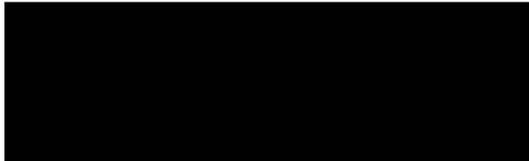


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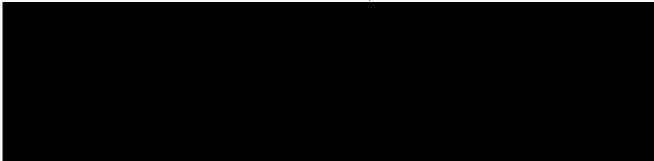
B6

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: OCT 19 2006
EAC 03 071 55276

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

A handwritten signature in black ink, appearing to read "Michael Valdes".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: the Director, Vermont Service Center, denied the preference visa petition. A subsequent appeal was rejected and treated as a motion. The motion was denied, after which a second motion was filed and also denied. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a knishes manufacturing business. It seeks to employ the beneficiary permanently in the United States as a preparation supervisor. 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 February 22, 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)(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 September 29, 1997. The proffered wage as stated on the Form ETA 750 is \$25.43 per hour or \$52,894.40 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 beneficiary's 2003 Form W-2, Wage and Tax Statement, copies of the beneficiary's pay summaries for the period April 16, 2003 through January 21, 2004, and copies of other Forms W-2 for individuals the petitioner claims the beneficiary will replace. The other Forms W-2 are for the years 1997 through 2003. Other Relevant evidence includes copies of the petitioner's 1997 and 2001 Forms 1120, U.S. Corporation Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The beneficiary's 2003 Form W-2 issued by the petitioner reflects wages earned by the beneficiary of \$40,720, and the pay summaries reflect the beneficiary was compensated at the proffered wage rate during the period April 16, 2003 through January 21, 2004.

The Forms W-2 in 1997 were for [REDACTED] at \$10,378, for [REDACTED] at \$24,654, and for [REDACTED] at \$18,548 for a total of \$53,580.

The Forms W-2 in 1998 were for [REDACTED] at \$12,345, for [REDACTED] at \$16,257, for [REDACTED] at \$14,389, and for [REDACTED] at \$13,998 for a total of \$56,989.

The Forms W-2 in 1999 were for [REDACTED] at \$16,587, for [REDACTED] at \$18,563, and for [REDACTED] at \$17,546 for a total of \$52,696.

The Forms W-2 in 2000 were for [REDACTED] at \$17,893, for [REDACTED] at \$17,996, and for [REDACTED] at \$17,635 for a total of \$53,524.

The Forms W-2 in 2001 were for [REDACTED] at \$19,326, for [REDACTED] for \$16,332, and for [REDACTED] at \$18,574 for a total of \$54,232.

The Forms W-2 in 2002 were for [REDACTED] at \$19,285, for [REDACTED] at \$18,425, and for [REDACTED] at \$16,584 for a total of \$54,294.

The Forms W-2 in 2003 were for [REDACTED] at \$17,125, for [REDACTED] at \$17,543, and for [REDACTED] at \$19,364 for a total of \$54,032.

The petitioner's 1997 and 2001 Forms 1120 reflect a taxable income before net operating loss deduction and special deductions or net income of -\$6,901 and \$59,484, respectively. The petitioner's 1997 and 2001 Forms 1120 also reflect net current assets of -\$49,279 and -\$55,123, respectively.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$52,894.40 based on the Forms W-2 for the other employees that the beneficiary will replace

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

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).

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 September 21, 1997, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has provided the beneficiary's 2003 Form W-2, issued by the petitioner for the beneficiary, indicating that the petitioner employed the beneficiary in 2003. Therefore, the petitioner has established that it employed the beneficiary in 2003.

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 1997 and 2001 were -\$49,279, and -\$55,123, respectively. The petitioner could not have paid the proffered wage of \$52,894.40 in 1997 and 2001 from its net current assets.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$52,894.40 based on the Forms W-2 of the employees the beneficiary will replace. The record does not, however, provide evidence that the petitioner has replaced or will replace them with the beneficiary. 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. Moreover, there is no evidence that the positions of the other employees involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and terminations of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

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 this case, however, the petitioner has only provided tax returns for the years, 1997 and 2001, which is not enough evidence to establish that the business has met all of

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.

its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. In addition, the petitioner did not provide tax returns for the years 1998 through 2000 or 2002 and 2003. Those tax returns would be needed to determine if the petitioner met the requirements of *Sonegawa*.

The petitioner's 1997 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$6,901 and net current assets of -\$49,279. The petitioner could not have paid the proffered wage of \$52,894.40 from either its net income or its net current assets in 1997.

The petitioner's 1998 through 2000 tax returns were not submitted.

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$59,484 and net current assets of -\$55,123. The petitioner could have paid the proffered wage of \$52,894.40 from its net income in 2001.

The petitioner's 2002 and 2003 tax returns were not submitted.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome 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 not been met.

ORDER: The appeal is dismissed