

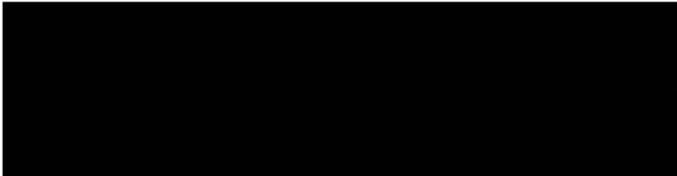
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U.S. Citizenship
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Services

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FILE: EAC 04 126 50248 Office: VERMONT SERVICE CENTER Date: FEB 01 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 sustained.

The petitioner is a baking factory. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 24, 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 or seasonal 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is January 9, 2003. The proffered wage as stated on the Form ETA 750 is \$11.84 per hour or \$24,627.20 annually.

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 appeal¹. Relevant evidence submitted on

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

appeal includes counsel's brief and copies of the petitioner's 2001 through 2003 Forms 1120, U.S. Corporation Income Tax Returns, for fiscal years April 1 through March 31 of each year. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$52,016, -\$49,019, and \$0, respectively. The petitioner's 2001 through 2003 Forms 1120 also reflect net current assets of -\$121,621, -\$119,369, and -\$108,569, respectively. It is also noted that the petitioner's 2001 through 2003 Forms 1120 show wages paid of \$1,487,938, \$1,472,420, and \$1,251,256, respectively with additional cost of labor of \$2,498,385, \$2,692,107, and \$3,071,951, respectively.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$24,627.20 based on its net income, its net current assets, its ratio analysis, depreciation, and on its length of time in business.

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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on November 4, 2002, the beneficiary claims to have been employed by the petitioner from April 2002 to the present. However, counsel has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary, for the period April 2002 and continuing to the present. Therefore, the petitioner has not established that it employed the beneficiary from 2002 to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns,

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).

rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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.² 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 a corporation's end-of-year 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 petitioner's net current assets in 2001 through 2003 were -\$121,621, -\$119,369, and -\$108,569, respectively. The petitioner could have paid the proffered wage of \$24,627.20 from its net current assets in 2001 through 2003.

On appeal, contends that the petitioner has established its ability to pay the proffered wage of \$24,627.20 based on its net income, its net current assets,³ its ratio analysis, depreciation, and on its length of time in business. However, the petitioner's net income in 2001 through 2003 was \$52,016, -\$49,019, and \$0, respectively. The petitioner could not have paid the proffered wage of \$24,627.20 from its net income in 2002 and 2003. While it appears that the petitioner had the ability to pay the proffered wage in 2001 from its net income, the petitioner has filed an additional three petitions with the same priority date of January 9, 2003; and, therefore, the petitioner is obligated to show that it had sufficient funds to pay all of the wages with that priority date and any subsequent petitions. Therefore, the petitioner has not established that it had the ability to pay the proffered wage from its net income in 2001.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable

² According 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.

³ The petitioner's net current assets are discussed above with the petitioner failing to show the ability to pay the proffered wage from its net current assets in any of the pertinent years. It should be noted that CIS will not consider the petitioner's assets without also considering the petitioner's liabilities. CIS will only consider the petitioner's net current assets when determining the petitioner's ability to pay the proffered wage.

equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

Counsel's assertion that ratio analysis should be used when determining the petitioner's ability to pay the proffered wage of \$24,627.20 is misplaced. CIS notes that the three tax returns provided show current liabilities in excess of current assets. Moreover, financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. In isolation, a financial ratio is a useless piece of information. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital.⁴

While counsel argues that the current ratio shows the petitioner has the ability to pay the proffered wage, she provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, she has not provided any authority or precedent decisions to support the use of current ratios in determining the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, as stated above, when determining the petitioner's ability to pay the proffered wage, CIS first examines whether the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, then CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, and finally, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.⁵ Net current assets are the same as

⁴ *See Financial Ratio Analysis*, <http://www.finpipe.com/equity/finratan.htm> (accessed March 21, 2006); *Financial Management, Financial Ratio Analysis*, <http://www.zeromillion.com/business/financial/financial-ratio.html> (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis*, http://www.ventureline.com/FinAnal_indAnalysis.asp (accessed March 21, 2006).

⁵ The AAO's analysis complied with policy set forth by William R. Yates, Associate Director of Operations of CIS, who issued an internal memorandum dated May 14, 2005 guiding adjudications of petitioning entities' continuing ability to pay the proffered wage through the following three-tiered analysis:

working capital which bankers look at over time to determine a company's ability to weather financial crises. In the instant case, net current assets show its highest level in 2003 at -\$108,569 and its lowest level in 2001 at -\$121,621. Neither the petitioner's net income nor its net current assets are sufficient to pay the proffered wage in 2001 through 2003⁶. Moreover, because the current ratio is not designed to demonstrate an entity's ability to take on the obligation of paying additional wages, and this office is not persuaded to rely upon it, this office will not accept that calculation⁷.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In the instant case, in light of the petitioner's long and continuing business presence (since 1932), since the petitioner has shown that it has paid wages in excess of \$4 million yearly, and since the proffered wage offered to the beneficiary in the significant years is meager, even when including the salaries of the three additional employees with the same priority date, when

Adjudicators should make a positive ability to pay determination on an I-140 under the following circumstances:

The petitioner's net income is equal to or greater than the proffered wage;

The petitioner's net current assets are equal to or greater than the proffered wage; or

The employer submits credible, verifiable evidence that the petitioner is both employing the beneficiary and has paid or is currently paying the proffered wage.

The petitioner could have paid the proffered wage of \$24,627.20 in 2001 from its net income provided it had not filed three additional petitions with the same priority date.

⁷ There are several points one must keep in mind about ratios. First, they are "flags" indicating areas of strength or weakness. One or even several ratios might be misleading. Second, there is no single correct value for a ratio. The observation that the value of a particular ratio is too high, too low, or just right depends on the perspective of the analyst. Third, financial ratios are meaningful only when they are compared with some standard, such as another industry trend, ratio trend, or a ratio trend for the specific sector being analyzed.

compared to the petitioner's continuous earnings of over \$10 million yearly, the AAO finds that the petitioner could pay the proffered wage in 2001 and continuing to the present.

After a review of the record, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above and the assertions of counsel on appeal, the evidence submitted on appeal overcomes the decision of the director.

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 been met.

ORDER: The appeal is sustained. The petition will be approved.