

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6



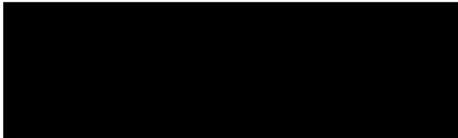
Date: **JAN 10 2012** Office: TEXAS SERVICE CENTER

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 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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's decision denying the petition concluded that the petitioner failed to establish that it had the continuing ability to pay the proffered wage.

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.

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.<sup>1</sup>

As set forth in the director's June 18, 2008 denial, at 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.

At the outset, it is noted that the current employer in the instant case is a different entity than the company that filed the Form ETA 750 and the I-140, Immigrant Petition for Alien Worker. The labor certification and I-140 were filed by [REDACTED] (EIN [REDACTED]). [REDACTED] merged with [REDACTED] (EIN [REDACTED]), an S corporation, on October 21, 2008. On appeal, counsel asserts that "[REDACTED], and the successor-in-interest, [REDACTED], had the ability to pay the beneficiary's proffered wage in the amount of \$32,760.00 per year as of the filing date up to the present."

The evidence in the record sufficiently documents that [REDACTED] merged with [REDACTED] and is now a successor-in-interest to the petitioner. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986)

---

<sup>1</sup> 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).

The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

The priority date is April 30, 2001, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The effective date of the merger was October 21, 2008. Therefore, [REDACTED] must show that it possessed the ability to pay the proffered wage from 2008 to the present, and that [REDACTED] possessed the ability to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006 and 2007.

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).

The proffered wage as stated on the Form ETA 750 is \$32,760 per year. The petitioner and its successor are structured as S corporations. On the petition, the petitioner claimed to have been established in 1999 and to currently employ 19 workers.<sup>2</sup> 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 April 25, 2001, the beneficiary did not claim to have worked for the petitioner.

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

<sup>2</sup> The website for the New York Department of State, Division of Corporations at [http://www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html) states that the successor entity, [REDACTED] was incorporated on June 22, 2007.

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, 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'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 2008 and 2009 Forms W-2, Wage and Tax Statement, issued to the beneficiary establish that [REDACTED] and [REDACTED] paid the beneficiary wages that met or exceeded the proffered wage in 2008 and 2009. Therefore, the petitioner's ability to pay the proffered wage has been established for 2008 and 2009.

The record also contains a 2007 Form W-2 showing that [REDACTED] paid the beneficiary wages of \$5,040. The record does not contain any evidence that the beneficiary was paid any wages for 2001 through 2006.

Therefore, the petitioner must establish that it had sufficient funds to pay the entire wage of \$32,760 from 2001 through 2006, and \$27,720 in 2007 (the difference between the proffered wage of \$32,760 and the actual wage of \$5,040). In addition, the petitioner has filed multiple petitions on behalf of other beneficiaries. Therefore, the petitioner must establish that it has had the ability to pay the combined proffered wages to all of the beneficiaries of its pending petitions. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 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 petitioner's tax returns demonstrate its net income for 2001 through 2007, as shown in the table below:

- In 2001, the Form 1120S stated net income<sup>3</sup> of \$84,975.

---

<sup>3</sup> 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 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 20, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits,

- In 2002, the Form 1120S stated net income of \$96,029.
- In 2003, the Form 1120S stated net income of \$113,862.
- In 2004, the Form 1120S stated net income of \$11,013.
- In 2005, the Form 1120S stated net income of \$41,512.
- In 2006, the Form 1120S stated net income of \$39,125.
- In 2007, the Form 1120S stated net income of \$47,018.

Therefore, for the years 2001, 2002, 2003, 2005, 2006, and 2007, the petitioner had sufficient net income to pay the proffered wage of \$32,760. It did not have sufficient net income for 2004.

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.<sup>4</sup> 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-year net current assets for 2001 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$111,754.
- In 2002, the Form 1120S stated net current assets of -\$702.
- In 2003, the Form 1120S stated net current assets of \$23,419.
- In 2004, the Form 1120S stated net current assets of \$9,271.
- In 2005, the Form 1120S stated net current assets of \$22,538.
- In 2006, the Form 1120S stated net current assets of \$26,114.
- In 2007, the Form 1120S stated net current assets of \$104,914.

