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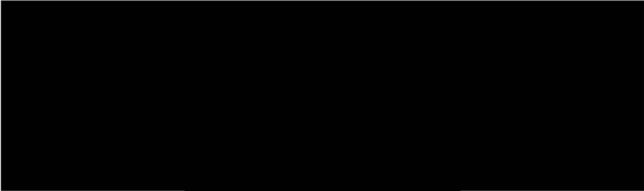
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

AUG 15 2007

WAC 06 065 52479

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 dismissed.

The petitioner is a poly-packaging manufacturer. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2002 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 April 20, 2006 denial, the primary 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)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), 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 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 December 9, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$52,375 per year. The Form ETA 750 states that the position requires a baccalaureate degree in Mechanical Engineering and no years of work 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 appeal². On appeal, counsel submits the petitioner's 2005 federal tax return, IRS Form 1120, and Form DE-6 quarterly wage and withholding reports for the four quarters of tax year 2005. The beneficiary is not listed on these reports. The record also contains the petitioner's 2004 Internal Revenue Service (IRS) Form 1120, with attachments and statements; a letter from James Jan to the DOL Division of Foreign Labor Certification, Dallas, Texas dated August 2, 2005. In his letter [REDACTED] stated that the petitioner is a successor of interest to Evergreen Plastics Manufacturing, Inc. [REDACTED] explained that the petitioner acquired Evergreen Plastic Manufacturing, Inc. in May 2003 and that Evergreen Plastics subsequently dissolved. [REDACTED] stated that the petitioner still uses Evergreen's FAX number and was located at [REDACTED] In Oakland, California. The petitioner also submitted a letter addressed to the valued customers of the petitioner telling them about the acquisition of Evergreen plastics Manufacturing, Inc.; a cover letter for the petition that states that the beneficiary has 15 years of experience in the poly-packaging industry and that he was sub-contracted to Evergreen during November 2001 to August 2004, and currently is employed by the petitioner's major customer, [REDACTED], as a mechanical engineer; a letter of work verification also signed by [REDACTED] dated November 10, 2005 stating that the beneficiary worked for the petitioner as a mechanical engineer from November 2001 to August 2004, and was paid \$46,966; a letter written by [REDACTED] Vice President, Pan Pacific Plastics Manufacturing, Inc., stating that the beneficiary worked for this company as a mechanical engineer from July 2000 through the date of the letter, November 10, 2005. Finally, [REDACTED] stated the beneficiary earned \$52,707. 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 Subchapter C corporation. On the petition, the petitioner claimed to have been established in 2003, and to currently employ twelve workers. On the Form ETA 750B, signed by the beneficiary on November 26, 2002, the beneficiary did not claim to have worked for the petitioner but claims to have worked for Evergreen Plastic Manufacturing as of September 2001.

On appeal, counsel states that Citizenship and Immigration Services (CIS) should have issued a request for evidence, rather than deny the petition outright. The regulation at 8 C.F.R. § 103.2

¹ The Form ETA 750 indicates that the Department of Labor (DOL) on October 11, 2005, approved a correction made by the petitioner to the Form ETA 750. The correction consisted of changing the name and address of the employer from Evergreen Plastics Manufacturing, Inc., to D & J International, Inc.

² 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).

provides that if there is evidence of ineligibility, the director shall deny the petition on that basis. In this matter, the director determined that the 2004 tax returns did not demonstrate an ability to pay the proffered wage in that year. Any error in failing to issue a request for additional evidence is most efficiently remedied by considering any evidence that might have been submitted in response to such a request on appeal. We will consider the new evidence submitted on appeal below.

More specific to the merits, counsel asserts on appeal that the new evidence submitted to the record indicates that the petitioner had gross revenue of \$3,478,530 in tax year 2005 and paid salaries to five employees, with rates ranging from \$12,000 to \$80,064 per year. Counsel further asserts that the regulations do not require that the beneficiary be employed by the petitioner and be paid the proffered wage as of the 2002 priority date or as of the filing of the I-140 petition. Counsel states that since the beneficiary was employed by another company, it is immaterial if the petitioner had a low amount of payroll in tax year 2004. Counsel also states that the petitioner's Schedule L, in its 2004 tax return, reflects that the petitioner's current assets were \$961,164, and its current liabilities were \$960,734, leaving net assets of \$1,430.³ Counsel then states that the petitioner made considerable sales and had considerable net assets in tax year 2005 and that as long as the petitioner employs and pays the beneficiary the proffered wage upon the approval of his adjustment of status application, the petition is viable.

Counsel further states that the totality of the evidence submitted to the record demonstrates that the petitioner generates considerable income. Finally, counsel states that the evidence indicates that the petitioner had considerable income in tax years 2004 and 2005, is a viable business and will pay the beneficiary the proffered wage upon the approval of the beneficiary's adjustment of status application.

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) (stating that the petitioner must demonstrate an ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence). 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).

³ Counsel appears to have added in two long-term assets of accumulated amortization and depreciation in calculating the petitioner's net assets. The AAO will examine the calculation of the petitioner's net assets and net liabilities more fully below.

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 petitioner has not established that it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it or Evergreen Plastic Manufacturing paid the beneficiary the proffered wage, or any wages, as of the 2002 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2002 to 2005.

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). Contrary to counsel's assertions on appeal, reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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.*, 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 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* stated:

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*, 719 F. Supp. at 537.

As previously stated, the priority date for the instant petition is December 9, 2002, prior to the sale of the previous petitioner to the instant petitioner in 2003. The tax returns submitted to the record only cover the relevant time period of tax years 2004 and 2005. The record also reflects that the instant petitioner purports to be a successor-in-interest to Evergreen Plastics Manufacturing Inc. This

status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, the instant petitioner did not submit any evidence as to the ability of the predecessor-in-interest to pay the proffered wage from the December 2002 priority date to the actual acquisition of the prior petitioner by the instant petitioner in 2003. Thus, the AAO cannot examine whether the original petitioner had the ability to pay the proffered wage in 2002 and the relevant part of the 2003 tax year, and will only examine the instant petitioner's net income for tax years 2004 and 2005.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$53,375 per year from the priority date:

- In 2004, the Form 1120 stated a net income⁴ of -\$5,199.
- In 2005, the Form 1120 stated a net income of -\$15,584.

Therefore, for the years 2004 and 2005, the instant petitioner did not have sufficient net income 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. 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.⁵ 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.

⁴The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the IRS Form 1120.

⁵According 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.

Again, the instant petitioner provides no evidence as to the original petitioner's ability to pay the proffered wage as of the 2002 priority date and until the acquisition of the original petitioner by the instant petitioner. Therefore the AAO can only examine the instant petitioner's net current assets for tax years 2004 and 2005 in these proceedings.

- The petitioner's net current assets during 2004 were -\$3,972.
- The petitioner's net current assets during 2005 were -\$9,183.

Therefore, for the years 2004 and 2005, the instant petitioner did not have sufficient net current assets to pay the proffered wage.

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 or the predecessor-in-interest 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 the petitioner's net income or net current assets.

Counsel asserts in his brief accompanying the appeal that the totality of the evidence submitted to the record demonstrates that the petitioner has the ability to pay the proffered wage, based on its considerable income. However, as stated previously, the AAO does not look at the petitioner's gross receipts or sales, or income, but rather a petitioner's net income or net current assets, in determining whether a petitioner has the ability to pay a proffered wage.

Counsel'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.

The evidence submitted does not establish 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 not met that burden.

ORDER: The appeal is dismissed.