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U.S. Citizenship
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Services

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FILE: WAC 04 110 50969 Office: CALIFORNIA SERVICE CENTER Date: **SEP 21 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a cabinet & interior design and manufacturing business. It seeks to employ the beneficiary permanently in the United States as an electrical drafter. 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 was offering the beneficiary full-time employment 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 January 14, 2005 denial, the single issue in this case is whether or not the petitioner was offering the beneficiary full-time employment.

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 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 counsel's brief, a letter from the petitioner's president, and copies of the payroll records for the beneficiary for the period January 15, 2005 through February 11, 2005. Other relevant evidence in the record includes copies of the petitioner's 2002 and 2003 Forms 1120S, U.S. Income Tax Return for an S Corporation, a copy of the petitioner's 2001 Form 1120, U.S. Corporation Income Tax Return, a copy of the petitioner's payroll record for the year to date December 20, 2004, copies of the beneficiary's 2001 through 2003 Forms W-2, Wage and Tax Statements, and copies of the petitioner's September 30, 2003 through June 30, 2004 payroll history.

The letter from the petitioner's president states that "[t]he CAD/CAM drafter designer position was offered to the beneficiary for forty hours per week full time job. During the previous years, the economic condition on cabinetry and architectural interior works was very slow and my company is one of the most affected by this economic upheavals. As of last quarter of 2004 and up to the present, my company has experience[d] tremendous growth. Mr. Alaba is employed forty hours per week permanent full time employee with the salary of \$28.08."

The petitioner's 2001 Form 1120 reflects taxable income before net operating loss deduction and special deductions or net income of \$15 and net current assets of -\$38,569.

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 petitioner's 2002 and 2003 Forms 1120S reflect ordinary incomes or net incomes of \$47,554 and \$79,971, respectively. The petitioner's 2002 and 2003 Forms 1120S also reflect net current assets of \$21,861 and \$33,530, respectively.

The petitioner's December 20, 2004 payroll records reflect year to date wages paid to the beneficiary of \$29,090.89.

The beneficiary's 2001 through 2003 Forms W-2 reflect wages paid to the beneficiary by the petitioner of \$33,556.45, \$30,663.22, and \$26,427.23, respectively.

The petitioner's September 30, 2003 through June 30, 2004 payroll history reflects wages paid to the beneficiary by the petitioner of \$9,067.07 for the quarter ended September 30, 2003, \$7,487.68 for the quarter ended December 31, 2003, \$7,892.06 for the quarter ended March 31, 2004, and \$9,855.82 for the quarter ended June 30, 2004.

The petitioner's payroll records for the beneficiary for the period January 15, 2005 through February 11, 2005 reflect wages paid to the beneficiary at the proffered wage rate of \$28.08 per hour.

On appeal, counsel states that "[i]n a situation where an alien is working for the petitioning employer and the alien is earning a salary lower than the labor certification indicates the alien will be paid, the Department of Labor has determined that the higher wage need not be paid until the alien immigrates to the United States. (9 FAM 40.51 Notes, N8) In the case where the alien is already in the United States, the FAM note means when the alien adjusts status to permanent residence." Counsel cites *Matter of Maysa, Inc.* 98 INA 259, 1999 WL355170 (1999) in support of his contention.

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).

Counsel is correct when stating that the petitioner is not obligated to pay the proffered wage until the beneficiary obtains lawful permanent residence. The fact the beneficiary receives less hours or salary prior to his adjustment of status does not affect the validity of the job offer. Therefore, the decision of the director is withdrawn, and the petition will be remanded for further consideration.

The petitioner is obligated, however, to show that it has sufficient funds to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Even though it appears the petitioner is currently compensating the beneficiary at the proffered wage, it did not begin to do so until three years after the priority date. It is also noted that the petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for additional workers using similar priority dates. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

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 24, 2001.** The proffered wage as stated on the Form ETA 750 is \$28.08 per hour or \$58,406.40 annually.

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 February 14, 2001, the beneficiary claims to have been employed by the petitioner from 2000 to the present. In addition, the petitioner has provided copies of the beneficiary's 2001 through 2003 Forms W-2 showing that the beneficiary was compensated \$33,556.45 in 2001, \$30,663.22 in 2002, and \$26,427.23 in 2003. Therefore, the petitioner has established that it employed the beneficiary in 2001 through 2003. The petitioner is obligated to establish that it has sufficient funds to pay the difference between the proffered wage of \$58,406.40 and the actual wages paid to the beneficiary in 2001 through 2003. Those differences are \$24,849.95 in 2001, \$27,743.18 in 2002, and \$31,979.17 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 2001 through 2003 were -\$38,569, \$21,861, and \$33,530, respectively. When adding the wages actually paid to the beneficiary, the petitioner could not have paid the difference between the proffered wage of \$58,406.40 and the wages actually paid to the beneficiary from its net current assets in 2001 and 2002, but could have in 2003.

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, counsel has provided three tax returns (2001

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.

through 2003) for the petitioner. Two of the tax returns (2002 and 2003) demonstrate that the petitioner has the ability to pay the proffered wage when only considering the wage of this beneficiary. However, as noted above, the petitioner has filed additional petitions; and, therefore, must provide verifiable evidence showing its ability to pay all the wages at the priority date. In addition, the three tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

As the petitioner may meet the requirements of *Matter of Sonogawa*, the director must afford the petitioner reasonable time to provide evidence of its ability to pay the beneficiary the proffered wage of \$58,406.40, to pay the wages of the additional employees with similar priority dates, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 14, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.