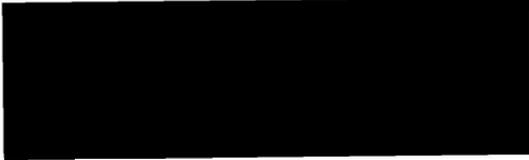




U.S. Citizenship
and Immigration
Services

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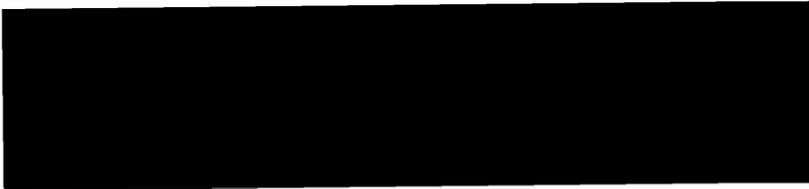
Office: TEXAS SERVICE CENTER

Date: JAN 22 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center denied the preference visa petition. The AAO subsequently reviewed the petition and then remanded the petition to the director for additional evidence as to the petitioner's business structure and identity. The director requested further evidence from the petitioner with regard to the petitioner's identity, which the petitioner submitted. The matter is now before the Administrative Appeals Office (AAO) on renewed appeal. The appeal will be dismissed.

The petitioner is a cabinet making business. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. 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 has not demonstrated the ability to pay the proffered wage as of the 1997 priority date and to the present. The director denied the petition accordingly.

The record shows that the initial appeal is properly filed, timely and makes a specific allegation of error in law or fact.

Due to the protracted nature of these proceedings, the AAO will briefly discuss the procedural history of the petition. On March 26, 2003, the director examined the petitioner's ability to pay the proffered wage by analyzing the tax records initially submitted to the record, namely Forms 1040 for the petitioner's owner, with accompanying Schedules C. The director analyzed the sole proprietor's gross income and profits as documented on the Schedules C of the Forms 1040 submitted to the record and determined that the sole proprietor could not pay the difference between the beneficiary's actual wages and the proffered wage based on the petitioner's Schedules C profits. On appeal the AAO then examined the submitted Form 1040 tax returns and Schedules C and corrected the director's analysis. The AAO determined that the sole proprietor's¹ adjusted gross income, in the years 1997 to 2001, in combination with the sole proprietor's expenses for himself and his wife were sufficient to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. However, the AAO raised the issue of the petitioner's identity, noting that the original Form ETA and the I-140 petition both indicate that the petitioner is named [REDACTED] Incorporated. The AAO also noted that the sample of the petitioner's letterhead contained in the record also indicates the petitioner's name is [REDACTED] Incorporated. The AAO then noted that the petitioner's owner's tax returns, as well as the W-2 forms submitted to the record, stated that the name of the company was [REDACTED]. The AAO then remanded the petition to the director for clarification of the petitioner's identity and form of ownership.

On February 23, 2005, the director sent a request for further evidence to counsel requesting the following information: clarification of the ownership of the petitioner; a copy of the Articles of Incorporation for [REDACTED] Inc; a list of the petitioner's owner's monthly expenses; evidence as to the petitioner's ability to pay the proffered wage in tax years 2002, 2003 and 2004; a clarification of the address where the beneficiary will work, and a copy of the lease for the petitioner's current work location.

In response, on March 21, 2005, counsel submitted the articles of incorporation for [REDACTED] Inc. to clarify the ownership of the petitioner. She also submits a notice of intention to incorporate, signed by [REDACTED] the petitioner's owner, and his wife that stated [REDACTED] Inc. intended to incorporate on April 1, 1980. The petitioner resubmitted evidence of the petitioner's owner's Form 1040 for 2001, and Forms 941 with an employer identification number of [REDACTED]. The petitioner also submitted the petitioner's Forms 1120 for tax years 2002 and 2003, that identifies the petitioner's employer identification number as [REDACTED]. These two documents indicate the petitioner's net income during these two years as -\$6,710 and -\$194. The petitioner

¹ The AAO identified the sole proprietor business as [REDACTED]

also appears to submit evidence as to the petitioner's owner's assets, as well as the lease for the petitioner's business location. On April 1, 2005, the director then sent the petitioner a second request for further evidence, asking for [REDACTED] Inc.'s federal income tax returns for the years 1997, 1998, 1999, 2000, and 2001. In response, counsel submitted the petitioner's tax returns for these five years.

