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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUL 03 2006
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



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

The petitioner is a commercial sign manufacture and installation business. It seeks to employ the beneficiary permanently in the United States as an office helper. 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 28, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. 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 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 CFR § 204.5(d). The priority date in the instant petition is April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$6.66 per hour or \$13,852.80 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes a copy of the front page of the petitioner's 2003 Form 1120S, U.S. Income Tax Return for an S Corporation. Other relevant evidence includes a letter from [REDACTED] Treasurer of the petitioner, copies

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

of the petitioner's 2000 through 2002 Forms 1120S, copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax Statements, copies of the beneficiary's 2003 pay stubs through October 31, 2003, and copies of unaudited financial statements for the petitioner for 2001, 2002, and the first nine months of 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2000 through 2003 Forms 1120S reflect ordinary incomes or net incomes of \$9,592, -\$55,607, -\$67,291, and \$45,307, respectively. The petitioner's 2000 through 2003 Forms 1120S also reflect net current assets of \$68,273, \$26,537, -\$1,536, and an unknown amount as only the first page was provided for 2003, respectively.

The beneficiary's 2001 and 2002 Forms W-2 issued by the petitioner reflect wages earned of \$6,543.70 and \$10,769.93, respectively. The copies of the pay stubs reflect wages earned by the beneficiary, as of October 31, 2003, of \$9,602.17. The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$13,852.80 and the actual wages paid to the beneficiary. The differences between the wages earned by the beneficiary during 2001 and 2002 and the proffered wage of \$13,852.80 were \$7,309.10 and \$3,082.87, respectively. In 2003, the beneficiary earned \$9,602.17 as of October 31, 2003. At the rate the beneficiary was being compensated as of October 31, 2003, the beneficiary would have earned an additional \$1,920.434 for the two remaining months in 2003; thereby, earning a total of \$11,522.60 or \$2,330.20 less than the proffered wage of \$13,852.80 in 2003.

The letter from the Treasurer of the petitioner asserts that the petitioner's depreciation, the beneficiary's gross wages, the petitioner's share of the beneficiary's payroll taxes, and the petitioner's share of the beneficiary's H&A Insurance should be added back to ordinary income when determining the petitioner's ability to pay the proffered wage of \$13,852.80. The letter also claims that the petitioner suffered a loss in income from September 2001 through May 2002 because of the tragedy of September 11, 2001.

On appeal, counsel states:

The Immigration Examiner has made some serious legal errors in this decision. The denial is based on the examiner's finding that the petitioner did not pay the beneficiary the offered wage since she began working therein 2001. She was paid close to the wage, but not the actual wage listed on the labor certification. The law is very clear that the wage listed on the labor certification is an OFFERED wage only, and must be paid only at the time that the permanent residence is granted. This is clearly stated at 20 C.F.R. Section 656.20(c)(2). This case was denied without a Request for Evidence, and the beneficiary has been paid wages very close to the wage on the labor certificate, and these wages have already been deducted from tax returns of petitioner.

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 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, on the Form ETA 750B, signed by the beneficiary on March 21, 2001, the beneficiary did not include the petitioner as a past or present employer. However, counsel submitted Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary, indicating that the petitioner employed the beneficiary in 2001 and 2002. Counsel also submitted pay stubs for the beneficiary for January through October 2003. Therefore, the petitioner has established that it employed the beneficiary in 2001 through the first ten months of 2003. The petitioner is obligated to establish that it has sufficient funds to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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 (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 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.² 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's net current assets in 2000 through 2002 were \$68,273, \$26,537, and -\$1,536, respectively. The petitioner did not provide Schedule L for its 2003 tax returns; and, therefore, the AAO is unable to determine its net current assets in 2003. The petitioner could not have paid the difference between

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.

the actual wages paid to the beneficiary and the proffered wage in 2002 from its net current assets, but could have paid the difference in 2000 and 2001.

The petitioner's Treasurer contends that the petitioner's depreciation should be considered when determining the petitioner's ability to pay the proffered wage. The Treasurer's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

The petitioner's Treasurer also asserts that the beneficiary's gross wages, the petitioner's share of the beneficiary's payroll taxes, and the petitioner's share of the beneficiary's H&A Insurance should be added back to the net income when determining the petitioner's ability to pay the proffered wage of \$13,852.80. However, the Treasurer fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner's Treasurer claims that the petitioner's loss of income from September 2001 through May 2002 was a result of the tragedy of September 11, 2001. While the Treasurer provides a figure of \$260,854 as evidence of the petitioner's decline in revenue during the period of September 2001 through May 2002, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by the Treasurer that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. 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)).

On appeal, counsel contends that the petitioner is not obligated to pay the proffered wage until the beneficiary obtains lawful permanent residence. While counsel is correct that the petitioner is not compelled to pay the proffered wage until the beneficiary obtains lawful permanent residence, the regulations at 8 C.F.R. § 204.5(g)(2) specifically state that the petitioner is obligated to establish that it has sufficient funds to pay the proffered wage from the priority date of April 19, 2001 and continuing until the beneficiary obtains lawful permanent residence. Considering only the petitioner's tax returns, the petitioner's 2002 tax return does not establish the ability to pay the difference of \$3,082.87 between the proffered wage of \$13,852.80 from either its net income of -\$67,291 or its net current assets of -\$1,536 in 2002.

Counsel complains that the petition was denied without a Request for Evidence. The regulations at 8 C.F.R. § 103.2(b)(8) states in pertinent part:

Request for evidence. If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence, including blood tests.

In the instant case, the petitioner submitted copies of its 2000 through 2002 income tax returns, a copy of the first page of its 2003 tax return, copies of the beneficiary's 2001 and 2002 Forms W-2, and copies of the beneficiary's pay stubs for the first ten months of 2003. The record of proceeding was complete in that it contained all the necessary initial evidence; and, therefore, the director was not obligated to issue a request for evidence. In addition, since the record of proceeding included evidence of ineligibility on the petitioner's part (the petitioner's 2002 tax return), the director was justified in denying the petition on that basis alone.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, 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 the instant case, the petitioner submitted four tax returns, 2000³ through 2003, with three of the four returns establishing the ability to pay the proffered wage either based on net income or net current assets. Since the petitioner has been in business since February 1992 (a little more than fourteen years), since it has provided four tax returns with three of the four reflecting the petitioner's ability to pay the proffered wage, since the proffered wage is relatively low (only \$13,852.80 per year), and since the wage is less than 2.5% of the petitioner's lowest gross income of \$561,892 in 2002, the AAO has determined that the petitioner has established its ability to pay the proffered wage of \$13,852.80.

After a review of the record, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcomes the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

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

³ It is important to note that the AAO will not ordinarily consider a tax return that precedes the priority date when determining the petitioner's ability to pay the proffered wage as it is not relevant to the petitioner's ability to pay at the priority date and continuing to the present. See the regulation at 8 C.F.R. § 204.5(g)(2). In the instant case, however, the AAO will consider the 2000 tax return when evaluating the totality of the petitioner's circumstances.