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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:

EAC 04 147 50086

Office: VERMONT SERVICE CENTER

Date: OCT 02 2006

IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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.

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 original August 25, 2004 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)(i) of 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, 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$20.20 per hour or \$42,016 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

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

appeal includes counsel's brief, copies of the petitioner's 1996 through 2002 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 2003 and 2004 Forms 1120S, U.S. Income Tax Returns For an S Corporation, a copy of the petitioner's 2004 reviewed financial statement, a copy of a letter, dated September 13, 2004, from the petitioner's Certified Public Accountant (CPA), and a copy of the petitioner's Articles of Amendment showing the petitioner's name change. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 1996 through 2002 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$12,677, \$19,522, \$26,926, \$14,853, \$2,326, \$0, and \$388,135, respectively. The petitioner's 1996 through 2002 Forms 1120 also reflect net current assets of \$12,669, \$7,594, \$11,006, \$4,135, \$3,860, -\$118,751, and \$74,845, respectively.

The petitioner's 2003 and 2004 Forms 1120S reflect ordinary incomes or net incomes of \$356,813 and \$426,788, respectively. The petitioner's 2003 and 2004 Forms 1120S also reflect net current assets of -\$37,301 and -\$334,389, respectively.

The petitioner's Articles of Amendment show that the petitioner's name was changed from [REDACTED] to [REDACTED] on April 4, 2002.

The CPA's letter states that, in his opinion, the petitioner has the ability to pay the proffered wage of \$42,016 based on depreciation and net asset value (all assets less all liabilities). It is noted, however, that the CPA's calculations do not include all the liabilities. As explained below, CIS will consider net current assets, not net asset value.

On appeal, counsel states that the director's denial did not appropriately examine the financial evidence in light of precedent. Counsel stresses that this case is directly analogous to both *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *Oriental Pearl Restaurant*, 92-INA-59 (August 24, 1993). It should be noted that 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). In this case, the AAO will discuss *Matter of Sonogawa* with regard to the petitioner's ability to pay the proffered wage, but will not discuss *Oriental Pearl Restaurant*.

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).

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).

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 26, 2001, the beneficiary claims to have been employed by the petitioner from February 2000 to the present. However, counsel has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary in 2000 through 2004. Therefore, the petitioner has not established that it employed the beneficiary in 2000 through 2004.

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 1996³ through 2004 were \$12,669, \$7,594, \$11,006,

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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ It should be noted that the 1996 through 2000 tax returns are before the priority date of April 26, 2001 and will only be considered when determining the totality of the circumstances.

\$4,135, \$3,860, -\$118,751, \$74,845, -37,301, and -\$334,389, respectively. The petitioner could not have paid the proffered wage of \$42,016 in 1996 through 2001 or in 2003 and 2004 from its net current assets. The petitioner has established that it had sufficient funds to pay the proffered wage in 2002 from both its net income and net current assets.

On appeal, the petitioner's CPA contends that the petitioner's depreciation should be considered when determining its ability to pay the proffered wage of \$42,016. However, counsel'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 CPA also claims that a more accurate picture of the petitioner's balance sheet health would take into account all assets less all liabilities to come up with the company's net asset value (NAV). However, while the CPA does include all of the assets in his calculations, he only includes the petitioner's current liabilities. As explained above, CIS will consider net current assets only (current assets minus current liabilities). It would be inappropriate to consider all the petitioner's assets and only part of its liabilities.

On appeal, counsel asserts that this case is directly analogous to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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. 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 this case, the petitioner provided tax returns for the years, 1996 through 2004, which show that the petitioner has steadily increased its income from its inception (1996) to the present (2004). In fact, the petitioner's income has increased in 2004 over 30.5 times its initial income of \$180,859. In addition, although the petitioner had a net income in 2001 of \$0, it has never shown a loss in net income. Furthermore, while it is obvious that the petitioner could not have paid the proffered wage of \$42,016 before the priority date of April 26, 2001, the tax returns provided for those years do show the petitioner's historical growth.

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$0 and net current assets of -\$118,751. The petitioner could not have paid the proffered wage of \$42,016 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$388,135 and net current assets of \$74,845. The petitioner could have paid the proffered wage of \$42,016 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects an ordinary income or net income of \$356,813 and net current assets of -\$37,301. The petitioner could have paid the proffered wage of \$42,016 from its net income in 2003.

The petitioner's 2004 tax return reflects an ordinary income or net income of \$426,788 and net current assets of -\$334,389. The petitioner could have paid the proffered wage of \$42,016 from its net income in 2004.

For the reasons discussed above, specifically *Matter of Sonogawa*, 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.