



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: JUN 14 2012

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 with the field office or service center that originally decided your case by filing a 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

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DISCUSSION: The preference visa petition was denied by the Director, the 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 carpet sales and service business. It seeks to employ the beneficiary permanently in the United States as a carpet installer. 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 April 7, 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 April 25, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$17.78 per hour (\$36,982.40 per year). The Form ETA 750 states that the position requires four years of 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.²

On appeal, counsel submitted only a single letter dated April 20, 2009 from [REDACTED] Human Resources Director of [REDACTED]

The evidence in the record of proceeding does not indicate the nature of the petitioner's corporate structure. On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of \$0, and currently to employ 120 workers. The petitioner provided no tax returns and, therefore, has not identified whether its fiscal year is based upon a calendar year. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary claims to have worked for the petitioner since February 1998.³

On appeal, counsel provides a document which she asserts will demonstrate the petitioner's ability to pay the beneficiary the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

¹ Form ETA 750 was initially filed by [REDACTED]. However, prior to certification, the DOL registered a change of the employer's name and address to reflect [REDACTED]

² 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).

³ Initially, the beneficiary claimed to have worked for [REDACTED] the company which initially filed the labor certification, from February 1998 until the time that the labor certification was filed. However, the DOL registered a change, indicating that the beneficiary worked for [REDACTED] for the period of time indicated. Further, the petitioner provided a letter dated July 23, 2007 from [REDACTED], stating that the beneficiary had been employed by [REDACTED] as a carpet installer since February 1998 until the present. Additionally, the petitioner provided W-2 statements issued to the beneficiary by [REDACTED] dating from 2001 until 2008.

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Comm'r 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,⁴ 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'l Comm'r 1967).

Form ETA 750 was initially filed by [REDACTED] but was certified for [REDACTED]. According to the web site of the California Secretary of State, <http://kepler.sos.ca.gov/cbs.aspx> (accessed April 25, 2012), and public records accessed through [REDACTED] business operations were suspended on December 3, 2003. Since the DOL registered the change in employers prior to certifying Form ETA 750, it would appear that the petitioner is a successor-in-interest to [REDACTED]. Thus, under such circumstances, the petitioner must demonstrate that [REDACTED] had the ability to pay the beneficiary the proffered wage from the priority date until the transfer of ownership to [REDACTED]. *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm'r 1986) at 482 ("*Matter of Dial Auto*"). In the instant situation, the petitioner provided no evidence of the predecessor's ability to pay the proffered wage during 2001, 2002 or 2003.

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.

At this point it is worthy of note that the petitioner which filed Form I-140 is identified as [REDACTED], using the Federal Employer's Identification Number (FEIN): [REDACTED]. The petitioner's business address is [REDACTED]. According to public records, accessed through [REDACTED] the FEIN [REDACTED] is registered to [REDACTED].

⁴ In addition, the petitioner has filed two other Immigrant Petitions for Alien Workers (Form I-140): [REDACTED], the priority dates being April 26, 2001 and April 25, 2001 respectively. Though both petitions were approved and the beneficiaries have adjusted their status to that of lawful permanent residents, both petitions were pending at the time the instant petition was filed. [REDACTED] was approved on November 27, 2006 and [REDACTED] was approved on February 8, 2007. Further, the beneficiary of the first petition adjusted his status on March 9, 2007 while the second beneficiary adjusted his status on October 7, 2008. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Based upon the dates of adjustment, the petitioner would had to have demonstrated the ability to pay all three beneficiaries until 2007 and then two beneficiaries through 2008.

██████████ Oregon. As evidence of its ability to pay, the petitioner provided a letter dated July 23, 2007 from ██████████ who identifies himself as the President of ██████████. The letter is written on ██████████ letterhead but bears the address ██████████. According to public records, ██████████ is registered as the president of ██████████ in Milwaukie, OR. Public records show that ██████████ is registered as the president of ██████████, Inc. in ██████████ CA.

The petitioner submitted Forms W-2 which were issued to the beneficiary by ██████████ in ██████████ Oregon for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. The beneficiary's IRS Forms W-2 show compensation received from ██████████, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$9,230.00.
- In 2002, the Form W-2 stated compensation of \$15,370.00.
- In 2003, the Form W-2 stated compensation of \$18,165.00.
- In 2004, the Form W-2 stated compensation of \$16,250.00.
- In 2005, the Form W-2 stated compensation of \$16,750.00.
- In 2006, the Form W-2 stated compensation of \$15,208.00.
- In 2007, the Form W-2 stated compensation of \$14,448.81.
- In 2008, the Form W-2 stated compensation of \$16,301.00.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently through 2008. The petitioner is obligated to demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in each year.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 corporation, USCIS considers net income to be the taxable income before net operating loss deduction and special deductions, as shown on federal corporation income tax returns (e.g. Forms 1120 or 1120S). The record before the director closed on March 13, 2009 with the receipt by the director of the petitioner's submission 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 would have been the most recent return available. However, though requested to do so, the petitioner did not provide its federal corporate income tax return for any of the years under consideration either in response to the director's request for evidence or on appeal. Additionally, though the regulations permit the submission of annual reports or audited financial statements for purposes of demonstrating the ability to pay, the petitioner did not provide these forms of evidence either.