As set forth in the AAO remand, the single issue in this case is whether the petitioner is a corporation, rather than a sole proprietor, and if so, does the petitioner have the ability to pay the proffered wage as of the 1997 priority date and to the present.

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 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 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 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 18, 1997. The proffered wage as stated on the Form ETA 750 is \$15.60 per hour (\$32,448 per year).

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. Relevant evidence in the record includes the petitioner's owner's Forms 1040 for the relevant years in question, with accompanying Schedules C for a business identified as [REDACTED] W-2 Forms for the beneficiary issued by the sole proprietor business known as [REDACTED], Forms 941 Quarterly Wage reports, as well as the most recently submitted IRS Forms 1120 corporate tax returns, for the petitioner, identified as [REDACTED] 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).

The evidence in the record of proceeding submitted in response to the director's requests for further evidence to address the issue raised by the AAO in its adjudication of the initial petition consists of the petitioner's Forms 1120 for tax years 1997 to 2003. These documents show that the petitioner identified on the I-140 and the ETA 750 is structured as a corporation. On the petition, the petitioner claimed to have been established in 1984, and to have five employees. The petitioner referred to the petitioner's owner's Schedules C for information on the petitioner's gross annual income and net annual income.³ On the Form ETA 750B, signed by the beneficiary on December 15, 1997, the beneficiary claimed to have worked for the petitioner since January 1995.

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, 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 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, namely, [REDACTED], has not submitted any evidence to the record with regard to any wages that it paid the beneficiary as of the 1997 priority date and to the present.⁴ Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. The petitioner thus has the obligation to establish its ability to pay the entire proffered wage as of 1997 and to the present.

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). 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.

³ This appears to be the first step in intermixing the petitioner's owner's sole proprietor business structure with the petitioner's corporate business structure.

⁴ As stated previously, the W-2 forms submitted to the record show [REDACTED] as the beneficiary's employer.

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$32,448 per year from the priority date:

- In 1997, the Form 1120 stated a net income⁵ of \$6,666.
- In 1998, the Form 1120 stated a net income of \$32,349.
- In 1999, the Form 1120 stated a net income of \$5,364.
- In 2000, the Form 1120 stated a net income of \$8,018.
- In 2001, the Form 1120 stated a net income of \$487.
- In 2002, the Form 1120 stated a net income of -\$6,710.
- In 2003, the Form 1120 stated a net income of -\$194.

Therefore, for the years 1997 to 2003, 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. 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁵Ordinary income (loss) from trade or business activities as reported on Line 28 of the Form 1120.

⁶According 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.

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.

- The petitioner's net current assets during 1997 were \$5,289.
- The petitioner's net current assets during 1998 were \$30,338.
- The petitioner's net current assets during 1999 were \$29,950.
- The petitioner's net current assets during 2000 were \$29,340.
- The petitioner's net current assets during 2001 were \$24,456.
- The petitioner's net current assets during 2002 were \$21,347.
- The petitioner's net current assets during 2003 were \$49,894.

As stated previously, the proffered wage is \$32,448. Therefore, for the years 1997 through 2002, the petitioner did not have sufficient net current assets to pay the proffered wage. While the petitioner has established that it has the ability to pay the proffered wage in tax year 2003, the petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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 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 its net income or net current assets except for 2003.

Counsel in submitting the petitioner's Form 1120 tax returns for the years 1997 to 2002 does not provide any further evidence as to additional funds that can be utilized to pay the proffered wage.

The AAO, as stated previously, may consider the totality of the petitioner's circumstances in petitions in which the petitioner shows negative or insufficient financial assets to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in 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. 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 that 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that any of the years from 1997 to 2003 was an uncharacteristically unprofitable year for the petitioner. In fact, the petitioner has demonstrated positive net current assets for all seven years in question, and reported small amounts of negative net income only during two years.

The evidence submitted does not establish that the corporate petitioner identified as [REDACTED] Inc. on the I-140 petition and the Form ETA 750, had the continuing ability to pay the proffered wage beginning on the priority date and to the present. The AAO does note that the sole proprietor business identified in these proceedings retains the ability to file a new I-140 petition with accompanying DOL Form 9089 without prejudice.

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.