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



U.S. Citizenship
and Immigration
Services



B6

Date: JUN 22 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a real property management services company. It seeks to permanently employ the beneficiary in the United States as a supervisor of paint department, [REDACTED] job code number [REDACTED] (first-line supervisors of mechanics, installers, and repairers). 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 denied the petition, finding that that the petitioner did not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 September 28, 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 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on July 8, 2002. The rate of pay or the proffered wage stated on the Form ETA 750 is \$17.92 per hour or \$37,273.60 per year. The AAO also notes that the position offered in this case requires all job applicants to have a minimum of two years of work experience in the job offered.

To show that the petitioner has the continuing ability to pay \$17.92 per hour or \$37,273.60 per year from July 8, 2002 until the beneficiary obtains lawful permanent residence, the petitioner submits copies of the following evidence:

- Forms 1120S, U.S. Income Tax Return for an S Corporation, of the petitioner for the years 2005 through 2008;
- Forms 1120S of [REDACTED] for the years 2002 through 2008;
- Forms 1040, U.S. Individual Income Tax Return, of [REDACTED] and [REDACTED] for the years 2002 through 2007;
- Forms W-2 issued by the petitioner for the year 2002 to the beneficiary; and
- Forms 1099-MISC issued by various companies to the beneficiary for the years 2002, 2003, and 2008.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in February 2001, to currently employ 20 workers, and to have gross annual income and net annual income of \$685,000 and \$40,000, respectively. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'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).

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).

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 this case, based on the evidence submitted above, the beneficiary received \$750 from the petitioner in 2002. The director declined to accept any of the Forms 1099-MISC issued to the beneficiary by various companies other than the petitioner. The AAO agrees. 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."

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that it has the ability to pay \$36,523.60 in 2002 and the full proffered wage of \$37,273.60 per year from 2003 until the beneficiary obtains his lawful permanent residence. The petitioner can demonstrate the ability to pay those amounts as stated above through either its net income or net current assets.

If the petitioner chooses to use its net income to pay the proffered wage during that period, USCIS will 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 petitioner’s tax returns demonstrate its net income for the years 2002 through 2008, as shown in the table below:

Tax Year	Net Income (Loss)² – in \$	The Remainder of the PW/year – in \$
2002	8,410	36,523.60
2003	(22,405)	37,273.60
2004	27,210	37,273.60
2005	6,282	37,273.60
2006	28,968	37,273.60

² 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 (2006-2008) of Schedule K. See Instructions for Form 1120S, 2008 at <http://www.irs.gov/pub/irs-prior/i1120s--2008.pdf> (last accessed May 24, 2012) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had adjustments shown on its Schedule K for 2002 and 2006, the petitioner’s net income is found on Schedule K of its tax returns for those years. The petitioner’s net income for 2003, 2004, 2005, 2007, and 2008 is found on line 21.

2007	3,860	37,273.60
2008	3,873	37,273.60

Therefore, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage during the qualifying period from the priority date.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2006 through 2009, as shown below:

<i>Tax Year</i>	<i>Net Current Assets - in \$</i>	<i>The Remainder of the PW - in \$</i>
2002	7,878	36,523.60
2003	(4,628)	37,273.60
2004	(10,418)	37,273.60
2005	(5,190)	37,273.60
2006	23,691	37,273.60
2007	22,372	37,273.60
2008	19,709	37,273.60

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary's proffered wage during the qualifying period from the priority date. Based on the net income and net current asset analysis above, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

On appeal, to show that the petitioner has the ability to pay the proffered wage, the petitioner submits copies of Mr. [REDACTED] and Ms. [REDACTED] individual income tax returns for the years 2002 through 2007. In a signed statement dated May 11, 2009, Mr. [REDACTED] and Ms. [REDACTED] state that they are the sole owners of the petitioning corporation and both are willing to pay the proffered wage of the beneficiary in the future out of their own personal assets. Counsel additionally argues on appeal that the owners of the petitioning corporation should

³ 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, 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.

be allowed to personally pay the proffered wage of the beneficiary.⁴ Counsel also urges USCIS to consider the net income and net current assets of the petitioner's affiliated company, [REDACTED]

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners 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). 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." For these reasons, the AAO will not consider any of the individual income tax returns of Mr. [REDACTED] and Ms. [REDACTED]. Nor will the AAO consider the federal income tax returns of [REDACTED], even though the [REDACTED] is an affiliate of the petitioner.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in

⁴ As part of his argument, counsel states that the State law preempts Federal law and common law principles as to the duties and obligations of the officers of a corporation. Counsel indicates that under California Labor Code § 1197.1(a), an officer of a corporation who fails to pay an employee less than the minimum fixed by an order of the commission shall be subject to a civil penalty. Based on this law, counsel states that owners or officers of a corporation should be allowed to personally pay the beneficiary's proffered wage. Counsel's argument is not persuasive. There is no precedent establishing that the State law preempts Federal law in this matter.

⁵ The record contains a letter dated April 30, 2009 from counsel stating that the petitioner is an affiliate of [REDACTED]. Based on the tax returns submitted, Mr. [REDACTED] fully owned [REDACTED] from 2002 to 2004; he owned 50% of the company from 2005 to 2008. Mr. [REDACTED] and Ms. [REDACTED] based on their individual income tax returns, are married.

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.

Unlike *Sonegawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until each beneficiary receives or received his or her permanent residence.

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.