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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

SRC 04 012 51584

IN RE:

Petitioner:

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:

[Redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health food sales, wholesale and retail company. It seeks to employ the beneficiary permanently in the United States as a retail and wholesale manager (health foods/vitamins). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

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 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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 U.S. Department of Labor. 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 U.S. Department of Labor 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 April 3, 2001. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour (\$41,600.00 per year). The Form ETA 750 states that the position requires three years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of IRS Form 1120S tax return for 2001 and 2002, and, copies of documentation concerning the beneficiary's wages from another business and beneficiary's joint personal tax return.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of from the priority date April 3, 2001:

- In 2001, the Form 1120S stated taxable income¹ of \$29,558.00.
- In 2002, the Form 1120S stated taxable income of \$32,387.00.

The proffered wage is \$41,600.00 per year; therefore the taxable income stated on the petitioner's tax returns for 2001 and 2002 was insufficient to pay the proffered wage.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Please submit further evidence of your ability to pay the proffered wage/salary as of the priority date. Please also submit additional such evidence of your ability to pay the proffered wage/salary on a continuing basis up until the most recent date for which financial documentation can be obtained. (if your 2003 federal tax report is available, please submit copies, including all schedules. Please include copies of all forms 941 you filed during 2003.)

The petitioner submitted unaudited financial statements for 2001 and 2002.

The director denied the petition on May 26, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts:

The Department of Homeland Security/Texas Service Center erred in denying ... [the petitioner's] I-140 [petition] when sufficient and probative evidence was submitted with the original I-140 package. The ratio between the employer's gross sales versus the net sales is sufficient to sustain the beneficiary's states [sic] wages. The DHS/TSC's restrictive view regarding the employer's ability to pay the stated wages focuses erroneously [on] only the employer's 2001 income taxes and fails to grasp the company's continuous growth throughout 2001, 2002 and 2003

With the appeal, counsel submitted a brief.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) 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

¹ IRS Form 1120S, Line 21.

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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure 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, (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 that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

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 net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage at any time between the years 2001 through 2002 for which petitioner's tax returns are offered for evidence.

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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120 federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Forms 1120 U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following:

- In 2002, petitioner's Form 1120 return stated current assets of \$36,792.00 and \$5,131.00 in current liabilities. Therefore, the petitioner had \$31,661.00 in current net assets for 2002. Since the proffered wage was \$41,600.00 per year, this sum is less than the proffered wage.
- In 2001, petitioner's Form 1120 return stated current assets of \$41,381.00 and \$18,236.00 in current liabilities. Therefore, the petitioner had a \$23,145.00 in current net assets for 2001. Since the proffered wage was \$41,600.00 per year, this sum is less than the proffered wage.

² 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Counsel suggests that the amount of the gross earnings of the petitioner and the large payroll, salaries and commissions, lends credence to the petitioner's ability to pay the proffered wage. As already stated above, in *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income.

Counsel also asserts in his brief accompanying the appeal that there are another ways to determine the petitioner's ability to pay the proffered wage from the priority date. The elements of this contention are, the replacement of an existing employee, the store retail and wholesale manager, and a demonstration of the ability to pay the proffered wage by financial indicators developed by information outside that provided by the two tax returns submitted into evidence in support of the petition.

According to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. Petitioner has introduced unaudited financial statements. The unaudited Profit and Loss statements that petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited Profit and Loss statements are of little evidentiary value in this matter.

CIS records indicate that the beneficiary is in ill health. Petitioner has not explained how the beneficiary who could not continue working because of chronic health problems will be able to replace the existing manager or when he can next be fit to work. Counsel asserts that it will be advantageous to employ the beneficiary since the business in 2003 has suffered a down turn, although the petitioner has failed to provide its 2003 tax return. In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a retail and wholesale manager will improve its situation, or what its contribution will be in the business or why beneficiary's employment is necessary to alleviate the situation. The petitioner has provided no information concerning this existing manager. 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)).

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers. The record does not name this worker, state his wages, verify his full-time employment, or provide evidence that the petitioner will replaced him with the beneficiary.

³ 8 C.F.R. § 204.5(g)(2).

Counsel cites, citing *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989), contends that since the petitioner's tax returns do demonstrate the ability to pay the proffered wage from taxable income, "normal" accounting practices should be taken as evidence of the ability to pay the proffered wage. That holding is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns. The Court held that Citizenship and Immigration Services (CIS), formerly the Service or INS, should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia. *See also, Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

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 position of the existing manager involves 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 who already performs the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel points to the petitioner's the payroll, salaries and commissions as evidence of the ability to pay the proffered wage. The cost of labor as an expense cannot also be considered an asset available to pay the proffered wage. 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. Again, as already stated above, there is no evidence that the position of the worker involves 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 who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.⁴ Since it has already been expended, cost of labor cannot be included in taxable income. The suggestion that expenses (i.e. salaries and commissions) should be treated as assets available to pay the proffered wage is not persuasive. Therefore, wages paid to others cannot be used to prove the ability to pay the proffered wage.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date through an examination of the gross revenues of the petitioner, or examining the ratio between the petitioner's gross sales versus net sales. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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

⁴ If there is already a United States worker in the job who the petitioner wishes to replace with an alien worker, the necessity for an alien worker is questionable and contrary to United States Department of Labor regulations.

determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unique or unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the period examined was an uncharacteristically unprofitable period for the petitioner.

Also, beyond the decision of the director, the corporate officers of petitioner are [REDACTED] and the beneficiary, husband and wife. The petitioner has not disclosed her relationship to the beneficiary in the subject company. The petitioner did not disclose that fact to CIS when it initially filed the petition nor is it indicated that it made the appropriate disclosure to the Department of Labor (DOL) during the alien labor certification application process, since there is no such inclusion in the purportedly complete copy of the alien labor certification filing submitted to DOL that the petitioner submitted to CIS. According to DOL precedent and regulations, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the two corporate tax returns as submitted by petitioner that by any test shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Also, The AAO cannot conclude that the petitioner is extending a *bona fide* job offer to the beneficiary.

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.

ORDER: The appeal is dismissed.