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U.S. Citizenship
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FILE: [REDACTED]
EAC 02 196 51517

Office: VERMONT SERVICE CENTER

Date: OCT 11 2005

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

PETITION: 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:



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

The petitioner is a ceramic tile manufacturer and dealer. It seeks to employ the beneficiary permanently in the United States as a custom tile molder. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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 and 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 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:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$27.22 per hour, which amounts to \$56,618 annually. On the Form ETA 750B, signed by the beneficiary on March 27, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on May 20, 2002. On the petition, the petitioner claimed to have been established in May 1999, to currently have three employees, to have a gross annual income of \$812,365 and to have a net annual income of \$125,389.

In support of the petition, the petitioner submitted:

- An original certified ETA 750; and,
- The petitioner's Form 1120 for 2001 showing at line 28, "taxable income," that the petitioner had a \$5,153 loss.

In a request for evidence (RFE) dated September 16, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested the petitioner's corporate income tax return for 2002.

In response to the RFE, the petitioner submitted:

- The affidavit of company owner [REDACTED] notarized on November 26, 2003, stating that the “negative annual income in 2001” was the result of business “renovations,” and that the petitioner’s profitability should resume by 2003;
- A November 19, 2003 statement by a CPA stating that the beneficiary worked as an independent contractor for the petitioner in both 2001 and 2002.

In a decision dated March 15, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director denied the petition, noting that the petitioner had not submitted the requested 2002 income tax return and that for 2001 its net current assets amounted to only \$18,535, failing to establish the ability to pay the proffered wage of \$56,618. The decision further noted the record should have included evidentiary support for the assertion that the beneficiary had worked for the petitioner as an independent contractor, such as with an Internal Revenue Service Form 1099 employers normally issue to independent contractors. In that regard, the director noted that under “other deductions,” the petitioner had only spent \$8,166 on “outside services.”

On appeal, counsel submits a brief but no additional evidence.

Counsel states on appeal that beyond the petitioner’s taxable income loss of \$5,153 for 2001 reported on its Form 1120 return for 2001, the petitioner’s net income, consisting of gross receipts less purchases plus inventory, equals \$125,389 for the year. He further contends that the beneficiary worked for the petitioner as an independent contractor during 2001 and 2002, the cost of which appears in the 2001 tax return under “purchases.” Counsel finally asserts the director raised for the first time, in his denial of the petition, that the beneficiary could at most claim the petitioner paid him \$8,166 as an independent contractor, as evidenced by the return reporting \$8,166 for “outside services.”

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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 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 instant case, the Form ETA 750B, signed by the beneficiary, indicated that the beneficiary did not claim to have worked for the petitioner. Instead, on the ETA 750 the beneficiary asserts that from January 1999 to the date he signed the ETA 750, he worked full time for a [REDACTED] brand gasoline station located in Paramus, New Jersey. Assuming the beneficiary did put in a 40-hour workweek at a [REDACTED] gas station, as stated on the ETA 750, this

office notes that such work would leave the beneficiary with little time to spare in the hours that remain in the workweek to make hand-made tiles. Accordingly, this office does not accept the petitioner's claim that the beneficiary worked for it as an independent contractor in 2001 and 2002 that might help the petitioner establish its ability to pay the proffered wage.

This office further notes that the record of proceedings do not include W-2 forms, payroll records, quarterly wage reports, paychecks, etc., that would corroborate any wages the petitioner paid to the beneficiary. Further, counsel's assertion that payments made to the beneficiary, as an independent contractor, would be included among purchases reported on its 2001 return is not persuasive and cannot be accepted without specific details, such as would be set forth on a Form 1099. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, it is incumbent upon counsel to establish the petitioner's ability to pay in other ways, such as through its net income as reflected on the petitioner's federal income tax return for a given year, 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now 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 the Service 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 *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 25 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show taxable income on line 28 of the petitioner's Form 1120 return for 2001 to be -\$5,135 for 2001. Since the figure is negative, his 2001 taxable income loss fails to establish the ability of the petitioner to pay the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are those that an employer might expect to convert to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax Year	Net Current Assets	Net Current Assets Short of Ability To Pay The Proffered Wage
2001	(\$18,535)	(\$75,153)

Each of the foregoing figures is negative and fails to establish the petitioner's ability to pay the proffered wage.

Counsel, by asserting that the petitioner's remodeling expenditures overshadowed its profitability, implicitly relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), although the reliance is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within 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 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.

No unusual circumstances, parallel to those in *Sonogawa*, have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

After a review of the federal tax returns, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence status.

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.