In lieu of federal income tax returns, the petitioner initially submitted a letter dated July 23, 2007 from [REDACTED], President of [REDACTED]. In his letter, Mr. [REDACTED] states:

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In accordance with 8 CFR 204.5(g)(2), we hereby state and confirm that [REDACTED] currently employs over 120 employees and is fully capable of meeting payroll for [the beneficiary].

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage (emphasis added).

The regulation at 8 C.F.R. § 204.5(g)(2) identifies three pieces of documentation, any one of which is required to demonstrate the ability to pay, those documents being federal income tax returns, audited financial statements or annual reports. The regulation indicates that in certain circumstances, the director may accept a statement from a financial officer of the organization. However, the regulatory language does not compel the director to consider such evidence, particularly if there is reason to doubt its veracity.

Though Mr. [REDACTED] indicates that he is the President of [REDACTED] he does not indicate whether he is also the organization's financial officer. Further, in Part 5 of Form I-140, the petitioner indicated that both its gross annual and net annual incomes are \$0. For these reasons, the director was warranted in issuing a request for evidence.⁵ In this case, the director requested that the petitioner supply the W-2 statements which it issued to the beneficiary for the years 2001 through 2008. The director then requested the petitioner's federal income tax returns for any years in which the petitioner paid the beneficiary less than the proffered wage. In its response, the petitioner submitted W-2 statements which were issued to the beneficiary by [REDACTED] but did not provide the requested federal income tax returns, even though the W-2 statements show that the beneficiary was never paid the full proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the years 2001 through 2008. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

⁵ The director would have also been warranted in issuing a request for evidence since a successor-in-interest seems to have been effected during the labor certification process and the petitioner provided no evidence demonstrating that the predecessor had the ability to pay the proffered wage from the priority date in 2001 until the transfer of ownership to the petitioner which seems to have occurred in December 2003. *See Matter of Dial Auto*, 19 I&N Dec. at 482. In his request, however, the director did not address this issue.

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Based upon the petitioner's failure to supply the requested tax returns, it has not demonstrated sufficient net income to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, 2007 or 2008.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. Again, the petitioner provided neither federal corporate income tax returns nor annual reports or audited financial statements for any of the years under consideration.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008, the petitioner did not demonstrate sufficient net current assets to pay the 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 makes no explicit assertions but merely provides a single letter dated April 20, 2009 from [REDACTED] Human Resources Director of [REDACTED]. In her letter, Ms. [REDACTED] states:

In accordance with 8 CFR 204.5(g)(2), we hereby state and confirm that [REDACTED] employees [sic] over 300 employees and is fully capable of meeting payroll for [the beneficiary].

The letters of Mr. [REDACTED] and Ms. [REDACTED] both bear the same corporate address at the bottom. However, Mr. [REDACTED]'s July 23, 2007 letter is written on company letterhead, bearing the name of [REDACTED]. Ms. [REDACTED]'s April 20, 2009 letter is written on company letterhead, bearing the name of [REDACTED]. The petitioner offers no explanation for the differences in the company names, no explanation to clarify the nature of the petitioning entity's corporate structure and no evidence to demonstrate that [REDACTED] and [REDACTED]

⁶According 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.

are one and the same company or whether they are related through some sort of parent-subsidary or affiliate relationship.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has provided no such evidence.

Further, 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."

Without evidence demonstrating the relationship which exists between and the petitioner in this matter, evidence supplied from is not sufficient for purposes of demonstrating ability to pay the beneficiary the proffered wage from the priority date until he gains lawful permanent residence.

Further, in the letter issued by Ms. she identifies herself as the Human Resources Director of and not the Financial Officer. Thus, even if it were established that and are one and the same company, the evidence would still not conform to the regulatory requirements set forth in 8 C.F.R. § 204.5(g)(2).

Counsel's assertions on appeal cannot be concluded to overcome the lack of regulatory evidence and, therefore, the petitioner's failure to demonstrate the ability to 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 (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, the petitioner has provided no objective, verifiable evidence which demonstrates the size, scope or nature of the petitioner's business. The petitioner has not demonstrated the historical growth of its business, 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.