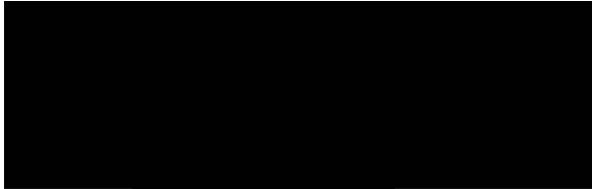


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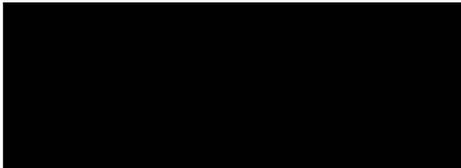
Office: TEXAS SERVICE CENTER

Date: AUG 16 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

Wiemann

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a wholesaler.¹ It seeks to employ the beneficiary permanently in the United States as a kitchen manager. 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 and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 2, 2000. The proffered wage as stated on the Form ETA 750 is \$14.07 per hour, which equals \$29,265.60 per year.

The Form I-140 petition in this matter was submitted on May 31, 2005. On the petition, the petitioner stated that it was established during 1979 and that it employs 13 workers. The petition states that the petitioner's gross annual income is \$700,000 and that its net annual income is \$140,000.² On the Form ETA 750, Part B, signed by the beneficiary on November 13, 2000, the beneficiary claimed to have worked for the petitioner as

¹ The petitioner described itself as a "wholesaler." The file appears to indicate that the petitioner prepares and packages Mexican food items and distributes them to retailers.

² The tax returns submitted do not support those estimates of the petitioner's gross and net income.

a cook from December 1994 to June 1998 and as a kitchen manager since June 1999. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Austin, Texas.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³

In the instant case the record contains the petitioner's 2001, 2002, 2003 and 2004 Form 1120, U.S. Corporation Income Tax Returns; and a letter dated April 20, 2006 from the petitioner's tax accountant. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date that was submitted prior to the decision of denial.

The petitioner's tax returns show that it is a corporation, that it incorporated on October 30, 1979, and that it reports taxes pursuant to cash convention accounting and the calendar year.

The 2000 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,351 during that year. At the end of that year the petitioner had current assets of \$42,624 and current liabilities of \$36,299, which yields net current assets of \$6,325.

The 2001 tax return shows that the petitioner declared a loss of \$57,636 as its taxable income before net operating loss deduction and special deductions during that year. At the end of that year the petitioner had current assets of \$38,142 and current liabilities of \$37,963, which yields net current assets of \$179.

The 2002 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,648 during that year. At the end of that year the petitioner had current assets of \$51,694 and current liabilities of \$39,321, which yields net current assets of \$12,373.

The 2003 tax return shows that the petitioner declared a loss of \$24,156 as its taxable income before net operating loss deduction and special deductions during that year. At the end of that year the petitioner had current assets of \$60,190 and current liabilities of \$36,533, which yields net current assets of \$23,657.

The 2004 tax return shows that the petitioner declared a loss of \$18,626 as its taxable income before net operating loss deduction and special deductions during that year. At the end of that year the petitioner had current assets of \$71,683 and current liabilities of \$29,247, which yields net current assets of \$42,389.

The director denied the petition on March 23, 2006. In that decision, the director noted the amounts of the petitioner's end-of-year net current assets, derived from its tax returns for the salient years.

On appeal, counsel asserted the basis of the director's decision could not be determined from the decision of denial, stating, "There is no way of knowing how the Director arrived at the conclusion that the petitioner did not have the ability to pay the prevailing wage." Counsel also asserted that, in assessing its ability to pay the

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

proffered wage, the director should have considered the petitioner's cost of goods sold, which counsel stated includes the petitioner's salary expense.

With the appeal counsel submitted an April 20, 2006 letter from the petitioner's tax accountant. That letter states that the director incorrectly calculated the petitioner's net assets and asserted that they were less than the proffered wage. The accountant noted the amount of the petitioner's total assets at the end of each of the salient years, apparently citing them as a fund available to pay additional wages.

