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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

DATE: **MAR 06 2015**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director) approved the immigrant visa petition on August 27, 2011. The director revoked the approval of the petition on June 17, 2014. The director dismissed a subsequent motion to reopen and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a “manufacturer for professional teeth.” It seeks to employ the beneficiary permanently in the United States as a financial analyst pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).¹ As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 7, 2009. *See* 8 C.F.R. § 204.5(d).

The director’s decision revoking the approval of the petition states that the petitioner failed to establish that it has the continuing ability to pay the proffered wage as of the priority date. The director found that the evidence submitted by the petitioner in response to a Notice of Intent to Revoke (NOIR) failed to overcome these findings. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Revocation

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). Notice must be provided to the petitioner before a previously approved petition can be revoked. *See* 8 C.F.R. § 205.2; 8 C.F.R. § 103.2(b)(16); *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987).

The director’s decision states that the petitioner failed to establish that it had the ability to pay the proffered wage from the priority date onwards. The director found that the evidence submitted by the

¹ Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

petitioner in response to a NOIR failed to overcome these findings. The NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out a specific lack of net income or net current assets to establish the petitioner’s ability to pay the proffered wage and the secondary evidence in the record was not acceptable to establish the petitioner’s ability to pay the proffered wage, that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

Ability to Pay

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’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, U.S. 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).

The proffered wage as stated on the ETA Form 9089 is \$57,500.00 per year. 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 [REDACTED] to have a gross annual income of \$4.5 million worldwide, and to currently employ 10 workers in the United States and 156 in China.

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, Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, reflect that the petitioner paid the beneficiary \$36,000.00 in 2009 and 2010, \$38,000.00 in 2011 and \$52,000.00 in 2012. Therefore, the petitioner must establish that it had the ability to pay the full proffered wage in 2013 and the difference between the actual wages

paid and the proffered wage in 2009, 2010, 2011 and 2012.³

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. The courts have 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). Similarly, the courts have agreed that adding depreciation back into net income does not reflect an employer's ability to pay the proffered wage. *See River Street Donuts*, 558 F.3d at 118 and *Chi-Feng Chang*, 719 F. Supp. at 537.

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

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 (2006-2013) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 26, 2015) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its Schedule K for 2009 through 2013, the petitioner's net income is found on Schedule K of its tax returns. A corporation's year-end current assets are shown on Schedule L, lines

³ The difference between the actual wages paid and the proffered wage is \$21,500.00 in 2009 and 2010, \$19,500.00 in 2011 and \$5,500.00 in 2012.

⁴ 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.

1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. The petitioner’s tax returns demonstrate the following:

Tax Year	Net Income	Calculation of Net Current Assets	W-2 Wage	Balance Due Beneficiary
2009	-\$504,871.00	-\$1,151,070.00	\$36,000.00	\$21,500.00
2010	-\$219,793.00	-\$1,032,738.00	\$36,000.00	\$21,500.00
2011	-\$282,180.00	-\$785,116.00	\$38,000.00	\$19,500.00
2012	-\$290,606.00	-\$1,064,457.00	\$52,000.00	\$5,500.00
2013	-\$294,109.00	-\$1,219,987.00	\$0.00	\$57,500.00

Therefore, for the years 2009 through 2012, the petitioner did not have sufficient net income or net current assets to pay the difference between the actual wages paid and the proffered wage, or the total proffered wage in 2013.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has 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.

The petitioner asserts that the financial capability of its shareholders should be taken into account in considering its ability to pay the proffered wage. The petitioner contends that, in light of the legal and financial liabilities imposed by the U.S. government to the shareholders of an S corporation, there is no reason to differentiate treatment of a single member S corporation from a sole proprietorship when determining a petitioner’s ability to pay the proffered wage. The petitioner’s contention is unpersuasive. USCIS (legacy INS) 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’r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm’r 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.

The record contains a number of the petitioner’s business savings and checking bank statements and an August 5, 2010 certificate of deposit. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that

were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered above in determining the petitioner's net current assets. Additionally, the petitioner does not explain how a deposit in August 2010 would have provided funds available to pay the beneficiary in 2009 or subsequent years.

The record contains a March 1, 2014 purchase agreement between the petitioner and [REDACTED] in which the petitioner agrees to sell 65% of its assets for \$2.5 million, \$1.5 million of which is a loan repayment from the petitioner to [REDACTED]. However, while the influx of cash will be relevant to whether the petitioner will be able to pay the proffered wage in 2014 and later years, these amounts cannot be retroactively applied to demonstrate the petitioner's ability to pay the proffered wage in 2009 through 2013. Further, the new investment will be reflected in Schedule L of the petitioner's 2014 tax returns.

The record also contains income statements for [REDACTED]. However, the record does not reflect that [REDACTED] is the petitioner's parent company or that the petitioner is included in [REDACTED] annual reports. Even though [REDACTED] became a shareholder in 2014, as discussed above, USCIS cannot pierce the corporate veil to look to the assets of [REDACTED] to satisfy the petitioner's ability to pay the proffered wage.

The record contains evaluations of the petitioner's dental whitening kits and vacuum forming machine from the [REDACTED] and the [REDACTED] however, the gross sales amounts reflected on the petitioner's tax records do not reflect a steady increase over the years. The [REDACTED] evaluations are paid for by the petitioner. Further, the evaluations are insufficient to establish a continuing high reputation within the petitioner's industry from the 2009 priority date.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL in 2009.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls

outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the 2009 through 2013 tax returns reflect no significant increase in gross receipts, and negative net income and net current assets in every year. Nothing in the record demonstrates that the tax returns paint an inaccurate financial picture of the petitioner. While the petitioner claimed to have been established in [REDACTED], Texas Secretary of State records reflect that the petitioner was not incorporated until [REDACTED]. In addition, there is no evidence in the record of the historical growth of the business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the business' reputation within its industry from 2009 to 2012. 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 petitioner asserts that it hired a sales account manager in 2014 in order to increase revenue, which should be considered in the petitioner's ability to pay the proffered wage. To support this contention the petitioner provided an employment offer letter, copies of paystubs for the new hire and a 2014 marketing plan for the business. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'I Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

While the new hire and marketing plan will be relevant to whether the petitioner will be able to pay the proffered wage in 2014 and later years, if there is increased revenue it cannot be retroactively applied to demonstrate the petitioner's ability to pay the proffered wage in 2009 through 2013.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The director's revocation is affirmed. The appeal is dismissed and the petition remains revoked.