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U.S. Citizenship  
and Immigration  
Services

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**MAR 17 2005**



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

WAC 02 141 51225

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a clothing manufacturer. It seeks to employ the beneficiary permanently in the United States as an office manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits a statement and indicates that a brief would be submitted within thirty days. To date, no additional documentation has been received; therefore, a decision will be determined based on the record, as it is currently constituted.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on January 15, 1998. The proffered salary as stated on the labor certification is \$775.20 per week or \$40,310.40 per year.

With the petition, the petitioner submitted copies of the petitioner's 1998 through 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, a copy of the beneficiary's 1998, 1999, and 2001 Form W-2, Wage and Tax Statements, from Altres, Inc., and a copy of a 2000 payroll statement from Altres, Inc. for the beneficiary. The 1998 tax return reflected an ordinary income of \$59,990 and net current assets of -\$31,288. The 1999 tax return reflected an ordinary income of \$67,363 and net current assets of -\$57,743. The 2000 tax return reflected an ordinary income of \$66,285 and net current assets of -\$43,982. The director considered this documentation insufficient and on July 12, 2002, April 3, 2003, and July 10, 2003, he requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage from the priority date of January 15, 1998 and continuing to the present to be in the

form of copies of annual reports, federal tax returns (with appropriate signature(s)), or audited financial statements. The director specifically requested copies of the beneficiary's Forms W-2, Wage and Tax Statements, from the date the beneficiary was hired until the present, signed copies of the petitioner's 1998 through the present income tax returns with all schedules and attachments, and evidence that the petitioner is a successor in interest.

In response, the petitioner submitted signed copies of the petitioner's 1998 through 2002 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the beneficiary's 2002 Forms W-2 from Altres Employer Services, Inc. and CMD Management Corp., and a letter reflecting the sale of Knit Industries, Inc. to Marc Johnson and Darrell Czaykowski with a name change to Knit Heaven, Inc., a copy of a Certificate of Registration for Knit Heaven, Inc., a copy of a business license for Knit Heaven, Inc., and a copy of a health permit for Knit Heaven, Inc. The 2001 tax return reflected an ordinary income of \$63,290 and net current assets of -\$13,463. The 2002 tax return reflected an ordinary income of -\$69,561 and net current assets of -\$16,958.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on August 27, 2003, denied the petition.

On appeal, the petitioner states:

This case is being appealed on the basis that the employer has had the ability to pay the wage each and every year since this priority date was established. The proof of this is the 2002 Income Tax Statement. There is no compensation to office[r] due to the fact that the officer in this corporation Yves Atlan sold his business to Mark Johnson as we have previously outlined to you in the letter addressed to BCIS Service Center dated July 30, 2003 along with the contract for sale and the conditions of the sale purchase along with the compensation to Mr. [REDACTED]. Also this same income Tax statement shows cost of labor of [\$]863,552.

This is sufficient funds available to pay the proffered wages for Ms. [REDACTED] of \$40,300. We will also provide written brief in 30 days with additional evidence. Additionally since this company is no [longer] associated with Mr. Altres, we believe that the income Tax declaration for the current year 2003 will show a substantial rise in income. Since Ms. [REDACTED] is still employed there. But we believe a careful review of the tax return will show the income available to pay the actual and proffered wages.

At the outset, it is noted that this proceeding consists of a successor-in-interest issue, and since no information of the "new" petitioner's ability to pay the proffered wage was submitted, the appeal will be remanded to the director for further consideration of this issue. However, since the petitioner must establish that the initial petitioner had the continuing ability to pay the proffered wage from the priority date to the date of sale of the business, the AAO will review the initial petitioner's ability to pay the proffered wage for the years 1998 through 2002.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) 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 proffered wage. In the present matter, the beneficiary was paid by Altres Employer Services, Inc. and CMD Management Corp., employee-leasing companies, in 1998 through 2002. Therefore, it appears that even though the beneficiary worked at Knit Industries, Inc./Knit Heaven, Inc., she was actually employed by Altres Employer Services and CMD Management Corp. As such, the wages paid to the employee will not be considered as evidence of the petitioner's ability to pay the proffered wage, since the petitioner did not directly employ her.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 1998 through 2002 were -\$31,288, -\$57,743, -\$43,982, -\$13,463, and -\$16,958, respectively. The petitioner could not have paid the proffered wage in 1998 through 2002 from its net current assets.

The petitioner suggests that the cost of labor should be considered when determining the petitioner's ability to pay the proffered wage. In many instances, CIS will consider the cost of labor when determining the petitioner's ability to pay the proffered wage. However, in the instant case, the record does not name the workers paid under cost of labor, state their wages, verify their full-time employment, or provide evidence that the petitioner will replace them with the beneficiary. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions paid under cost of labor involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker(s) who performed the duties of the proffered position. If the employee(s) performed other kinds of work, then the beneficiary could not have replaced him/her or them.

The petitioner contends that since the 2002 tax return reflected no compensation of officers because the officer of the corporation sold his business in 2003, this establishes the ability to pay the proffered wage. The petitioner does not, however, explain how this fact establishes the petitioner's ability to pay the proffered wage. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner also states that since the company is no longer associated with Mr. [REDACTED] he believes that the income tax return for 2003 will show a substantial rise in income. However, the petitioner has not provided any evidence to substantiate his claim. See *Matter of Treasure Craft of California, supra*.

As in *Matter of Sonegawa*, CIS 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. CIS may consider such factors as the number of years that 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 CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner has not provided an explanation as to why it showed such a large loss in ordinary income in 2002 compared to prior years, and the petitioner has not provided any evidence of its income in 2003 under the new owners. In order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. The petitioner, as a successor-in-interest, must also demonstrate that it can pay the proffered wage from the time of purchase and continuing until the beneficiary obtains lawful permanent residence.

The 1998 tax return reflects an ordinary income of \$59,990 and net current assets of -\$31,288. The petitioner could pay the proffered wage out of its ordinary income in 1998.

The 1999 tax return reflects an ordinary income of \$67,363 and net current assets of -\$57,743. The petitioner could pay the proffered wage out of its ordinary income in 1999.

The 2000 tax return reflects an ordinary income of \$66,285 and net current assets of -\$43,982. The petitioner could pay the proffered wage from its ordinary income in 2000.

The 2001 tax return reflects an ordinary income of \$63,290 and net current assets of -\$13,463. The petitioner could pay the proffered wage from its ordinary income in 2001.

The 2002 tax return reflects an ordinary income of -\$69,561 and net current assets of -\$16,958. The petitioner could not pay the proffered wage from either its ordinary income or its net current assets in 2002.

The petitioner has established its ability to pay the proffered wage in 1998 through 2001. The petitioner has not established its ability to pay the proffered wage in 2002. However, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). In this case, the petitioner had been in business for ten years prior to 2002 when it had a loss of -\$69,561, and, therefore, the petitioner may establish its ability to pay the proffered wage if it can show that 2002 was an uncharacteristically unprofitable year for the petitioner. *See Sonogawa, supra*. The petitioner, as a successor-in-interest, must also show that it has the ability to pay the proffered wage from the date it purchased the prior company and continuing to the present.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the loss in 2002, the ability of the successor-in-interest to pay the proffered wage, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's August 27, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.