

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: NOV 28 2011 OFFICE: CALIFORNIA 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:

SELF-REPRESENTED

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

The petitioner is a Mexican restaurant¹. It seeks to employ the beneficiary permanently in the United States as a cook. 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 September 25, 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.

As a threshold issue on appeal, the petitioner has failed to establish that [REDACTED] has been doing business under the name [REDACTED] since prior to April 12, 2001, the priority date of the labor certification or that alternatively, it is the successor-in-interest to the entity which filed the labor certification. The petitioner has submitted tax records for [REDACTED] and public records reflect that [REDACTED] was incorporated in 1994 and has been doing business under the fictitious business name of [REDACTED] located at the petitioner's address; however, public records only reflect that the d/b/a for the business was filed on March 1, 2007. As such, the petitioner has failed to establish that the corporation has been doing business under the name stated on the labor certification since prior to April 12, 2001. Any future filings by the petitioner should submit evidence that the petitioner was doing business under the name [REDACTED] since at least April 12, 2001 or, alternatively, establish that it is a successor-in-interest to the entity which filed the labor certification. However, since the director failed to identify this as an issue in her decision, the AAO will analyze the petitioner's evidence of ability to pay as if the petitioner had established that it also does business as [REDACTED] since prior to the priority date.²

¹ See below in regard to whether [REDACTED] has established that it has been doing business under the fictitious business name of [REDACTED] since at least April 12, 2001.

² The petitioner must address this deficiency in any future filings.

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 12, 2001. The proffered wage as stated on the Form ETA 750 is \$8.50 per hour (\$17,680.00 per year). The Form ETA 750 states that the position requires no education, training or experience.

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.³ On appeal, the petitioner submits a letter from its general manager; a letter from the petitioner's Certified Public Accountant (CPA); federal tax returns for [REDACTED] from 2005 through 2008; and a 2008 W-2, Wage and Tax Statement for the beneficiary.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, signed on October 6, 2003, the petitioner claimed to have been established in 1966, to have a gross annual income of 1,550,948.00, and to currently employ 30 workers. According to the tax returns in the record, the petitioner's fiscal year is from May 1 through April 30. On the Form ETA 750B, signed by the beneficiary on April 4, 2001, the beneficiary claimed to have worked for the petitioner since May 1996.

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

³ 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).

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).

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 beneficiary's Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for 2001 through 2008 show compensation received from the petitioner, as:

- In 2001, the Form W-2 stated compensation of \$18,386.27;
- In 2002, the Form W-2 stated compensation of \$12,903.77; and
- In 2008, the Form W-2 stated compensation of \$21,211.83.

The Social Security Number (SSN) of XXX-XX-6342, listed on the beneficiary's Forms W-2 does not match the other documents in the record. As such, the AAO cannot accept the beneficiary's Forms W-2 without further evidence that the SSN belongs to the beneficiary and thus that these Forms W-2 were issued to the beneficiary. Specifically, in any future filings, if the petitioner wishes to utilize the beneficiary's Forms W-2 to establish ability to pay, it must provide proof from the Social Security Administration (SSA) that the referenced SSN on the Forms W-2 belongs to the beneficiary.

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 C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the AAO closed on October 22, 2009 with the director's receipt of the petitioner's appeal. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 was the most recent return available prior to submission of documentation by the petitioner on appeal. The petitioner's tax returns demonstrate its net income for 2001 through 2008, as:

- In 2001, the Form 1120 stated net income of \$0.00;
- In 2002, the Form 1120 stated net income of \$0.00;
- In 2003, the Form 1120 stated net income of \$0.00;
- In 2005, the Form 1120 stated net income of \$0.00;
- In 2006, the Form 1120 stated net income of \$16,839.00;

- In 2007, the Form 1120 stated net income of \$9,572.00; and
- In 2008, the Form 1120 stated net income of -\$90,799.00.

Therefore, for the years 2001 through 2008, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner failed to submit its 2004 Form 1120.

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.⁴ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2008, as:

- In 2001, the Form 1120 stated net current assets of -\$39,392.00.
- In 2002, the Form 1120 stated net current assets of -\$31,323.00.
- In 2003, the Form 1120 stated net current assets of -\$4,517.00.
- In 2005, the Form 1120 stated net current assets of \$41,704.00.
- In 2006, the Form 1120 stated net current assets of \$30,964.00.
- In 2007, the Form 1120 stated net current assets of \$54,742.00.
- In 2008, the Form 1120 stated net current assets of -\$47,804.00.

Therefore, for the years 2001 through 2004 and in 2008, the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner failed to submit its 2004 Schedule L.

In addition, USCIS records indicate that the petitioner has filed at least one other petition since the petitioner's establishment in 1966, including I-140 petitions.⁵ The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). Despite the director's request for such evidence in the request for evidence issued on July 16, 2004, the evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries

⁴According 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.

⁵ The record also contains a list of employees submitted by the petitioner which indicates that the petitioner has filed other I-140 petitions; however, the list fails to provide any relevant evidence required to establish ability to pay.

have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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, the petitioner's CPA asserts that the corporation had profits during 2009, 2008, 2007 and 2005 which were not reflected in the corporation's net income or net assets because the corporation paid rent to one of the corporation's shareholders and there was depreciation of property during the relevant tax years. The petitioner's CPA also asserts that two of the petitioner's shareholders own personal residences which have equity in excess of \$1 million each. He asserts that one of the shareholders' properties is owned by the petitioning business. First, as discussed above, it is inappropriate to consider depreciation in determining ability to pay. Second, 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." Third, regarding the property value of the shareholder's personal residence owned by the petitioning business, a home is not a readily liquefiable asset. Further, it is unlikely that a shareholder would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As such, the rent paid to a corporation's shareholder, the depreciation of the corporation's property and the personal residences of the shareholders will not be considered by the AAO in determining the petitioner's ability to pay.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not 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 *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 petitioner failed to submit its 2004 tax return and necessary information regarding other I-140 petitions filed on its behalf, precluding the AAO from making a determination as to whether it has the ability to pay the proffered wage for 2004 or any other relevant year. The petitioner's CPA asserted that the corporation paid officer compensation during 2009, 2008, 2007 and 2005 which should be considered in determining the petitioner's ability to pay. However, the petitioner did not submit any evidence to demonstrate that shareholders were willing and able to forego officer compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the proprietor's reputation within its industry. 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.