



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 272 51184

Office: TEXAS SERVICE CENTER Date:

APR 10 2007

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:

[REDACTED]

PUBLIC COPY

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 Director, Texas Service Center, denied the preference visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a sign manufacturing business. It seeks to employ the beneficiary permanently in the United States as a sign cutter machine set-up operator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits a statement and indicates that a brief and/or evidence would be submitted within thirty days. In response to a phone call by the AAO to counsel on February 2, 2007, counsel stated that he did not file a brief and/or evidence on this appeal. Subsequent to counsel's statement of February 2, 2007, counsel requested an additional thirty days to submit an appeal. The request was granted, and the AAO received counsel's brief on March 21, 2007.

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 October 16, 2006 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 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 DOL. See 8 CFR § 204.5(d). The priority date in the instant petition is July 22, 2002. The proffered wage as stated on the Form ETA 750 is \$13.55 per hour or \$28,184 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 counsel's brief, a letter, dated February 16, 2007, from [REDACTED] of [REDACTED], a professional corporation of certified public accountants (CPAs), a copy of a balance sheet and profit and loss statement for the period ended February 16, 2007, copies of the petitioner's 2002 through 2005 fiscal years March 1 through February 28 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 2003 through 2006 Forms W-3, Transmittal of Wage and Tax Statements, and copies of the petitioner's 2003 through 2006 Forms W-2, Wage and Tax Statements, for the petitioner's employees. Other relevant evidence includes a copy of a different 2003 Form 1120 for the petitioner for fiscal year March 1 through February 28 and copies of the petitioner's owner's 2003 and 2004 Forms 1040, U.S. Individual Income Tax Returns. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 through 2005 Forms 1120 reflect a taxable income before net operating loss deduction and special deductions or net income of \$1,903, \$10,306 (first Form 1120 submitted), \$8,561 (2nd Form 1120 submitted), \$14,695 and -\$26,705, respectively. The petitioner's 2002 through 2005 Forms 1120 also reflect net current assets of \$3,973, -\$1,753 (first Form 1120 submitted), -\$3,498 (2nd Form 1120 submitted), \$2,890 and \$37,496, respectively.

The owner's 2003 and 2004 individual tax returns reflect adjusted gross incomes of \$85,682 and \$74,802, respectively.²

The petitioner's 2003 through 2006 Forms W-3 reflect wages reported of \$31,605.70, \$154,840.29, \$136,286.35, and \$174,971.11, respectively.

The petitioner's 2003 through 2006 Forms W-2 do not demonstrate that the beneficiary was employed by the petitioner during those years.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$28,184 based on the information provided by the petitioner's CPA and based on the previous evidence submitted.

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 Please note that the petitioner is organized as a corporation, and as such, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. In a similar case, the court in *Sitar Restaurant 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."

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).

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 July 13, 2002, the beneficiary does not claim the petitioner as a past or present employer. In addition, 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, for any of the pertinent years (2002 through 2005) to demonstrate that the petitioner employed the beneficiary in 2002 through 2005. Therefore, the petitioner has not established that it employed the beneficiary in 2002 or subsequently.

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 Chi-Feng Chang*, 719 F. Supp. at 537. *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 13, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns demonstrate that its net incomes in fiscal years 2002 through 2005 were \$1,903, \$10,306 (first Form 1120 submitted), \$8,561 (2nd Form 1120 submitted), \$14,695, and -\$26,705, respectively. The petitioner could not have paid the proffered wage of \$28,184 in 2002 through 2005 from its net income.

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.³ 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 2002 through 2005 were \$3,973, -\$1,753 (first Form 1120 submitted), -\$3,498 (2nd Form 1120 submitted), \$2,890, and \$37,496, respectively. The petitioner could not have paid the proffered wage of \$28,184 in 2002 through 2004 from its net current assets. The petitioner has established its ability to pay the proffered wage of \$28,184 in 2005 from its net current assets of \$37,496.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$28,184 based on the documentation provided by the petitioner's CPA and based on the evidence previously submitted.

The petitioner's CPA states:

Although the company had no taxable income in 2002 through 2005, there were net operating loss carry-forwards that were generated in the years 1997 through 2001 that were utilized in the years 2002 through 2004 to result in no taxes due (and will be used in 2006 to offset net income). In addition, the officers took W-2 compensation to bring the net income down in all years to avoid double taxation assuming there would be profits in future years. . . .

In the year 2002, prior to the date of sponsoring [the beneficiary (2/22/02)], there was an attempted merger with another company, so there was no income reported for Exp [sic] Sign during that period and all income was reported by the other company and salaries were paid to the shareholders from the other company. When work was resumed under Exp [sic] Sign, they were clearly in a growth mode until 2005, when an affiliated company Sign-Tific ceased operations. We expect 2006 and 2007 to be more profitable and the services of [the beneficiary] are needed. As shown in the W-2's attached, salaries to employees exceed the salary promised to [the beneficiary] and new employees are hired to replace ones that leave, so the company would have no hardship to pay [the beneficiary] \$28,496.00. Although the total liabilities exceed the total assets in the current period (2/16/07), there are loans from the officer in the amount of \$54,392.80 that should be excluded from the liabilities, since these are not owed to outside vendors.

