

(b)(6)

Matter of E-S-A-S-, Inc.



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF E-S-A-S-, INC.

DATE: SEPT. 21, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a transportation company doing business as [REDACTED]¹ seeks to employ the Beneficiary as its general manager under the immigrant classification of a multinational executive or manager. *See* Immigration and Nationality Act (the Act) § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. LAW

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien’s application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision only to those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

¹ The record indicates that the petitioner also operates “a bakery and gift shop, named [REDACTED]

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A United States employer may file Form I-140 to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. The regulation at 8 C.F.R. § 204.5(j)(5) states:

No labor certification is required for this classification; however, the prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such letter must clearly describe the duties to be performed by the alien.

II. ISSUE ON APPEAL: ABILITY TO PAY

At issue in this proceeding is the Petitioner's ability to pay the Beneficiary's proffered wage from the petition's filing date onward. 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

A. Facts

The Petitioner filed Form I-140 on February 24, 2014. The evidence of record shows that the Petitioner is structured as a C corporation. On the petition form, the Petitioner claimed to have been established in [REDACTED] to have a gross annual income of \$63,641, and to currently employ seven workers. The Petitioner indicated that the Beneficiary's salary will be \$25,000 per year. The Petitioner left blank the line marked "Net Annual Income." The Petitioner has employed the Beneficiary since 2007.

The Petitioner submitted copies of its IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2010, 2011 and 2012.

The Petitioner's president, [REDACTED] stated in a letter dated February 14, 2014, that the company faced many challenges as a result of the 2008 economic crisis. She added:

[REDACTED] owes its survival to two major factors. First has been the [Beneficiary's] unrelenting leadership . . . Second has been the support provided by [parent entity] [REDACTED], which has given financial support to allow [REDACTED] to avoid incurring debt to external creditors. During the period January 2011

through March 2012 we provided funds in excess of \$19,000 to assist our Florida subsidiary during this difficult time.

The Director issued a request for evidence (RFE) on August 4, 2014, instructing the Petitioner to submit required financial documentation from 2013 to establish its ability to pay the Beneficiary \$25,000 per year, as well as evidence of compensation paid to the Beneficiary in 2013. In response, the Petitioner submitted a copy of its 2013 IRS Form 1120 return and other financial documents.

The Director denied the petition on January 14, 2015. In the denial notice, the Director noted that “the petitioner paid the Beneficiary \$8,250.00” in 2013, and that the Petitioner’s tax return for that year shows a loss of \$33,418, as well as current liabilities that exceeded its current assets by \$1,176. The Director cited case law to support the finding that, because the Petitioner is a distinct legal entity, U.S. Citizenship and Immigration Services (USCIS) cannot take into account the assets of outside individuals or entities when determining the Petitioner’s ability to pay the proffered wage. The cited cases were *Matter of M*, 8 I&N Dec. 24 (BIA 1958) and *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm’r 1980).

On appeal, the Petitioner submits copies of previously submitted correspondence, indicating that the parent entity intends to support the petitioning company. In an accompanying brief, the Petitioner states that the evidence regarding the parent entity constitutes “‘additional evidence’ that its ability to pay rested in part on the continuing financial support of its UK-based affiliate.” The Petitioner disputes the relevance of the case law cited by the Director, and asserts that the Director should have relied instead on *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), which the Petitioner had cited in the RFE response.

The Petitioner submits a 2014 profit and loss statement, and contends that this document shows a significant increase in the Petitioner’s income.

B. Analysis

For the reasons discussed above, we find that the Petitioner has not established its ability to pay the Beneficiary’s proffered wage as of the petition’s filing date.

In determining the Petitioner’s ability to pay the proffered wage, USCIS will first examine whether the Petitioner employed the Beneficiary at the time the priority date was established. If the Petitioner establishes by documentary evidence that it employed the Beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the Petitioner’s ability to pay the Beneficiary’s salary. In the present matter, the Petitioner employed the Beneficiary, but has not established that it paid the Beneficiary the full proffered wage from the February 24, 2014 filing date.

If the Petitioner did not pay the Beneficiary an amount at least equal to the proffered wage, we will then next examine the petitioner's net income figure as reflected on its federal income tax return. 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).

In *K.C.P. Food Co., Inc. v. Sava*, the court held 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 on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

For a C Corporation, USCIS considers net income to be the figure shown on Line 28 of IRS Form 1120. At the time of filing, the Petitioner's most recent federal income tax return corresponded to 2012. The most recent federal income tax return available at the time of the director's decision was the Petitioner's 2013 return.

- The Petitioner's 2012 Form 1120 showed net income of -\$32,286.
- The Petitioner's 2013 Form 1120 showed net income of -\$33,418.

Therefore, for the years 2012 and 2013, the Petitioner did not have sufficient net income to pay the proffered wage. Earlier returns likewise showed five-figure net income losses for 2010 and 2011.

Because the Petitioner's net income does not make up the difference between the Beneficiary's actual compensation and the proffered wage, we will review the Petitioner's net current assets. Net current assets are the difference between the Petitioner's current assets and current liabilities.² 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 the Petitioner's end-of-year net current assets and the wages paid to the Beneficiary are equal to or greater than the proffered wage, then the Petitioner is expected to be able to pay the proffered wage using those net current assets.

