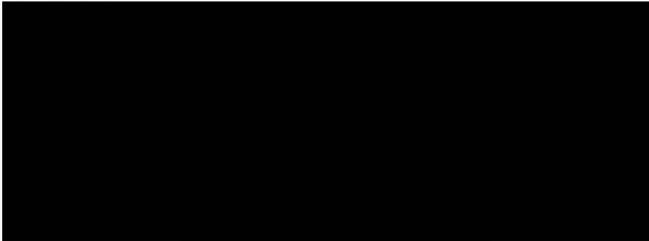


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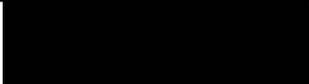
U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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FILE:



SRC 04 145 52188

Office: TEXAS SERVICE CENTER

Date: **SEP 08 2006**

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a construction manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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.

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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 14, 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 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 DOL. See 8 C.F.R. § 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 DOL 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 October 9, 2002. The proffered wage as stated on the Form ETA 750 is \$27.20 per hour (\$56,576.00 per year based on a 40 hour work week). The Form ETA 750 states that the position requires a bachelor of science degree in civil engineering and three years of experience in the job offered.

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 appeal.¹ On appeal, counsel submits the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2002 and 2003, a letter dated March 3, 2005 from the petitioner's accountant, the petitioner's unaudited financial statements for fiscal years 2001 and 2003, the petitioner's previously submitted unaudited financial statements for fiscal year 2002, the petitioner's IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2002, 2003 and 2004 and the petitioner's IRS Forms W-2, Wage and Tax Statements, for 2002 and 2003. Other relevant evidence in the record includes the beneficiary's IRS Forms 1040A, U.S. Individual Income Tax Returns, for 2002 and 2003 and the beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1987 and to currently employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year begins on August 1 and ends on July 31 each year. On the Form ETA 750B, signed by the beneficiary on September 16, 2002, the beneficiary claimed to have worked for the petitioner from May 2000 to the date he signed Form ETA 750B.

On appeal, counsel submitted the petitioner's financial statements for fiscal years 2001, 2002 and 2003 and the petitioner's federal income tax returns for 2002 and 2003 as evidence of the petitioner's ability to pay the proffered wage. Counsel also submitted the petitioner's IRS Forms W-3 for 2002, 2003 and 2004 and the petitioner's IRS Forms W-2 for 2002 and 2003 as evidence of the petitioner's ability to pay the proffered wage. In addition, the petitioner's accountant asserts in a letter dated March 3, 2005 that the corporate income tax returns were prepared with the cash basis of accounting and, therefore, indicate different results from the amounts he lists in the letter for the petitioner's net income, net current assets and retained earnings for fiscal years 2001, 2002 and 2003. Counsel asserts that the petitioner's net income was greater than the difference between the proffered wage and the wages paid to the beneficiary and that the petitioner's net current assets have always been greater than the proffered wage. Further, the petitioner's accountant recommends the use of retained earnings to pay the proffered wage and states the wages paid to the beneficiary were included on the petitioner's federal income tax return on page 2, Schedule A, line 3-cost of labor. Counsel also states that the petitioner indicated on the petition that the position was a "new petition" because the proffered job is a permanent position, as opposed to the beneficiary's H-1B position with the petitioner, which is a temporary position.²

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

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).

² This office notes that wages paid to the beneficiary by the petitioner in 2002 and 2003 will be considered in the determination of the petitioner's ability to pay the proffered wage.

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 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 beneficiary's IRS Forms W-2 establish that the petitioner employed and paid the beneficiary \$40,160.00 in 2002 and \$44,090.00 in 2003. Therefore, for the years 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in both years. Since the proffered wage is \$56,576.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$16,416.00 in 2002 and \$12,486.00 in 2003.

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). On appeal, the petitioner submitted its IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2002, 2003 and 2004 as evidence of the petitioner's ability to pay the proffered wage. Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 19, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2004 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2003 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2002 and 2003, as shown in the table below.

- In 2002, the Form 1120 stated net income of -\$74,970.00.
- In 2003, the Form 1120 stated net income of -\$38,387.00.

Therefore, contrary to counsel's assertion, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the 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. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6

³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. 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 tax returns demonstrate its end-of-year net current assets for 2002 and 2003, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of -\$152,738.00.
- In 2003, the Form 1120 stated net current assets of -\$99,608.00.

Therefore, contrary to counsel's assertion, for the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, the petitioner's accountant asserts in a letter dated March 3, 2005 that the corporate income tax returns were prepared with the cash basis of accounting and, therefore, indicate different results from the amounts he lists in the letter for the petitioner's net income, net current assets and retained earnings for fiscal years 2001, 2002 and 2003. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS. However, as indicated above, the petitioner failed to submit its complete tax returns in response to the director's RFE and, therefore, the AAO will not consider the sufficiency of the petitioner's corporate income tax returns submitted on appeal.

This office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. If the accountant wished to persuade this office that accrual accounting supports the petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

On appeal, counsel submitted the petitioner's financial statements for fiscal years 2001, 2002 and 2003. 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

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.

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

Further, the petitioner's accountant recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on a corporate tax return on Schedule L and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of stockholders' equity and represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's 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 Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the 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 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 relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner was incorporated in 1987. The petitioner's gross sales were \$2,887,605.00 in 2002 and \$3,133,626.00 in 2003. The petitioner paid salaries, wages and other labor costs of over \$500,000.00 in 2002, 2003 and 2004. The petitioner established that it employed 19 employees in 2002 and 26 employees in 2003. 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 established that it has the ability to pay the proffered wage.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 petition is approved.