Return (Form 1120). The petitioner uses the same Federal Employer's Identification Number (FEIN) on both sets of income tax returns, utilizes the same business address, and has the same ownership, at least as of 2007.

in three decisions rendered by the DOL's Board of Alien Labor Certification Appeals (BALCA). Counsel also asserts that the combination of the major shareholder's personal assets, the improving financial performance of the company and the president's willingness to fund the petitioning enterprise, personally, warrants approval of the instant petition. Counsel further asserts that the employment of the beneficiary is critical to the continued growth of the petitioner's business. Additionally, counsel asserts that USCIS should consider the totality of the petitioner's financial circumstances when ascertaining whether the petitioner has the ability to pay.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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'l Comm'r 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 provided copies of IRS Form W-2 which it issued to the beneficiary in 2005, 2006, 2007 and 2008. The petitioner also provided a document entitled, "W-2 backup" which identifies the 2004 wages paid to four employees, enumerating the wages paid to each employee individually. The beneficiary's IRS Form W-2, Wage and Tax Statement, for 2005, 2006, 2007 and 2008 and the W-2 backup for 2004 shows compensation received from the petitioner, as shown in the table below.

- In 2004, the Form W-2 stated compensation of \$45,958.92.
- In 2005, the Form W-2 stated compensation of \$46,119.28.
- In 2006, the Form W-2 stated compensation of \$58,921.28.
- In 2007, the Form W-2 stated compensation of \$64,265.71.
- In 2008, the Form W-2 stated compensation of \$85,391.91.

In the instant case, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2008. However, in 2004, 2005, 2006 and 2007, the petitioner demonstrates having paid the beneficiary a portion of the proffered wage. Since the petitioner did pay a portion of the proffered wage in 2004, 2005, 2006 and 2007, it must demonstrate the ability to pay the difference between the wages already paid and the proffered wage in those years, that difference being \$34,041.08 in 2004, \$33,880.72 in 2005, \$21,078.72 in 2006 and \$15,734.29 in 2007.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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).

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. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2004, the Form 1120S stated a net loss³ of \$22,112.00.
- In 2005, the Form 1120S stated a net loss of \$4,873.00.
- In 2006, the Form 1120S stated net income of \$4,514.00.⁴
- In 2007, the Form 1120⁵ stated net income of \$11,822.00.⁶

Therefore, for the years 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net income to pay the difference between wages already paid and the full proffered wage.

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.⁷ A corporation’s year-end current assets are shown

³ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation 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, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 14, 2012) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2006, the petitioner’s net income is found on Schedule K of its tax return for that year only. The petitioner did not report other income, credits, deductions or other adjustments for 2004 or 2005. Therefore, the petitioner’s net income for those years is found on line 21 of the first page of Form 1120S.

⁴ The director erroneously identified the petitioner’s net income for 2006 as \$21,685 because he did not consider Schedule K.

⁵ As mentioned above, from at least 2004 through 2006, the petitioner was structured as an S corporation, having submitted its U.S. Income Tax Returns for an S Corporation (Form 1120S) for those years. In 2007, the petitioner seems to have restructured to a C corporation and submitted its U.S. Corporation Income Tax Return for that year.

⁶ 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.

⁷ 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,

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-year net current assets for 2004, 2005, 2006 and 2007 as shown in the table below.

- In 2004, the Form 1120S, Schedule L stated net current liabilities of \$131,383.00.
- In 2005, the Form 1120S, Schedule L stated net current liabilities of \$70,214.00.
- In 2006, the Form 1120S, Schedule L stated net current liabilities of \$121,523.00
- In 2007, the Form 1120, Schedule L stated net current liabilities of \$114,362.00.

Therefore, for the years 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the full proffered wage.

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.

On appeal, counsel asserts that three decisions issued by BALCA support the consideration of the personal assets of the petitioner's major shareholder. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the \$4 million personal assets of the corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel is citing *Far East International, Inc.*, 1993-INA-22 (1993 BALCA), for the proposition that an owner's assets are allowed for consideration in a determination of the ability to pay.

Counsel, however, does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

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 case of *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

In *Far East International, Inc.*, the BALCA panel did not base its decision upon consideration of the petitioner's personal assets. Rather, the panel indicated that in response to the Certifying Officer's Notice of Findings, the petitioning entity provided evidence of its owner's personal assets and that the Certifying Officer did not consider such personal assets as available to the petitioner for purposes of paying the proffered wage. Ultimately, the BALCA panel approved the application, finding that the petitioner had to demonstrate an ability to pay beginning on September 20, 1991 and was able to do so, at least by that date, having also provided a logical explanation for prior losses. Thus, that situation does not correspond with the situation in the instant petition.

On appeal, counsel further asserts that the personal assets of the petitioner's owner, the improving financial performance of the company and the President's stated willingness to continue to fund the petitioner warrant the approval of the instant petition.

As has been discussed above, the decisions of BALCA are not binding upon USCIS. Further, the facts involved in each of the three cases cited are distinguishable from the facts of the instant case. Moreover, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (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."

Therefore, USCIS cannot consider the personal assets or personal assurance of any of the petitioner's shareholders in a determination of the petitioner's ability to pay.

With respect to whether or not the petitioner has demonstrated improving financial performance, we will discuss that issue below. However, it is worth noting at this point, that in her discussion of the petitioner's profitability, counsel refers to an unaudited profit and loss statement for 2008 which she provided on appeal.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel also asserts that the beneficiary is critical to the continued positive growth and financial success of the petitioning entity.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Therefore, USCIS may not issue a positive finding in favor of the petitioner's ability to pay on the petitioner's assurance that the beneficiary will generate future income for its company.

On appeal, counsel also asserts that USCIS should consider the totality of the petitioner's financial circumstances in making a determination regarding the petitioner's ability to pay.

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

In the instant case, at the time the petition was filed, the petitioner claims to have been doing business for nine years. However, the petitioner has provided regulatory prescribed evidence for only four of those years. Whereas in *Sonogawa*, that petitioner was able to demonstrate 11 years of profitability with a shortfall in only one year due to specific unforeseen circumstances, in the instant matter the petitioner has demonstrated only two years of profitability, and those of only marginal nature, against two years of unprofitability. The petitioner has not demonstrated the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's

reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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 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.