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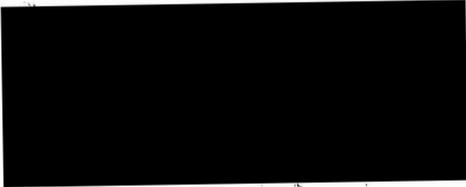
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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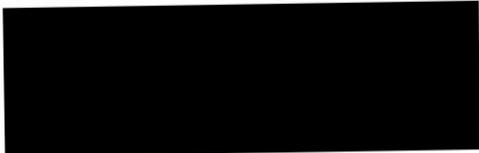
IN RE:

Petitioner:
Beneficiary:



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

The petitioner is a manufacturer of warp knit fabrics. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification application or Form ETA 750), 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.

Counsel filed a timely appeal with a brief and additional evidence.¹

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.

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). 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$17.60 per hour (\$36,608 per year). The Form ETA 750 states that the position requires one (1) year of training in electronics or computers and two (2) years of experience in the job offered. On the Form ETA

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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

750B signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1979, to have a gross annual income of \$3,549,675, to have a net annual income of \$825,042, and to currently employ 26 workers.

With the petition, the petitioner submitted its Form CBT-100, New Jersey Corporation Business Tax Return for 2001 pertinent to its ability to pay the proffered wage. On May 9, 2005, the director issued a request for evidence (RFE) for the petitioner's US federal tax returns for 2001 through 2004 or annual reports for 2001 through 2004 with audited or reviewed financial statements and W-2 forms for the beneficiary. In response to the RFE, the petitioner submitted Forms CBT-100 for its fiscal years 2001 through 2004.

The director denied the petition on January 11, 2006, finding that the evidence submitted with the petition and in response to the RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the evidence submitted on appeal and the totality of circumstance establish the petitioner's continuing ability to pay the proffered wage from the priority date.

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 record of proceeding contains the petitioner's Form 941 Employer's Quarterly Federal Tax Return, Form W-3 Transmittal of Wage and Tax Statements and Form W-2 Wage and Tax Statement for all employees for 2001, 2002 and 2003. However, the petitioner did not submit evidence that the petitioner paid any compensation to the beneficiary, nor did the beneficiary claim to have worked for the petitioner. In general, 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. Therefore, the petitioner has not established that it employed and paid the beneficiary the proffered wage during the period from the priority date to the present.

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, depreciation/amortization deduction or 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

Despite the director's specific request for federal tax returns in the RFE, the petitioner submitted New Jersey tax returns instead. The record of proceeding contains copies of the petitioner's Form CBT-100 New Jersey Corporation Business Tax Return for its fiscal years 2001 through 2004. The evidence shows that the petitioner is structured as a C corporation and the fiscal years last from August 1 to July 31. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,608 per year from the priority date.

In the fiscal year 2001 (8/1/00-7/31/01), the Form CBT-100 stated net income² of \$(224,781).
In the fiscal year 2002 (8/1/01-7/31/02), the Form CBT-100 stated net income of \$169,640.
In the fiscal year 2003 (8/1/02-7/31/03), the Form CBT-100 stated net income of \$105,679.
In the fiscal year 2004 (8/1/03-7/31/04), the Form CBT-100 stated net income of \$14,124.

Therefore, for the fiscal years 2001 and 2004, the petitioner did not have sufficient net income to pay the proffered wage while the petitioner established its ability to pay the proffered wage for the fiscal years 2002 and 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. On appeal counsel claims that the petitioner had the total assets of \$1,955,542, \$1,930,582, \$1,494,544 and \$1,390,054 in the years 2001 through 2004 respectively. Contrary to counsel's assertion, the AAO rejects 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.

² CIS considers taxable income before net operating loss deduction and special deductions as reported on Line 28 of Form 1120 as the petitioner's net income in purpose of immigration visa processing. Similarly in the instant case we consider Form CBT-100 Schedule A Line 28, Taxable income before net operating loss deductions and special deductions as net income. *See* Line 28, Schedule A, Form CBT-100 "Taxable income before net operation loss deductions and special deductions line 11 less line 27 must agree with line 28, page 1 of the Unconsolidated Federal Form 1120, or the appropriate line item from the Federal Forms 1120-IC-DISC, 1120-FSC or 1120-A, whichever is applicable. 1120-S filers who have not elected to be New Jersey S Corporations must report the amount from line 7, Schedule S-1 of the CBT-100)."

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are usually shown on Schedule L, lines 1 through 6 of Form 1120, and its year-end current liabilities are shown on lines 16 through 18. However, in the instant case, since the petitioner submitted New Jersey Form CBT-100 instead of federal Form 1120, the petitioner's year-end current assets are shown on Schedule B, lines 1, 2, 7, 8, and 17,⁴ and the year-end current liabilities are shown on lines 21 through 23.⁵ 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 were \$122,985 in 2001 and \$(23,527) in 2004. Therefore, the petitioner had sufficient net current assets to pay the proffered wage of \$36,608 in 2001 but the petitioner's net current assets were not sufficient for the proffered wage in 2004.

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. Counsel submits Form 1120 U.S. Corporation Income Tax Return filed by [REDACTED] and Subsidiaries for the fiscal years 2001 through 2004 and asserts that the petitioner is a subsidiary of [REDACTED]. Evidence shows that [REDACTED] owns 100% of shares of the petitioner, however, both the petitioner and [REDACTED] are structured as C corporations with their own federal employer identification numbers. Contrary to counsel's assertion, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In the instant case, the income or assets of the parent company, [REDACTED] cannot be considered in determining the petitioner's ability to pay the proffered wage.

On appeal, counsel submitted [REDACTED] and Subsidiaries' reviewed financial statements for the fiscal years 2001 through 2005. 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 accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The

³ 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.

⁴ Line 1. Cash; Line 2. Trade notes and accounts receivable; Line 7. New Jersey State and Local government obligations; Line 8. All other government obligations; and Line 17. Inventories.

⁵ Line 21. Accounts payable; Line 22. Mortgages, notes, bonds payable in less than 1 year; and Line 23. Other current liabilities.

unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Counsel's argument concerning the petitioner's size, longevity, and number of employees, however, cannot be overlooked. 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 Songawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the present case, the petitioner is a manufacturer of warp knit fabrics, was incorporated in 1979, and has been in business for 22 years at the time the Form ETA 750 was filed. The petitioner had \$3.5 million in gross receipts and paid out \$285,644 in wages and compensation of officers during the year in which the priority date was established. The record shows that the petitioner had gross receipts of more than \$3.3 million, and paid officer's compensation of \$348,612 and salaries and wages of \$122,461 in 2004. After reviewing the totality of circumstances in 2004, the AAO found that the petitioner has the ability to pay the proffered wage in 2004 while it established its ability to pay in 2001 through 2003 with its net income or net current assets.

Finally, the Immigrant Petition for Alien Worker (Form I-140) indicated that the proffered position was not a new position, thereby implying that the beneficiary would be replacing a previously hired employee. Although the director did not inquire into this question in the RFE, the validity of the job offer would be further strengthened if the beneficiary had been replacing and assuming the salary of an employee who had left the organization. However, as the record is devoid of evidence regarding the identity and actual salary of the previous employee, this factor may not be considered in the current matter. Regardless, a review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). 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.

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 decision of the director is withdrawn. The petition is approved.