The accountant noted the magnitude of the petitioner's gross profit during the salient years as compared to the annual amount of the proffered wage, apparently citing it as a fund available to pay additional wages. The accountant also stated that the amount the petitioner paid the beneficiary during the salient years is included in its cost of goods sold.

On the appeal counsel stated that he would submit additional evidence or a brief to supplement the appeal within 60 days. No additional evidence or argument was received. On June 29, 2007 this office sent a facsimile transmission to counsel, asking whether he had submitted any supplemental materials and asking, if he had, to submit an additional copy of them. Counsel did not respond to that inquiry. The appeal will be adjudicated based on the evidence in the record as currently constituted.

The decision of denial indicates that the petitioner's tax returns did not demonstrate that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. This office finds that the basis of that decision was expressed sufficiently clearly, but will explain the calculations and conclusions in more detail.

The director referred to, and correctly calculated, the petitioner's net current assets, rather than its net assets. The significance and calculation of net current assets is explained in detail below. The reason that the petitioner's total assets are not germane to the determination of its ability to pay the proffered wage is also explained.

In the appeal, counsel misstated the director's finding and, by implication, the burden of proof in this matter. The director did not find that the petitioner was unable to pay the proffered wage, nor was such a finding required. The director found that the petitioner had not submitted evidence sufficient to demonstrate its ability to pay the proffered wage. The burden is on the petitioner to demonstrate that ability pursuant to 8 C.F.R. § 204.5(g)(2). Counsel may not shift the burden to require the director to show that the petitioner is unable to pay the beneficiary's wages.

The assertion by the accountant that the petitioner's cost of goods sold includes salaries in general, or the beneficiary's salary in particular, is not supported by the record. Typically, cost of goods sold does not include salaries. Cost of goods sold is subtracted from gross receipts to equal total income. Salaries and wages are included in operating expenses and subtracted from total income to equal net income.

An exception could exist if the petitioner were a contract worker, rather than an employee, and her wages were included the calculation of cost of goods sold as Schedule A, Line 3 Cost of Labor. The petitioner's tax returns indicate Cost of Labor of \$0, \$15,873, \$13,327, \$0, and \$0 during 2000, 2001, 2002, 2003, and 2004.

However, the petitioner submitted no evidence of wages paid to the beneficiary. What portion of the amounts shown as Cost of Labor was paid to the beneficiary, if any, is neither demonstrated nor alleged. The petitioner has not demonstrated that it paid any wages to the beneficiary.

Other than the possibility that some portion represents the beneficiary's wages, no reason exists to consider the petitioner's cost of goods sold, which is an expense, as a fund available to pay additional wages or otherwise relevant to any issue material to today's decision.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 examine whether the petitioner employed 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 did not establish that it paid any wages to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the

beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁴ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$29,265.60 per year. The priority date is August 2, 2000.

During 2000 the petitioner declared taxable income before net operating loss deduction and special deductions⁵ of \$5,351. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$6,325. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2000 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$179. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2001 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$11,648. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$12,373. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2002 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁵ This office considers taxable income before net operating loss deduction and special deductions to be net income for the purpose of determining a petitioner's ability to pay the proffered wage.

During 2003 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$23,657. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2003 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$42,389. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

The petition in this matter was submitted on May 31, 2005. On that date the petitioner's 2005 tax return was unavailable. On June 30, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

In a letter dated November 30, 2005 the petitioner's owner stated, "Just recently my business suffered a tragic fire that caused me to have to lay employees off until I was able to rebuild."

Had the petitioner demonstrated that a fire occasioned a casualty loss to its facilities and/or a loss of revenue that resulted in a loss or low profit that was uncharacteristic, occurred within a framework of profitable or successful years, and was demonstrably unlikely to recur, then this office might appropriately have overlooked those losses or low profits during one or more years pursuant to the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant case, however, the evidence of record does not support such a finding.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2000, 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.