- In 2013, the Form 1120 showed net current assets of -\$1,156.
- In 2012, the Form 1120 showed net current assets of -\$654.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

Therefore, for 2013, the Petitioner did not have sufficient current assets to pay the difference between the Beneficiary's actual compensation and the proffered wage.

The above information shows that the Petitioner has not established its continuing ability to pay the Beneficiary the proffered wage as of the filing date through actual wages paid to the Beneficiary, net income, or net current assets.

On appeal, the Petitioner submits a profit and loss statement showing net income of \$52,569.74 during calendar year 2014, the result of what the Petitioner calls "a doubling of income, to \$257,176, from the \$100,150 realized in 2013" (emphasis in original). The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of ability to pay to be in the form of annual reports, federal tax returns, or audited financial statements. The profit and loss statement takes none of these forms, and does not show the Petitioner's ability to pay the Beneficiary's full proffered wage as of February 24, 2014.

The Petitioner acknowledges that it was unable, on its own, to pay the Beneficiary's proffered wage at the time of filing. The appeal rests primarily on the contention that the Director should have taken the parent entity's assets and income into consideration. The Petitioner has submitted photocopies of pay receipts, showing that the foreign parent company paid the Beneficiary in December 2013 and during 2014. British tax documents indicate earlier payments, including £11,600 paid to the Beneficiary during the tax year ending April 5, 2014.³

The regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to submit "evidence that the prospective United States employer has the ability to pay the proffered wage." The foreign parent company is not the prospective United States employer.

The Petitioner quotes language from *Full Gospel Portland Church v. Thornburgh*:

New divisions in businesses or new parishes of larger churches may not themselves be financially profitable, but if documents show that they may rely on the larger body for support, it is arbitrary and capricious for the INS not to consider the resources of the larger organization in making its evaluation of ability to pay.

Full Gospel Portland Church v. Thornburgh, 730 F. Supp. at 450. The Petitioner claims: "In the instant case we have exactly the same situation; the Director has arbitrarily and capriciously dismissed relevant proof."

Although we may consider the reasoning of the *Full Gospel* decision, we are not bound to follow the published decision of a United States district court, even in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). More directly on point is the decision in *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 *2, (D. Mass. 2003). The court noted that the employer in that case had not rebutted the contention that nothing in the governing regulation, 8 C.F.R. § 204.5,

³ At the exchange rate on that date, available at <http://www.xe.com/currencytables/?from=GBP&date=2014-04-05>, the sum was equal to \$19,231.06 U.S. dollars. (Printout of exchange rate information added to record June 10, 2015).

permits us to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. The court added that immigration authorities did not err when they limited consideration to “assets under Petitioner’s legal control.” *Id.* at *4.

With regard to the Petitioner’s own resources, the Petitioner cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg’l Comm’r 1967). Describing that case, the Petitioner asserts that, although “an expensive change of premises” had temporarily affected the employer’s finances, “the totality of the circumstances” supported a finding in that petitioner’s favor.

The Petitioner has not established a fact pattern comparable to *Sonogawa*. 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 (1966), the employer changed business locations and paid rent on both the old and new locations for five months. There were substantial moving costs and also a period of time when the employer was unable to do regular business. The Regional Commissioner determined that the employer’s prospects for a resumption of successful business operations were well established. The Petitioner in *Sonogawa* was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. Her clients had been included in 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 employer’s sound business reputation and outstanding reputation as a couturiere.

As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a 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 case now before us, the Petitioner has not established any of the mitigating circumstances that characterize *Sonogawa*. The Petitioner’s income tax returns for 2010 through 2013 all show five-figure net income losses. Those losses exceeded \$30,000 per year in 2011, 2012 and 2013. The Petitioner claimed seven employees as of February 2014, but paid only \$26,107 in salaries in 2013. The Petitioner has not established a history of viability and profitability, offset by extraordinary, identifiable, one-time expenses as in *Sonogawa*.

The unaudited profit and loss statement submitted on appeal does not establish that the Petitioner’s prior history of unprofitability was the result of uncharacteristic expenditures or losses. Furthermore, the figures in the new statement do not appear to take into account the Petitioner’s continued reliance on funds from the foreign entity. Therefore, the new statement does not have the same weight as it would for a self-sufficient company. It does not show that the Petitioner is a

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profitable company. Rather, it shows that the foreign entity has absorbed sufficient expenses to allow the Petitioner to show a profit on paper. The Petitioner has not shown that the 2014 profit and loss statement is a more reliable indicator of its baseline state, under *Sonegawa*, than the several years of income tax returns that preceded it.

Accordingly, we find that the Petitioner has not demonstrated that the petitioning U.S. employer was able to pay the Beneficiary's proffered salary of \$25,000 per year as of the petition's filing date. For this reason, USCIS cannot approve this petition.

III. CONCLUSION

We will dismiss the appeal for the above stated reasons. 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, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of E-S-A-S-, Inc.*, ID# 13557 (AAO Sept. 21, 20154)