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U.S. Citizenship
and Immigration
Services

B6

FILE: [REDACTED] Office: TEXAS SERVICE CENTER
SRC 03 149 51501

Date: AUG 21 2006

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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a dental office and laboratory. It seeks to employ the beneficiary permanently in the United States as a dental technician. 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.

On appeal, counsel states that the petitioner has sufficient revenue and assets to pay the proffered wage, that Citizenship and Immigration Services (CIS) uses an inaccurate and incomplete analysis in its decision, and that the decision ignores precedent case law. Counsel submits no further documentation.

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 12, 2001. The proffered wage as stated on the Form ETA 750 is an hourly salary of \$14.10, or a yearly salary of \$29,328. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1997.

On the petition, the petitioner claimed to have been established in 1980, and to have nine employees. The petitioner did not identify its gross annual or net annual income. In support of the petition, the petitioner submitted an untranslated letter of previous work employment. The petitioner also submitted IRS Forms 1120S, the petitioner's corporate income tax returns for 2000 and 2001. These documents indicate that the petitioner had ordinary income of \$55,287 in tax year 2000 and ordinary income of \$11,135 in tax year 2001. The petitioner also submitted a Statement of Revenue and Expenses from [REDACTED] Inc., Houston, Texas, the petitioner's accountant. This report examines the monthly revenue and expenses for December 2002 and for the entire year of 2002. This document had a cover letter dated February 10, 2003

that states the statement is a compilation of the petitioner's assets and liabilities, and equity tax-basis, and that management had elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on December 8, 2004, the director requested additional evidence pertinent to that ability. The director noted that the Form ETA 750 stated that the beneficiary needed two years of experience as a denture-model maker. The director noted that the letter of previous work experience initially submitted to the record was not translated, and the director requested that if the initial letter was the work experience letter, that a translated version be submitted to the record. The director also noted that the petitioner's Form 1120S for 2001 indicated a net profit of \$11,135 which was less than the proffered wage. The director stated that since the beneficiary was currently employed by the petitioner that the petitioner should submit the beneficiary's W-2 Form for tax year 2001.

The director also stated that the petitioner might show its ability to pay the proffered wage by any one of three separate analysis paths: (a) by demonstrating the petitioner paid the beneficiary a salary equal to or greater than the proffered wage in all years under consideration; (b) by demonstrating that the petitioner's net income was equal to or greater than the proffered wage in all years under consideration, or (c) by demonstrating that the petitioner's net current assets were equal to or greater than the proffered wage in all years under consideration. The director noted that the petitioner's net current assets were the difference between current assets and current liabilities.¹ The director stated that evidence must include at least one of the three forms of evidence cited in 8 C.F.R. § 204.5(g)(2), namely, copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a translation of the letter of work experience previously submitted to the record. The petitioner also submitted copies of the petitioner's IRS Form 1120S, the petitioner's corporate tax returns for the years 2001, 2002, and 2003. These documents indicated the petitioner had ordinary income in tax year 2001 of \$11,135 as previously noted; ordinary income of -\$10,134 in tax year 2002, and ordinary income of \$15,239 in tax year 2003. Finally the petitioner submitted the beneficiary's W-2 Forms for tax years 2001, 2002, and 2003. These documents indicated the petitioner paid the beneficiary \$17,639.56 in 2001, \$22,121.12 in tax year 2002, and \$23,783.13 in tax year 2003.

On January 12, 2005, the director denied the petition. In his denial of the petition, the director noted the petitioner's net income and the beneficiary's income for the years 2001 to 2003 and stated that these figures were not sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date year and to the present. The director also examined the petitioner's net current assets and stated that these figures were also not sufficient to establish the petitioner's ability to pay the proffered wage.

¹ Although not explicitly stated by the director, the petitioner's current assets and liabilities are identified on Schedule L, of the Form 1120S document. The AAO will examine the petitioner's net current assets more completely further in these proceedings.

On appeal, counsel states that the petitioner is in compliance with 8 C.F.R. § 204.5(g)(2) in that sufficient revenue has been received in tax years 2001 to 2004 and sufficient assets exist to pay the proffered wage. Counsel also asserts that CIS applies an incomplete analysis that not only demands that the beneficiary's wages be paid, but that the petitioner's net income also must match or exceed the wage stated on the ETA 750. Counsel also states that the CIS calculation of net current assets is inaccurate in that certain assets are not considered in accordance with generally accepted accounting practices. Finally counsel asserts that the director's decision ignores precedent case law and cites to *Matter of Sonogawa*, 12 Int. Dec. 1612 (Reg. Com. 1967). Although counsel indicates on the Form I-290B that he will submit a brief or evidence to the AAO within 30 days, the AAO has received no further documentation. Therefore the AAO will examine the petition based on the record as presently constituted.

