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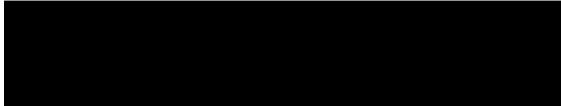
Office: VERMONT SERVICE CENTER

Date: APR 25 2007

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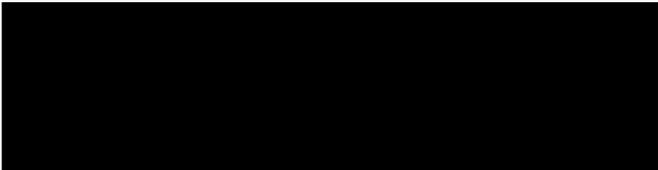
Petitioner:

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

The petitioner is a media and advertising company. It seeks to employ the beneficiary permanently in the United States as a director of photography (cinematographer). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established its 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 July 11, 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.

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 U.S. Department of Labor. 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 U.S. Department of Labor 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$59,051 per year. The Form ETA 750 states that the position requires five 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<sup>1</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2003, subscription agreement between the petitioner and Mr. [REDACTED], two letters dated June 6, 2005 from [REDACTED], bank statements of the petitioner's business checking accounts covering from November 21, 2000 to December 20, 2001, and the beneficiary's Form 1099s from the petitioner. 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. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$1.6 million, to have a net annual income of \$100,000, and to currently employ ten workers. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the outstanding balance of the purchasing price of 16 shares and the payment paid to contracted cinematographers in the last five years would be sufficient to pay the beneficiary the proffered wage. Counsel also argues that the petitioner's bank statements indicate that monthly balance was enough to cover the salary for each month from the application was filed.

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, Citizenship and Immigration Services (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 during a given period, 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.

Counsel submitted a letter dated June 6, 2005 from [REDACTED] Chairman and CEO of the petitioner. In the letter, the petitioner asserted that in the last five years the company had paid \$253,472 to contracted cinematographers. Counsel advised that the beneficiary will replace these contracted workers and the amount of the payment made to these contracted cinematographers could have covered the beneficiary's proffered wage. The record does not, however, name these workers, state their wages, verify their weekly hours of working, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. The petitioner's tax returns do not reflect the amount of the payment the petitioner claimed to have paid to contracted cinematographers. The assertions of counsel 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

<sup>1</sup> 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).

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)). 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. Therefore, the petitioner failed to establish its ability to pay the beneficiary the proffered wage as of the priority date through the payment paid to the to-be-replaced contracted cinematographers.

In the instant case, the petitioner submitted the beneficiary's 1099 forms issued by the petitioner in 2001, 2002 and 2003. These 1099 forms show that the petitioner paid the beneficiary \$10,175 in 2001, \$12,250 in 2002 and \$9,020 in 2003. The petitioner did not establish that it paid the beneficiary the full proffered wage in these years, however, the petitioner is obligated to demonstrate that it could pay the difference of \$48,876 in 2001, \$46,801 in 2002 and \$50,031 in 2003 between wages actually paid to the beneficiary and the proffered wage.

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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The petitioner's tax returns for 2001 through 2003 demonstrate the following financial information concerning the petitioner's ability to pay the difference of \$48,876 in 2001, \$46,801 in 2002 and \$50,031 in 2003 between wages actually paid to the beneficiary and the proffered wage from the priority date:

- In 2001, the Form 1120 stated a net income<sup>2</sup> of \$(98,562).
- In 2002, the Form 1120 stated a net income of \$(589,470).
- In 2002, the Form 1120 stated a net income of \$(79,224).

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net income to pay the difference of \$48,876 in 2001, \$46,801 in 2002 and \$50,031 in 2003 between wages actually paid to the beneficiary and the proffered wage respectively.

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.<sup>3</sup> 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 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 net current assets during 2001 were \$(1,000).<sup>4</sup>
- The petitioner's net current assets during 2002 were \$(605,570).<sup>5</sup>

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>4</sup> On appeal counsel asserts that the petitioner's total current assets were \$623,195 and the total current liabilities were \$918,989, and therefore, the net current assets in 2001 were \$424,206. Counsel's calculation is incorrect. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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. In 2001, the petitioner's year-end current assets shown on Schedule L, lines 1 through 6 were \$453,764, and the year-end current liabilities shown on lines 16 through 18 were \$454,764, and therefore, the current liabilities were greater than the current assets by \$1,000 contrary to counsel's assertion.

<sup>5</sup> In 2002, the petitioner's year-end current assets shown on Schedule L, lines 1 through 6 were \$463,234, and the year-end current liabilities shown on lines 16 through 18 were \$941,796. Counsel mistakenly asserts that the petitioner's total assets were \$733,031 and the total liabilities were \$476,552. The calculation is incorrect.

- The petitioner's net current assets during 2001 were \$(693,641).<sup>6</sup>

Therefore, for the years 2001 through 2003, the petitioner did not have sufficient net current assets to pay the difference of \$48,876 in 2001, \$46,801 in 2002 and \$50,031 in 2003 between wages actually paid to the beneficiary and the proffered wage respectively.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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.

Counsel asserts in the brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. The petitioner submitted a subscription agreement for \$250,000 and a letter dated June 6, 2005 from Mr. [REDACTED], one of the petitioner's owners, about this subscription agreement. Counsel argues that the outstanding balance of \$120,250 is sufficient to establish the petitioner's ability to pay the beneficiary the proffered wage. The AAO does not concur with counsel's assertions. The subscription agreement was for Mr. [REDACTED] to purchase 16 shares of the petitioner's stock at the total price of \$250,000. It was a stock purchase agreement by which Mr. [REDACTED] invested capital in the petitioning business. The investment in cash from Mr. [REDACTED] would not change the petitioner's net income for the year, but the petitioner's year-end cash balance, which is included in the petitioner's current assets. The agreement was entered into as of July 25, 2001 and provides that the entire purchase price shall be requested and paid by Purchaser before December 31, 2001. However, the petitioner's tax returns for 2001 through 2003 show that the petitioner's net current assets were still not sufficient to cover the proffered wage assuming the investment from Mr. [REDACTED] would have already been reflected on the schedule L balance sheets in these years. The outstanding balance of \$120,250 as claimed in Mr. [REDACTED] June 6, 2005 letter could not be considered in determining the petitioner's ability to pay the proffered wage for 2001 through 2003 since that amount of money was not in the petitioner's possession then. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

On appeal counsel also submits bank statements of the petitioner's business checking account for the year 2001 and asserts that "on a monthly basis for the period of time since the application was filed, there was enough balance in the bank at the end of each month to cover the salary when it is broken down into twelve divisible sums." Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate

<sup>6</sup> In 2003, the petitioner's year-end current assets shown on Schedule L, lines 1 through 6 were \$455,357, and the year-end current liabilities shown on lines 16 through 18 were \$1,148,998. Counsel mistakenly asserts that the petitioner's total assets were \$876,361 and the total liabilities were \$753,782. Counsel's calculation is incorrect.

cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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.