



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **FEB 12 2013**

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:

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,

Ron Rosenberg
Acting 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 hotel/motel. It seeks to employ the beneficiary permanently in the United States as an administrative service manager. 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 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 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 24, 2008 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.

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

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.

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).

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 (Act. Reg. Comm. 1977).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by DOL on April 27, 2001. The proffered wage specified on the Form ETA 750 is \$21.22 per hour or \$44,137.60 per year. The Form ETA 750 states that the position requires a minimum of two years of work experience in the job offered.

To show that the petitioner has the continuing ability to pay \$21.22 per hour or \$44,137.60 per year from April 27, 2001, the petitioner submitted the following evidence:

- Copies of federal income tax returns of [REDACTED] filed on Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for an S Corporation, for the years 2001 through 2006;
- Copies of federal income tax returns of [REDACTED] filed on IRS Form 1120S for the years 2004 through 2006; and
- Copies of federal income tax returns of [REDACTED] filed on IRS Form 1120S for the years 2001 through 2005.

On the petition, the petitioner claimed to have been established on June 15, 1998, to currently employ three individuals, and to have gross annual income and net annual income of \$645,192 and \$40,975, respectively.

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. Comm. 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary

equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner 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 April 2001 or subsequently.

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). 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).

In denying the petition, the director determined that neither [REDACTED] or [REDACTED] was the petitioner. Specifically, the director stated that the name listed on the labor certification Form ETA 750 and the Form I-140 petition is [REDACTED] and none of the evidence submitted reflected that neither [REDACTED] or [REDACTED] was related or connected to the petitioner. For this reason, the director rejected the federal tax returns of [REDACTED] and [REDACTED] as evidence of the petitioner's ability to pay.

On appeal to the AAO, the petitioner submitted the following evidence to show that [REDACTED] is the [REDACTED] or the petitioner:

- A copy of a business tax certificate of [REDACTED] located at [REDACTED] to show that the petitioner [REDACTED] is also located at [REDACTED]
- A copy of a business tax certificate of [REDACTED] located at [REDACTED] to show that the petitioner [REDACTED] is also located at [REDACTED]
- A copy of a check with [REDACTED] heading and a bank statement addressed to [REDACTED] to show that [REDACTED] has the same address as the [REDACTED] or the petitioner; and
- A copy of the Articles of Incorporation of [REDACTED]

In adjudicating the appeal, we note that the petitioner listed the following name and federal employer identification number (FEIN) on the Form ETA 750: [REDACTED]. The same name and FEIN were listed on the Form I-140 petition. We observe that the FEIN stated on both the Form ETA 750 and Form I-140 belongs to [REDACTED]. Both [REDACTED] have other FEINs. Moreover, we find that the location of [REDACTED] is at [REDACTED] and not at [REDACTED].

As noted above, on appeal the petitioner wants the AAO to consider the federal tax returns of [REDACTED] as evidence of the petitioner's ability to pay. Considering that [REDACTED] is doing business as [REDACTED] and it is located at the same address as the petitioner in this case, we will consider the tax returns of [REDACTED] as evidence of the petitioner's ability to pay.

We will not, however, consider either the tax returns of [REDACTED] as evidence of the petitioner's ability to pay, even though both companies appear to be affiliated with the petitioner. The tax returns submitted show that the owner of the petitioner, [REDACTED]. Nor will we combine the net income and/or net current assets of [REDACTED] and/or [REDACTED] to the net income and/or net current assets of the petitioner. 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."

The record before the director closed on March 14, 2008 with the receipt by the director of the petitioner's submissions in response to the director's Request for Evidence (RFE) dated February 13, 2008. As of that date, the petitioner's 2007 federal income tax return was not yet available. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income (loss) for the years 2001 through 2006, as shown below:²

<i>Tax Year</i>	<i>Net Income (Loss) – in \$</i>	<i>Proffered Wage – in \$</i>
2001	(46,491)	44,137.60
2002	(4,601)	44,137.60
2003	(9,547)	44,137.60
2004	(2,114)	44,137.60
2005	16,956	44,137.60
2006	4,278	44,137.60

Therefore, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage in any of the relevant years as shown above.

² For an S Corporation, 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 if the S corporation's income is exclusively from a trade or business. 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) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf> (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income in 2002 is found on line 23 (2001-2003), line 17e (2004-2005), and line 18 (2006) of schedule K.

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>Proffered Wage – in \$</i>
2001	(114,144)	44,137.60
2002	(116,682)	44,137.60
2003	(113,340)	44,137.60
2004	(116,960)	44,137.60
2005	(113,219)	44,137.60
2006	(109,727)	44,137.60

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary's proffered wage from 2001 to 2006. 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.

Finally, 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

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.

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*, 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. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage particularly from 2001 to 2006.

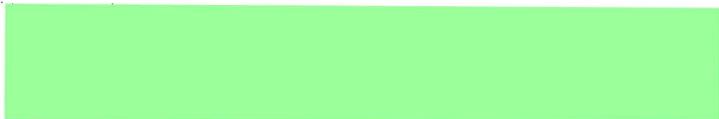
Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence.

Beyond the decision of the director, the AAO also finds that the petitioner has failed to demonstrate that the beneficiary has the requisite work experience in the job offered. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate that the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by DOL and submitted with the petition as of the priority date.

Here, the priority date, as noted earlier, is April 27, 2001, which was the date when the Form ETA 750 was filed and accepted for processing by DOL. The name of the job title or the position for which the petitioner seeks to hire is "Administrative Service Manager." The job description listed on the Form ETA 750 part A item 13 partly states, "Plan, direct, or coordinate supportive services of the office such as recordkeeping, mail distribution, telephone operator / receptionist, and other support services." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered and have verifiable job references.

The beneficiary listed the following relevant work experiences under item 15 of the Form ETA 750, part B:

Name and address of employer:



Name of Job:

Administrative Service Manager.

Date started:

August 1998.

Date left: Present [the Form ETA 750B was signed on April 23, 2001].

Name and address of employer: [REDACTED]

Name of Job: Administrative Service Manager.

Date started: March 1998.

Date left: August 1998.

Name and address of employer: [REDACTED]

Name of Job: Administrative Service Manager.

Date started: June 1996.

Date left: March 1998.

However, the record does not contain any evidence to support that the beneficiary worked in those places indicated above. Submitted along with the approved Form ETA 750 and the Form I-140 petition was a letter of employment verification dated December 15, 2005 from [REDACTED] Vice President, stating that the beneficiary worked at [REDACTED] from June 7, 2002 to June 20, 2005 as an administrative manager. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Therefore, the letter of employment verification from [REDACTED] cannot be considered as evidence of the beneficiary's qualifications for the job offered. In addition, the experience at [REDACTED] was gained *after* the priority date.

The regulations at 8 C.F.R. §§ 204.5(g)(1) and 204.5(l)(3)(ii)(A) provide:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Here, no evidence relating to the beneficiary's past work experience has been submitted. We therefore, find that the petitioner has failed to establish by a preponderance of the evidence that the beneficiary had the requisite work experience in the job offered before the priority date.

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.