In determining the petitioner's ability to pay the proffered wage of \$28,184, CIS looks at line 28, taxable income before net operating loss deduction and special deductions, of the petitioner's Form 1120 instead of

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

line 30, taxable income. Therefore, the fact that the petitioner's 2002 through 2005 tax returns reflect no taxable income does not negatively impact the petitioner's ability to pay the proffered wage as the net operating loss carry-forwards are not considered.⁴

Even though the CPA states that an attempted merger occurred in 2002 with another company, so there was no income reported for Sign Expo during that period and all income was reported by the other company and salaries were paid to the shareholders from the other company, counsel has submitted no evidence to corroborate this claim. The assertions of counsel or, in this instance the CPA, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The CPA's statement that "although the total liabilities exceed the total assets in the current period (2/16/07), there are loans from the officer in the amount of \$54,392.80 that should be excluded from the liabilities, since these are not owed to outside vendors" is not relevant as the balance sheet and profit and loss statement are unaudited financial records.⁵ 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel states:

⁴ The net operating loss (NOL) deduction is an exception to the general income tax rule that a taxpayer's taxable income is determined on the basis of its current year's events. This deduction allows the taxpayer to offset one year's losses against another year's income. The NOL for a company can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses.

If a corporation carries forward its NOL, it enters the carryover on Schedule K, Form 1120, line 12. It also enters the deduction for the carryover on line 29(a) of Form 1120 or line 25(a) of Form 1120-A. However, the carryover cannot be more than the corporation's taxable income after special deductions. See 26 C.F.R. §1.172-4. and 26 C.F.R. §1.172-5. See also Corporations, I.R.S. Pub. No. 542, at 15-16 (2006), <http://www.irs.gov/pub/irs-pdf/p542.pdf> (accessed April 2, 2007). Because a petitioner's NOL is related to another year's outcome, it should be omitted from the analysis of the petitioner's "bottom line" ability to pay the proffered wage in a certain year. CIS disregards NOL in C corporations by using Line 28 (taxable income before NOL deduction and special deductions) of the IRS Form 1120 in our computation of net income.

⁵ It should be noted that loans from shareholders are included as a long-term liability, not a current liability on Schedule L.

It should be duly noted that the United States Department of Labor, Employment and Training Administration also considers the financial stability of the petitioner employer and its ability to pay a proffered wage in reaching its determination for a Labor Certification, and said department has been satisfied that Sign Expo Corp. possessed the ability to pay [sic] the proffered wage as evidenced by its certification in the instant matter.

Counsel is mistaken. The court in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984) stated:

In *Ubeda v. Palmer*, 539 F.Supp. 647, 649-50 (N.D.Ill.1982), *aff'd mem.*, 703 F.2d 571 (7th Cir.1983), the court concluded that the determination of a petitioning employer's financial viability is one to be made solely by [CIS] and not the Secretary of Labor. In view of the agencies' current practice, which is given weight in determining the proper division of functions between [CIS] and the Department of Labor (DOL), see *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C.Cir.1983), we conclude likewise. Accordingly, the determination made by [CIS] must be upheld if it is supported by substantial evidence.

As stated above, the petitioner has not established its ability to pay the proffered wage of \$28,184 based on its 2002 through 2004 fiscal year tax returns. However, the petitioner has established its ability to pay the proffered wage of \$28,184 based on its net current assets in fiscal year 2005.

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 provided tax returns for 2002 through 2005, only one of which establishes the petitioner's ability to pay the proffered wage of \$28,184. There is no evidence in the record of proceeding that the petitioner's circumstances parallel the business in *Sonogawa*. The petitioner's tax returns also are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. It is further noted that the

petitioner's 2002 through 2005 gross receipts fluctuate while compensation of officers and salaries/wages are modest. In addition, there is no evidence of the petitioner's reputation throughout the industry.

The petitioner's 2002 fiscal year tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$1,903 and net current assets of \$3,973. The petitioner could not have paid the proffered wage of \$28,184 from either its net income or net current assets in fiscal year 2002.

The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$10,306 (first tax return submitted), \$8,561 (2nd tax return submitted), and net current assets of -\$1,753 (first tax return submitted), -\$3,498 (2nd tax return submitted). The petitioner could not have paid the proffered wage of \$28,184 from either its net income or net current assets in fiscal year 2003.

The petitioner's 2004 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$14,695 and net current assets of \$2,890. The petitioner could not have paid the proffered wage of \$28,184 from either its net income or net current assets in fiscal year 2004.

The petitioner's 2005 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$26,705 and net current assets of \$37,496. The petitioner could have paid the proffered wage of \$28,184 from its net current assets in fiscal year 2005.

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.