For the years 2001 and 2007 only, the petitioner had sufficient net current assets to pay the proffered wage of \$32,760. It did not have sufficient net current assets in 2002, 2003, 2004, 2005 or 2006.

Therefore, the petitioner did not have sufficient net income or net current assets to pay the proffered wage in 2004.

---

etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its Schedule K for 2002, 2004, 2005, 2006, and 2007, the petitioner's net income is found on Schedule K of its tax return for 2002, 2004, 2005, 2006, and 2007.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

In addition, when considering the beneficiaries of the other petitions, the record does not establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant petition and the beneficiaries of the other petitions for any year from 2001 through 2007. As was noted above, a petitioner that has filed multiple I-140 petitions on behalf of other beneficiaries must establish that it has had the ability to pay the combined proffered wages to all of the beneficiaries of its pending petitions. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The other proffered wages are considered starting from their respective priority dates until the beneficiaries have obtained lawful permanent residence, their petitions have been withdrawn, or their petitions have been revoked or denied without a pending appeal. For each year that it has not paid the beneficiary the full proffered wage, the petitioner must establish its ability to pay the combined proffered wages (reduced by any wages paid to the beneficiaries) from the priority date.

The AAO issued a request for evidence (RFE) on December 15, 2010. The RFE instructed the petitioner to submit documentation relating to the petitions filed on behalf of other beneficiaries necessary to determine whether the petitioner possessed the ability to pay the proffered wage to the beneficiary and the beneficiary of the other petitions. The response contains a chart stating that the original petitioner had submitted labor certifications for four beneficiaries, and petitions for only two; and the successor had filed labor certifications and petitions for two additional employees. However, USCIS records state that the petitioner has filed at least ten immigrant petitions on behalf of nine other beneficiaries. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Further, for the years 2001 to 2007, the petitioner submitted only one 2007 W-2 for an employee with the last name of [REDACTED] showing \$21,542 in wages. The petitioner claims it does not have W-2s for the other beneficiaries as it was not required to do so under New York law.

Therefore, the record in the instant case does not contain sufficient information to determine the priority dates and proffered wages for the other beneficiaries. The AAO cannot determine whether the petitioner has employed the additional beneficiaries or the wages paid to the other beneficiaries (except for the one 2007 W-2 for [REDACTED]). Therefore, the petitioner failed to establish that it had sufficient net income or net current assets to pay the proffered wage to the beneficiary in 2004, as well as to the other beneficiaries of its other petitions for 2001 to 2007.

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 *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 the instant case, the predecessor was incorporated in 1999 and had annual sales of approximately \$2 million. It had four owners and officer compensation totaling approximately \$200,000 per year. The company's payroll was approximately \$300,000 per year. Although these are positive factors in assessing the company's ability to pay the proffered wage, it is not so substantial as to overcome its shortfall in net income and net current assets and to cover the wages of the multiple beneficiaries of its petitions. There is no evidence in the record of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, of the petitioner's reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service.

On appeal, counsel asserts that the petitioner has established its continuing ability to pay the proffered wage based on officer compensation. Counsel submits affidavits from two of the petitioner's officers, personal tax returns for the two officers for the years 2004 and 2009; and monthly personal expenses for the two officers for the years 2004 and 2009. Both affidavits are identical and state:

I am willing to and will, if necessary, apply and [sic] portion of my income to pay the wage of employees including [the beneficiary].

Due to the success of [redacted] I have accumulated sufficient wealth to invest additional cash, more than \$100,000.00 into the company's payroll.

USCIS 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. 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 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

However, a relevant factor when determining ability to pay is if the petitioner pays its officer-owner(s) a substantial salary, and the remaining amount required to meet the proffered wage is only a small percentage of the total salary paid to the officer-owner(s). The record must also contain a statement or other evidence establishing that the salary of the officer-owner(s) is not set by contract and that the petitioner would have used and could have used a portion of the officer-owner(s) salary to pay the proffered wage. In performing this analysis, USCIS does not examine the personal assets of the officer-owner(s), but instead merely considers the ability of a corporation to set reasonable salaries for its officer-owner(s) based, in part, on the profitability of the organization.

In the instant case, the compensation paid to the petitioner's officer-owner(s) summarized in the preceding paragraph is not sufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary and the proffered wages of the other beneficiaries.

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.