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U.S. Citizenship  
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: **AUG 06 2007**

EAC-05-233-52744

IN RE:

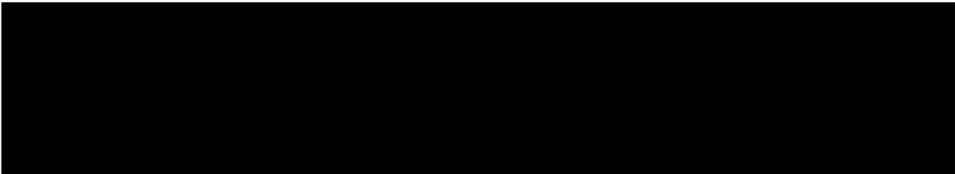
Petitioner:



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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener (landscaper). 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 March 17, 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 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 \$17.36 per hour (\$36,108.80 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or in a related occupation.

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>. On appeal counsel submits a brief and copies of documents submitted previously. Relevant evidence in the record includes the petitioner's corporate tax returns for 2001 through 2004 and a letter dated June 13, 2005 from the petitioner's accountant. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$289,908, to have a net annual income of \$51,217, and to currently employ 4 workers. On the Form ETA 750B, signed by the beneficiary on July 29, 2000, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director should have added depreciation back to net income and assets in determining the petitioner's ability to pay the proffered wage, and thus the petitioner would have established its continuing ability to pay the beneficiary the proffered wage from 2001 through the present.

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. In the instant case, the beneficiary did not work for the petitioner and the petitioner did not submit the beneficiary's W-2 forms, 1099 forms or any other documentary evidence showing that the petitioner paid the beneficiary any amount of compensation during the relevant years 2001 through 2004. The petitioner has not established its ability to pay the proffered wage through the examination of wages paid to the beneficiary from the priority date in 2001 onwards. The petitioner is obligated to demonstrate that it could pay the full proffered wage in 2001 through the present with its net income or its net current assets.

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 contrary to counsel's assertions. 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,

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<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).

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). Based on the petitioner's gross receipts, gross profits and wages paid the petitioner's accountant asserted in his letter dated June 13, 2005 that "the business is a profitable enterprise and with the capacity to pay a Landscape Gardener the wage of \$17.36/hr." 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. On appeal counsel claims that "[the petitioner's taxable income does] not reflect *non-cash deduction* for depreciation. Adding back depreciation, the actual ordinary income loss[sic] fro[sic] 2001 is \$127,935.00." Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. Contrary to counsel's argument, 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 evidence in the record of proceeding shows that the petitioner was incorporated as a C corporation on April 12, 2000 and elected as an S corporation on January 1, 2002. Accordingly, the petitioner filed Form 1120, U.S. Corporation Income Tax Return, until 2001 and from 2002 filed Form 1120S U.S. Income Tax Return for an S Corporation. According to the tax returns, the petitioner's fiscal year is based on a calendar year. The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001 and Form 1120S U.S. Income Tax Return for an S Corporation for 2002 through 2004. The priority date in the instant case is April 30, 2001. The record before the director closed on January 27, 2006 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the petitioner's federal tax return for 2005 was not due yet. Therefore, the petitioner's tax return for 2004 is **the most recent available tax return in the instant case**. The petitioner's 2001 through 2004 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$36,108.80 per year from 2001, the year of the priority date:

- In 2001, the Form 1120 stated a net income<sup>2</sup> of \$1,539.
- In 2002, the Form 1120S stated a net income<sup>3</sup> of \$85,927.

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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.

- In 2003, the Form 1120S stated a net income of \$22,887.
- In 2004, the Form 1120S stated a net income of \$50,456.

For the years 2002 and 2004, the petitioner had sufficient net income to pay the proffered wage, and thus established its ability to pay in these years. However, its net income in 2001 and 2003 could not establish its ability to pay 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. We reject, however, counsel's idea that 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.

Counsel claims on appeal that he did not understand how the director arrived at assets of \$11,233 and liabilities of \$9,614. The director correctly stated in her decision that: "[t]he accompanying balance sheet lists current assets of the company on lines 1-6 of \$11,233 and current liabilities on lines 16-18 of \$9,614. The net current assets of the company are correctly stated here as \$1,619." Counsel's reliance on the petitioner's total assets is misplaced. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</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 \$1,619.
- The petitioner's net current assets during 2003 were \$(29,506).

For the years 2001 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

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<sup>3</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

<sup>4</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.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, although the petitioner established its ability to pay the proffered wage in 2002 and 2004, it failed to establish its continuing ability to pay the proffered wage as of the priority date through the present because it failed to demonstrate that it had sufficient net income or net current assets to pay the beneficiary the proffered wage in 2001, the year of the priority date, and 2004, the most recent year the petitioner's tax return is available.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) as a binding precedent to support his assertion and claims that in *Sonogawa* the court held that a tax return showing insufficient income for the year prior to the filing of the visa petition did not in itself preclude the petitioner from establishing that she could pay the offered salary through additional data, some of it non-financial, such as scrapbooks, magazine articles and client lists, that she was likely to remain in business, increased her income, and be able to pay the offered salary. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that the years 2001 and 2003 were uncharacteristically unprofitable years but only in a framework of profitable or successful years for the petitioner.

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 addition, CIS records show that the petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for four more workers in 2004, 2005 and 2006 using the same priority date, reflected on a Form ETA 750. Three of them were approved on May 27, 2005, July 6, 2005 and September 25, 2006 respectively. Therefore, the petitioner must show that it had sufficient income to pay all the wages from the priority date of April 30, 2001 through at least 2005. The evidence submitted in the record does not establish that the petitioner had the ability to pay all proffered wages in 2001 through 2005.

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.