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U.S. Citizenship
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FILE:

EAC 05 111 50086

Office: VERMONT SERVICE CENTER

Date: **AUG 29 2007**

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

The petitioner is a landscape architecture business. It seeks to employ the beneficiary permanently in the United States as an architectural drafter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). 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. Therefore, the director denied the petition.

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.

According to the director's July 3, 2006 denial, the issue in this case is whether 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 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, which is the date the Form ETA 750 is accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on November 25, 1998. The proffered wage as stated on the Form ETA 750 is \$20.46 per hour, 40 hours per week, or \$42,556.80 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 on appeal.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage:

- the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 1998, 1999, 2000, 2001, 2002, 2003, 2004 and 2005, together with certain attachments filed with these forms;
- copies of the petitioner's monthly business checking statements for 1999 through 2003;
- a letter dated August 1, 2006 from the owner of the petitioner indicating that after the beneficiary begins working for her, she will be able to expand her business and will thereby generate income sufficient to cover the proffered wage;
- a description, written by the petitioner's owner, of a lucrative project that was apparently assigned to the petitioner in April 2006 which is scheduled to take several years to complete;
- a chart created to show that the petitioner's net current assets have tended to increase during the relevant period of analysis;
- the petitioner's depreciation and amortization reports for certain years within the relevant period of analysis;
- counsel's letters dated January 4, 2005 and March 5, 2005 which request: that the proffered wage be prorated for the year of the priority date, such that the petitioner might only need to show an ability to pay a portion of the proffered wage in 1998; that the petitioner's depreciation/amortization amounts be considered as funds available to pay the proffered wage; that the amount listed as cash or cash on hand on the petitioner's tax returns be considered as funds available to pay the proffered wage; and, that the annual, average monthly balance in the petitioner's checking account be considered funds available to pay the beneficiary's wage each month of any given year;
- counsel's appeal brief which indicates that in accordance with the reasoning laid out in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) the petitioner has demonstrated an ability to pay the proffered wage.

The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as a Subchapter C corporation. On the petition, the petitioner left blank the box in which it was to state the date on which it was established; in which it was to list its current number of employees; and in which it was to state its gross annual income. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on October 19, 1998, the beneficiary did not claim to have worked for the petitioner.

In the appeal and in various other submissions, counsel and the petitioner's owner assert that the petitioner has demonstrated the ability to pay the proffered wage in that it recently was assigned a very lucrative project; in that its net current assets have tended to increase during the relevant period of analysis; in that it expects to expand its business once the beneficiary becomes its employee. Counsel indicates that in keeping with the reasoning in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), Citizenship and Immigration Services (CIS) should consider the overall magnitude of the petitioner's business and other evidence beyond net income or net current assets and find that the petitioner has demonstrated an ability to pay the proffered wage.

are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition subsequently based on that Form 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 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 this case, the beneficiary did not indicate on the Form ETA 750 that he had worked for the petitioner, and there is no evidence in the record to indicate that he worked for the petitioner during the relevant period of analysis.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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, 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 gross sales and profits and wage expense is misplaced.** Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. It is also insufficient for the petitioner to show that it paid wages in excess of the proffered wage.

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 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.

The petitioner's tax returns demonstrate the following financial information concerning its ability to pay the proffered annual wage of \$42,556.80 from the priority date of November 25, 1998 onwards:

- Petitioner's 1998 Form 1120 states a net income or loss² of -\$601.
- Petitioner's 1999 Form 1120 states a net income or loss of \$786.
- Petitioner's 2000 Form 1120 states a net income or loss of -\$247.
- Petitioner's 2001 Form 1120 states a net income or loss of \$1,908.
- Petitioner's 2002 Form 1120 states a net income or loss of \$8.
- Petitioner's 2003 Form 1120 states a net income or loss of -\$317.
- Petitioner's 2004 Form 1120 states a net income or loss of \$349.
- Petitioner's 2005 Form 1120 states a net income or loss of \$72.

Therefore, for the years 1998 through 2005, the 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, contrary to counsel's assertions that CIS should consider certain assets such as cash on hand in isolation as funds available to pay the 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 Schedule L, 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 1998 were \$5,500.
- The petitioner's net current assets during 1999 were \$6,801.
- The petitioner's net current assets during 2000 were \$6,402.
- The petitioner's net current assets during 2001 were \$8,558.
- The petitioner's net current assets during 2002 were \$8,743.
- The petitioner's net current assets during 2003 were \$8,603.
- The petitioner's net current assets during 2004 were \$9,216.
- The petitioner's net current assets during 2005 were \$10,782.

²For purposes of this analysis, net income is equal to the taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

³According 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.

Thus, for the years 1998 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

In sum, the petitioner has not demonstrated an ability to pay the wage during any year in the relevant period of analysis. It has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel urges that CIS consider the petitioner's expectations for future growth and various other evidence beyond net income and net current assets in keeping with the holding of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), when determining the petitioner's ability to pay the proffered wage. Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in this matter is misplaced. That case relates to a petition filed during uncharacteristically unprofitable years within a framework of profitable years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 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. Also, 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. The petitioner has not shown that unusual circumstances, parallel to those in *Sonogawa*, exist in this case, nor has the petitioner established that 1998 through 2005 were uncharacteristically unprofitable years for its landscape architecture business.

Counsel and the petitioner's owner do refer to a lucrative landscaping project that was apparently assigned to the petitioner during April 2006 as evidence that the petitioner has demonstrated the ability to pay the wage from the priority date onwards. However, there is no formal documentary evidence in the record that the petitioner has been contracted to carry out such a project. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, speaking against the projection of future earnings, the Acting Regional Commissioner states in *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977):

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.

Based on the same reasoning, any reliance on the undocumented claim that the beneficiary, after he becomes employed by the petitioner, will generate sufficient additional income to cover the proffered wage is misplaced. The petitioner must demonstrate the ability to pay the proffered wage from the priority date onwards. See 8 CFR § 204.5(d) and § 204.5(g)(2). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Also, reliance on the claim that the petitioner has demonstrated an ability to pay the proffered wage by showing that its net current assets have tended to improve over the relevant period of analysis is misplaced. According to the tax returns in the record, the petitioner's net current assets have never risen high enough to cover more than approximately 25% of the proffered wage during any year in the relevant period of analysis. Again, the petitioner must demonstrate an ability to pay the proffered wage from the priority date onwards. *See Id.*

Further, the petitioner's bank statements submitted into the record do not help demonstrate that the petitioner had the ability to pay the proffered wage from the priority date onwards. Bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) as the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional evidence to be considered "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner in this matter. Also, the various bank statements submitted show the amount in the petitioner's checking account on a given date. Such statements standing alone cannot show an ability to pay the proffered wage from the priority date onwards. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's monthly checking statements somehow reflect additional available funds that were not listed on its tax returns.

Finally, CIS will not prorate the proffered wage for the portion of the year that occurred after the priority date, as suggested by counsel. This office will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.