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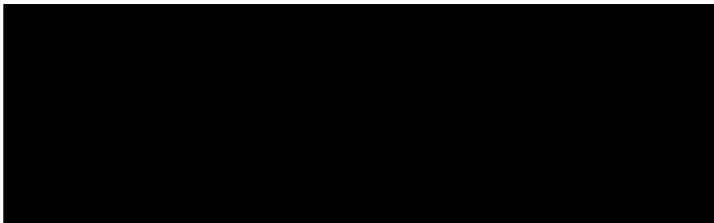
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 21 2006**
WAC 04 081 51198

IN RE: Petitioner: [REDACTED]
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:



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, Chief
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 sustained. The petition will be approved.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a secretary. 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.

On appeal, counsel submits a brief and additional evidence.

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.

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. *See* 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$14.75 per hour (\$30,680 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1981, to have a gross annual income of \$14,427,206.87, and to currently employ 80 workers. According to the tax returns in the record, the petitioner's fiscal year lasts from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on April 11, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents:

- An original certified ETA 750;
- Counsel's G-28;
- An unaudited compilation report for the first three quarters of the year 2003; and,
- An unaudited compilation report for the years 2000 and 2001.

On November 12, 2004, the director requested additional evidence pertinent to the petitioner's ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically

requested financial evidence for the years 2001 to 2003, along with certified copies of the petitioner's Form DE-6 (Quarterly Wage Reports) for the most recent four quarters.

In response, the petitioner submitted:

- Its compilation financial report for the first six months of the year 2004;
- Certified copies of the petitioner's DE-6 reports for the four quarters of 2004; and,
- Signed copies of the petitioner's Form 1120S for the years 2001–2003.

The director denied the petition on January 21, 2005, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submits:

- A declaration dated February 18, 2005, from the petitioner's president attributing the petitioner's drop in net income, i.e., a \$(424,919) net loss on its Form 1120S for the year 2003 to a drop in Asian tourism because of the outbreak of Sudden Acute Respiratory Syndrome (SARS);
- A CPA's February 12, 2005 declaration that in the year 2003, the petitioner invested \$2,438,598 excess cash into an office building, noted in its Form 1120S Schedule L, lines 9 and 12;¹
- A copy of the petitioner's bank statement for January 2005; and,
- The petitioner's declaration stating it employed the beneficiary "full time" (32 hours a week) for the last nine months of the year 2004, along with a copy of the W-2 (Wage and Tax Statement) and pay stubs for 2004.²

In determining the petitioner's ability to pay the proffered wage during a given period, 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 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 did not establish that it employed and paid the beneficiary the full proffered wage for 40 hours a week of work in the years 2001–2003.

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, CIS will next 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).

¹ The bulk of those investments also appear on the petitioner's Form 1120S for the years 2001 and 2002.

² The record shows that the beneficiary worked for the petitioner starting in April 2004 through December 2004, and his W-2 for the year 2004 stated \$16,992 in wages. The record of proceedings includes pay stubs from April 2004 through January 2005, all at the proffered hourly rate.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$30,6800 per year from the priority date.

In the year 2001, the Form 1120S stated net income³ of \$123,890.

In the year 2002, the Form 1120S stated net income of \$241,177.

In the year 2003, the Form 1120S stated net income of \$(424,919).

Therefore, while the petitioner had sufficient net income to pay the proffered wage for the years 2001 and 2002, it did not have sufficient net income to pay the proffered wage during the year 2003.

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. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

³ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁴ 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.

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 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 petitioner's net current assets during 2003, the only year in question, were \$(2,341,329).

Therefore, 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 continuing ability to pay the beneficiary the proffered as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts that the SARS outbreak in China and other Asian countries resulted in a slowdown in the petitioner's tourism business as reflected on the petitioner's Form 1120S net losses reported on for the year 2003, which the director should not view as evidence of the petitioner's inability to pay the proffered wage. We agree with counsel, that the petitioner's net income figures from its federal income tax returns for the years preceding 2003 reflects better its ability to pay the proffered wage. The petitioner's financial documents overall should be viewed in the context of the petitioner's size, longevity, and the number of its employees, which we cannot overlook.⁵ Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1981 and according to its quarterly wages reports, employs approximately 80 or more employees. Its gross receipts for the years 2001–2003 have ranged between approximately \$19 million and nearly \$27 million, with \$1,032,196 in salaries and wages in the year 2001 alone. Further, the shareholders of an S corporation such as the petitioner have 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, and for the years 2001–2003, officer compensation ranged from

⁵ The record of proceedings also includes compilations prepared by the petitioner's CPA for the years 2000 and 2001, as well as monthly statements for January 2005 from the petitioner's bank accounts. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. As to the petitioner's financial statements, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. A compilation is the management's representation of its financial position and is the lowest level of financial statements relative to other forms of financial statements. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

\$73,900 to \$170,073, and may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

Counsel's assertions on appeal have overcome the director's finding in his decision to deny the petition. The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.