



U.S. Citizenship
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SRC 06 055 51686

Office: TEXAS SERVICE CENTER

Date:

SEP 3 - 2009

IN RE:

Petitioner:

Beneficiary:

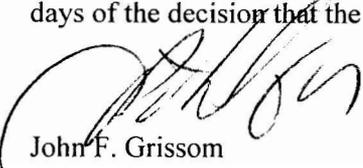
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom

Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

The regulation at 8 C.F.R. § 103.2(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence and affidavits with the motion demonstrates that the petitioner has established its ability to pay the proffered wage as of the priority date of July 3, 2002.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date of July 3, 2002. The AAO concurred with the director's decision on appeal. The AAO also noted on appeal that the beneficiary may be related to the petitioner's owner.

The record shows that the motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the AAO's June 26, 2006 dismissal, the single issue in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage from the priority date of July 3, 2002.

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 or seasonal 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, 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 3, 2002. The proffered wage as stated on the Form ETA 750 is \$36,650 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of retail store manager or two years of experience in the related occupation of manager or assistant manager of retail or department of retail store. The ETA 750 also states that experiential references are required.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On motion, counsel submitted a brief, a copy of the 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, for Diamond Brothers, Inc., a copy the petitioner's 2005 Form 1120, U.S. Corporation Income Tax Return, and affidavits from both the beneficiary and the petitioner's owner.

The 2004 Form 1120S for Diamond Brothers, Inc. reflects an ordinary income or net income of \$12,780 and net current assets of \$22,454.

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's 2005 Form 1120² reflects a taxable income before net operating loss deduction and special deductions or net income of \$37,159 and net current assets of \$46,717.

The affidavit, dated July 21, 2006, from the beneficiary states:

I am in no way related to _____ the owner of [the petitioner]. _____ is a common name in our community – it is a common Indian/Urdu name. I did not meet _____ until the store was sold by the previous owner to him last year

The affidavit, dated July 20, 2006, from the petitioner's owner states:

As the president and owner of [the petitioner], I take compensation from the company at the end of the year. However, this amount is flexible and dependent on the profits of the company. Therefore, in one given year if the company has more expenses or salaries to pay, I can be flexible in the amount of compensation I take for myself and reduce the amount of compensation I take myself. The final amount of salary that the company pays me (which is outlined under "compensation of officers" on the company's tax return) is determined by my accountant and myself at the end of the year based on our expected gross and net profit for the company for that year. If the company has less profit projection, my compensation decreases and if the company has more profit projection, my compensation increases. My main responsibility and priority as the business owner is to make sure that all the salaried employees are compensated first and only after that I take the remaining profit as compensation for myself. This is what I have done in the past and what I intend to continue to do in the future as a responsible business owner. Had I employed [the beneficiary] in the past, I would have decreased my compensation if necessary in order to pay him the proffered wage, and I have the flexibility to do so.

I have been a business owner for 2 years and have maintained my business responsibly. At the end of 2004, the previous owner knew that I was about to buy the business from him and therefore neglected aspects of the business which in turn reduced the profitability net income for that year. In addition, according to the tax records, the previous owner took for himself a salary of \$34,300 in 2004 while he did

² The Memorandum of Sale reflecting the purchase of the business by the petitioner as of January 20, 2005 establishes that the petitioner is a successor-in-interest to the prior owners as the Memorandum specifically states that "Seller does hereby sell, transfer, assign, and convey to the Purchaser assets of the business known as the 'Korner Store BP' (the Business) located at 155 E. Atlanta Road, Stockbridge, Henry County, Georgia 30281 (the Premises), and herewith delivers to said Purchaser all interest in and title and rights to same, free and clear of all liens and encumbrances except as provided for herein." The petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

not take such a salary in 2003 and 2002. The company definitely had sufficient cash to pay [the beneficiary's] proffered wage instead of paying the owner and the previous owner had the flexibility to reduce his own wage. In retrospect, he has not done that because in my opinion he knew he was going to sell the business. Even though the net income and net current assets for 2004 are lower than usual, the 2005 net income and net current assets are sufficient to pay [the beneficiary's] proffered wage. 2004 was an unusual year of lower net income compared with what the store has historically produced and is anticipated to produce in the future due to the restructuring of the business by the previous owner prior to its sale to me. 2004 was only a transition year and was not a typical year for the store as the net income and net current assets were significantly lower than the previous years (2001, 2002, and 2003) and also significantly lower than the subsequent years (2005 and 2006 YTD). As the current business owner, the financial projections for the store are to continue to increase profitability. We have already increased profitability for 2005 and based on year-to-date numbers for 2006, I believe that we will increase profitability for fiscal year 2006 more than 2005 which was a higher profit year than 2004. Our forecasts to the future are that the business will continue to grow and become even more profitable with the new management. Hiring [the beneficiary] will contribute to the growth and profitability of the business and will alleviate my own work pressure since I am short a competent and loyal store manager to work in the store.

