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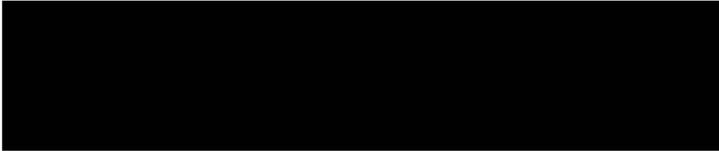
Date:
JAN 22 2007

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

The petitioner is an agricultural service business. It seeks to employ the beneficiary¹ permanently in the United States as a supervisor, vegetable farming. 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 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 22, 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 nature, for which qualified workers are not available in the United States.

The regulation 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 the Service.

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).

¹ The beneficiary is also known as [REDACTED]

Here, the Form ETA 750 was accepted on December 11, 2001. The proffered wage as stated on the Form ETA 750 is \$16.22 per hour (\$33,737.60 per year). The Form ETA 750 states that the position requires two years of experience.

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 appeal.² Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form 1120 tax returns and quarterly tax statements for 2001, 2002, and 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on March 18, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signature(s), and audited financial statements from 2002 to present.

The director requested California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The director requested that the forms should include the names, social security numbers and number of weeks worked for all employees.

In response to the director's request, counsel submitted copies of the petitioner's U.S. federal tax returns Form 1020 for the years 2002 and 2003 as well as the requested Form DE-6, Quarterly Wage Reports.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1975. On the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that real estate holdings and cash reserves were not considered by the director in his decision.

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

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).

circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. The Form ETA 750, Part, Item 15 a. prepared and signed by the beneficiary indicated that the beneficiary was not employed by the petitioner, and, no evidence was submitted stating wage payments.

CIS will 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.

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 returns³ demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$33,737.60 per year from the priority date:

- In 2001, the Form 1120 stated a net income of \$10,578.00.

³ The petitioner is obligated to demonstrate that is able to pay the difference between wages actually paid to the beneficiary and the proffered wage from the priority date. Tax returns submitted for years prior to the priority date have slight probative value in these matters. In 2000, the petitioner stated net income of \$13,771.00.

- In 2002, the Form 1120 stated a loss⁴ of <\$80,169.00>.⁵
- In 2003, the Form 1120 stated a loss of <\$83,541.00>.

Therefore, for the years 2001, 2002 and 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 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 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 2001 were <\$1,048,788.00>.
- The petitioner's net current assets during 2002 were <\$1,139,681.00>.
- The petitioner's net current assets during 2003 were <\$1,161,337.00>.

Therefore, for the years 2001, 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, 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 its net current assets.

With the brief, the petitioner has submitted copies of the following documents: a letter from the petitioner's accountant dated July 18, 2005; an undated letter from the petitioner's chief financial officer that the petitioner "maintains a payroll of more than 150 individuals" and, that presently the "company has a payroll of 250;" a copy of the petitioner's corporation data from a website <http://kepler.ss.ca.gov> accessed on August 29, 2005; information concerning the petitioner's Bank of America business savings account for the period May 1, 2005 to June 30, 2005; two Community Bank statements for separate business savings and business checking accounts both for the period June 1, 2005 to June 30, 2005; another Community Bank business checking account for the period June 1, 2005 to June 30, 2005; the petitioner's payroll register dated June 30, 2005; approximately 14 "2004-2005 secured tax statements" from San Bento County, California; approximately 44 pages of information concerning the petitioner's real property holdings and ownership;

⁴ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁶ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for four quarters of 2002 that were accepted by the State of California; U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002, and 2003; a State of California "Farm Labor Contractor License" issued to [REDACTED] Inc.; and, a remittance invoice to San Benito County, California for fiscal year July 1, 1993 to June 30, 1994 as well as other documents.

Counsel asserts in his statement accompanying the appeal and his brief submitted in this matter that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date.

Counsel asserts that real estate holdings were not considered by the director in his decision. We reject counsel's idea that the petitioner's total assets that include its real estate holdings should have been considered in the determination of the ability to pay the proffered wage. 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 mentioned above.

Counsel advocates the use of the cash balance of the business accounts variously dated May 1, 2005 through June 30, 2005, to show the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g) (2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also asserts that cash reserves were not considered by the director in his decision. A review of Schedule L of the petitioner's Form 1120 tax returns for 2001, 2002 and 2003 stated cash assets at the end of those years of <\$33,710.00>, <\$69,670.00> and <\$53,924.00> respectively. Cash assets are a component of current net assets, and, the petitioner's current net assets were mentioned by the director in his decision. However, in a letter dated July 18, 2005, the petitioner's accountant opined favorably concerning the resources of the petitioner, its 30 year history of business operations, and, stated that the company had converted "one of the real estate assets to cash and now has over \$800,000.00 in cash reserves." Since this additional cash infusion does not appear on the tax returns for 2001, 2002 and 2003, it is apparent that the funds were not available from the priority date at least through 2003. Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Proof of ability to pay begins on the priority date, that is December 11, 2001, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Similar reasoning pertains to the bank account data for 2005, four years after the priority date.

Counsel states on appeal that the totality of the circumstances as found in information in the record of proceedings supports the fact that the petitioner is a viable, profitable enterprise including factors such as business operations longevity, the number of employees, the petitioner's business reputation as well as other factors. CIS will review the totality of all the evidence petitioner has submitted to determine if petitioner has the ability to pay the proffered wage following the case precedent, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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 that 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 \$280.00 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. According to the petition, the business was established in 1975, and, according to the record its business involves farm labor contracting with varying employee employment levels. Wages paid per quarter when averaged are modest as calculated for each worker so employed as is evident from the California Quarterly Wage Reports for all employees for four quarters of 2002.

The petitioner has submitted California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for four quarters of 2002 that were accepted by the State of California. According to Part II of each of those statements, the total number of employees reported for each quarter was 195, 392, 514, and 231 respectively. Examining at random the fourth quarter report for 2002, the total wages paid were reported as \$389,317.92 for 231 employees. Therefore, the average wage paid for each worker for that three-month period was \$1,685.35. A few of those workers such as Ms. [REDACTED] who received \$30,000.00 in wages, [REDACTED] who received \$5,216.00, or [REDACTED] who received \$4,000.00 for that period, may be fulltime workers but there is no information if any of the other employees listed on the Form DE-6 statements were fulltime. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part "In a case where the prospective United States employer employs 100 or more workers, the director *may* [emphasis added] accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." Therefore, counsel submission on appeal of an undated letter from the petitioner's chief financial officer (who is Ms. [REDACTED]) that the petitioner "maintains a payroll of more than 150 individuals," and, that presently the "company has a payroll of 250," without direct evidence that the workers are employees, is insufficient to meet the requirements of the regulation.

Net income stated for the corporation for the three years for which tax returns were available were modest or stated losses, and, they were in each year (2001, 2002, 2003) less than the proffered wage of \$33,737.60 per year. The petitioner's net current assets during 2001, 2002 and 2003 were <\$1,048,788.00>, <\$1,139,681.00> and <\$1,161,337.00> respectively. Gross receipts are in modest decline from year 2001. There is no information in the record of proceeding concerning this decline, or other information concerning the Schedule L, Line 17 debt load item each year that accounts for the large current liabilities mentioned above. On one hand, counsel asserts that the petitioner realty is valuable and a resource, but on the other hand there is a large debt obligation (mortgage, notes, bonds payable in less than one year) per year that offsets this resource.

Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a supervisor, vegetable farming will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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

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.