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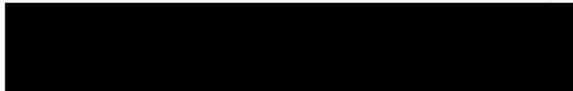
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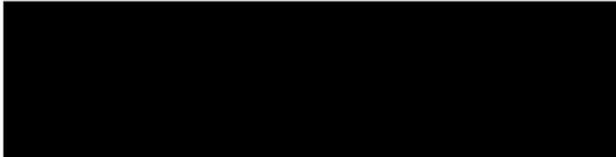
IN RE:

Petitioner:  
Beneficiary:



PETITION: 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 for*

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 residential concrete masonry business. It seeks to employ the beneficiary permanently in the United States as a cement mason. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. As set forth in the director's October 4, 2004 decision denying the petition, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage at the time of filing. The director also found a discrepancy between the end-of-tax-year retained earnings amount reflected on the petitioner's 2001 income tax return and the beginning-of-tax-year retained earnings amount reflected on the petitioner's 2002 income tax return. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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.

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 who are members of the professions.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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:

*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 either 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 petition's 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 C.F.R. § 204.5(d). The priority date in the instant

petition is September 7, 2001. The proffered wage as stated on the Form ETA 750 is \$15.08 per hour, which amounts to \$31,366.40 annually.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a brief and additional evidence.

Relevant evidence submitted on appeal includes a copy of the petitioner's income tax return for 2003, and copies of the previously submitted income tax returns for 2000, 2001, and 2002; copies of the petitioner's bank statements for 2002, 2003, and 2004, and a copy of the previously submitted bank statement for 2001; a faxed statement from the petitioner's accountant; and a copy of the 2001 IRS *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)*.

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).

On appeal, counsel states, in part, that the director ignored the financial information contained in the petitioner's 2000 corporate income tax return, and the petitioner's bank statements. Counsel states further that the petitioner's tax returns "indicate a pattern of continuous growth both in terms of gross revenues and asset value," and that the petitioner "is a growing, viable and profitable construction business that rests on a solid, financial foundation." Counsel submits a faxed statement from the petitioner's accountant as supporting documentation.

At the outset, faxed statements from accountants are not among the three alternative forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports, federal tax returns, or audited financial statements. The accountant's faxed statement provides little information beyond that contained in the petitioner's Form 1120 tax returns for 2001 and 2002, which are discussed herein. The accountant, however, did address the director's finding of a discrepancy between the end-of-tax-year retained earnings amount reflected on the petitioner's 2001 income tax return and the beginning-of-tax-year retained earnings amount reflected on the petitioner's 2002 income tax return. The CPA states, in part: "The firm that prepared the tax return apparently isolated an infusion of \$31,900 by the shareholder from a prior year as opposed to 'lumping' it together in retained earnings. There is no discrepancy in retained earnings in these two years, just a reclassification." The petitioner's 2002 Form 1120 Schedule L reflects \$31,900.00 as "Additional paid-in capital," which, when added to the petitioner's 2002 beginning-of-tax-year retained earnings of \$56,252.00, equals \$88,152.00, the same amount as the petitioner's 2001 end-of-tax-year retained earnings. As such, the petitioner has adequately explained this discrepancy, thereby overcoming this portion of the director's objections.

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). For each year at issue, the petitioner's financial resources generally must be sufficient

to pay the annual amount of the beneficiary's 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 August 20, 2001, the beneficiary did not claim to have worked for the petitioner.

As another 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 for a given year, 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service 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 Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *see also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence in the record of proceeding indicates that the petitioner is structured as a C corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000<sup>1</sup>, 2001, 2002, and 2003. The record before the director closed on May 3, 2004, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax return for 2003 is the most recent return provided by the petitioner.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return.

The petitioner's tax returns state amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	-\$28,122.00	\$59,488.40*	-\$59,488.40
2002	-\$20,988.00	\$52,354.40*	-\$52,354.40
2003	\$64,361.00	0	\$32,994.60

<sup>1</sup> Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in that year.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. 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. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	-\$55,929.00	\$87,295.40*	-\$87,295.40
2002	-\$177,538.00	\$208,904.40*	-\$208,904.40

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in that year.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

The record also contains copies of bank statements. Again, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

In the instant case, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets. Therefore, the bank statement evidence fails to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within 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 \$100,000.00. 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. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. It is also noted that information on the petition reflects that the petitioner has been in business only since September 1999, and has only 14 employees. Also noted is that the petitioner's income tax returns reflect no salaries and wages paid in 2000 or 2001, and only \$159,433.00 and \$33,956.00 paid in 2002 and 2003, respectively.

Forms 1120 of the petitioning business

Year	Gross receipts or sales	Gross Income	Net Profit
2000	\$1,557,703.00	\$461,074.00	\$96,734.00
2001	\$2,334,712.00	\$492,720.00	-\$28,122.00
2002	\$2,329,044.00	\$546,280.00	-\$20,988.00
2003	\$3,115,200.00	\$536,684.00	\$15,251.00

Counsel argues that the director refused to consider that the petitioner's loss in 2001 was due to a write-off for depreciation in the amount of \$76,449.00, a decision that is inconsistent with accounting principles and CIS decisions. Counsel also notes that the petitioner had a depreciation write-off in the amount of \$92,003.00 in 2002.

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* 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 record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome 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 not been met.

**ORDER:** The appeal is dismissed.