On motion, counsel claims that the petitioner has established its ability to pay the proffered wage based on its compensation of officers and on the totality of the circumstances. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in support of her contention.

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, 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 2002 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). 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.

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 116. "[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 prior petitioner's tax returns³ demonstrate its net income for 2002 through 2004, as shown in the table below.

- In 2002, the Form 1120S stated net income⁴ of \$24,519.
- In 2003, the Form 1120S stated net income of \$14,353.
- In 2004, the Form 1120S stated net income of \$12,780.

Therefore, for the years 2002 through 2004, the prior petitioner did not have sufficient net income to pay the proffered wage.

The petitioner's tax returns demonstrate its net income for 2005, as shown in the table below.

- In 2005, the Form 1120 stated net income⁵ of \$37,159.

Therefore, for the year 2005, the petitioner did have sufficient net income to pay the proffered wage of \$36,650.

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.⁶ 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

³ See footnote 2.

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) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the prior petitioner had no additional income, credits, deductions, other adjustments shown on its Schedule K for 2002 through 2004, the prior petitioner's net income is found on line 21 of page one of the petitioner's tax returns for 2002 through 2004.

⁵ 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.

⁶ 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.

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 prior petitioner's tax returns demonstrate its end-of-year net current assets for 2002 through 2004, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$42,724.
- In 2003, the Form 1120S stated net current assets of \$45,077.
- In 2004, the Form 1120S stated net current assets of \$22,454.

Therefore, for the years 2002 and 2003, the prior petitioner did have sufficient net current assets to pay the proffered wage of \$36,650. In 2004, the prior petitioner did not have sufficient net current assets to pay the proffered wage of \$36,650. The petitioner has already established its ability to pay the proffered wage of \$36,650 from its net income in 2005.

Counsel asserts in her brief accompanying the motion that prior petitioner has established its ability to pay the proffered wage of \$36,650 based on its compensation of officers and on the totality of the circumstances.

Counsel is mistaken. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S.

The documentation presented here is incomplete as the 2004 Form 1120S for the prior petitioner does not include Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., and the AAO is unable to determine the number of officers of the prior petitioner.⁷ Although the petitioner states that "the company definitely had sufficient cash to pay [the beneficiary's] proffered wage instead of paying the owner and the previous owner had the same flexibility to reduce his own wage," there is no evidence in the record that substantiates this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the prior owner has not stated that he has other business interests which could cover his personal expenses. Ordinarily, wages already paid to others cannot be used to establish the petitioner's ability to pay the proffered wages in the pertinent years. USCIS 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. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 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

⁷ The prior petitioner's 2002 Form 1120S reflects four owners, and its 2003 Form 1120S reflects two owners. The AAO cannot assume that there was only one owner in 2004.

proffered wage. 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.”

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 (BIA 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 prior petitioner’s tax returns indicate it was incorporated on October 28, 1999. The petitioner has provided the prior petitioner’s tax returns for fiscal years 2002 through 2004, with only the 2002 and 2003 tax returns establishing the petitioner’s ability to pay the proffered wage of \$36,650. Counsel asserts that “the fact that the business was going to be sold to the new owner had most likely a crucial effect on how the owners decided to distribute their profits at the end of the year and take the money to themselves because they were selling the business anyway.”⁸ However, the AAO is unable to approve a petition based on speculation by counsel. No evidence was provided to corroborate this claim or to show that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the prior petitioner’s reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the

⁸ The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

petitioner has not established that the prior petitioner had the continuing ability to pay the proffered wage. 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 prior petitioner had the continuing ability to pay the proffered wage beginning on the priority date.⁹

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. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

ORDER: The motion to reopen is granted. The AAO's decision of June 26, 2006 is affirmed. The petition remains denied.

⁹ Although not part of this decision, the AAO notes that it is unclear as to the beneficiary's intent to work for the petitioner as the beneficiary has obtained an approved Form I-140 through another petitioner located in Florida, and according to a recent search of government and/or public databases, has recently obtained a new Illinois Drivers License, valid until February 6, 2014, and has a current address of [REDACTED] in Chicago.