With the initial petition, counsel submitted an unaudited financial statement for tax year 2002. 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 that 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. 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.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. The petitioner submitted W-2 salary statements for the beneficiary for the years 2001, 2002, and 2003 that established the petitioner paid the beneficiary \$17,639.56 in 2001, \$22,121.12 in tax year 2002, and \$23,783.13 in tax year 2003. These wages are not equal to or greater than the proffered wage of \$29,328. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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). 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 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 the 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 evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax returns for 2001, 2002, and 2003² shows the following amounts of ordinary income: \$11,135, -\$10,134, and \$15,239. As stated previously the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage.

As also stated previously, the beneficiary earned \$17,639.56 in 2001, \$22,121.12 in tax year 2002, and \$23,783.13 in tax year 2003. Thus, with regard to the years 2001, 2002, and 2003, the differences between the beneficiary's actual wages and the proffered wage would be \$11,688.44 in 2001, \$7,207.88 in 2002 and \$5,544.87 in 2003.³ In the priority date year of 2001, the petitioner lacked \$554.44 to pay the difference between the beneficiary's actual wages and the proffered wage, based on its net income. In 2002, the petitioner had negative net income and therefore cannot establish that it can pay the difference between the beneficiary's actual wages and the proffered wage, based on its net income. In tax year 2003, however, the petitioner has sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$5,544.87. Thus, the petitioner has established that it is able to pay the proffered wage in tax year 2003. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner in the instant petition has not established its ability to pay the proffered wage as of the 2001 priority date year and tax year 2002, based on its net income.

² The petitioner also submitted its 2000 corporate tax return to the record; however, since the priority date was established in 2001, the petitioner's 2000 tax return is not dispositive. Therefore, the petitioner's 2000 federal income tax return is not examined in these proceedings.

³ These figures are calculated by subtracting the beneficiary's actual wages from the proffered wage of \$29,328.

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.⁴ 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 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 submitted the following information for tax years 2001 and 2002:

	2001	2002
Ordinary Income	\$ 11,135	\$ -10,134
Current Assets	\$ 3,603	\$ 371
Current Liabilities	\$ 47,643	\$ 58,198
Net current assets	\$ -44,040	\$ -57,827

These figures fail to establish the ability of the petitioner to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2001 or 2002. In 2001, the petitioner shows a net income of \$11,135, and negative net current assets of \$44,040, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. In 2002, the petitioner shows a negative net income of \$10,134, and negative net current assets of \$57,827, and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets. Thus, the petitioner cannot establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2001 or 2002, based on its net income or net current assets. Therefore the petitioner has not established its ability to pay the proffered wage as of the 2001 priority date and to the present.

On appeal, counsel cites *Matter of Sonogawa*, and asks CIS to examine the totality of the petitioner's circumstances. *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

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.

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

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Both tax years 2001 and 2003 were profitable years for the petitioner. However, in examining the totality of the petitioner's circumstances, it is noted that the petitioner has a sole owner/officer/shareholder. The compensation of sole corporate officers may be viewed as discretionary expense, as opposed to wages, which are not discretionary. As such, officers' compensation can be viewed at times as a source of additional funds with which to pay the proffered wage.

To determine whether or not an entity's officer compensation would have been available to the proffered wage, CIS examines many issues, including the flexibility that the shareholders have in setting their own compensation; the profitability of the corporation; whether the officers compensation is discretionary as opposed to wages which are not discretionary; and/or whether the officer compensation is substantially more than the amount of the proffered wage. In addition, the CIS would examine whether the amount of officer compensation varies over the course of the pertinent years, and whether the officer receiving the compensation is the sole owner/stockholder or majority owner/stockholder.

In examining these issues, the AAO finds that the officer receiving compensation is the sole owner/stockholder, and that her compensation varies over the years from \$230,769 in 2001 to \$260,000 in 2003. The AAO also notes that the money needed to pay the difference between the beneficiary's actual wages and the proffered wage is \$554 in tax year 2001 and \$7,206.88 in tax year 2002. During tax year 2001 and 2002, the sole officer/shareholder's compensation was \$230,769 and \$244,308, both figures being significantly higher than either the difference between the beneficiary's actual wages and the proffered wage, or the entire proffered wage. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). It is noted that the petitioner had been in business over 23 years when the instant petition was filed. It is further noted that in every year since the 2001 priority year, the petitioner's wages and salaries paid to other employees have increased, while the petitioner's gross receipts have always been over \$900,000 annually. The AAO finds sufficient evidence in the record, that the petitioner, based on its longevity, the compensation of its officer, and the nature of its business operations has the ability to pay the proffered wage as of the 2001 priority date and through tax year 2002. As previously stated, the petitioner established its ability to pay the difference between the beneficiary's wages and the proffered wage for tax year 2003, based on its net income.

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.