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U.S. Citizenship
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Services

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FILE: WAC 03 047 54275 Office: CALIFORNIA SERVICE CENTER

Date: JAN 31 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.

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 a graphic design and printing company. It seeks to employ the beneficiary permanently in the United States as an art director. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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. 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 May 7, 2003 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 DOL. *See* 8 C.F.R. § 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 DOL 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 January 9, 1998. The proffered wage as stated on the Form ETA 750 is \$3,580.00 per month (\$42,960.00 per year). The Form ETA 750 states that the position requires a bachelor's degree in fine art and three years of experience in the job offered.

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.¹ On appeal, counsel submits a brief. Relevant evidence in the record includes the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 1998, 1999 and 2000, the petitioner's bank statements for 2000 through 2002, the petitioner's IRS Form W-3 for 2001 and the petitioner's IRS Forms W-2 for 2000 and 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.²

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation from 1998 through 2000, and that the petitioner was structured as an S corporation in 2001. On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of \$1,136,676.00, to have a net annual income of \$78,934.00 and to currently employ four to seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on October 5, 1997, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's depreciation deductions should have been considered in the determination of the petitioner's ability to pay the proffered wage. Counsel also asserts that the funds paid by the petitioner for legal and professional services and outside services from 1998 through 2001 are available funds that could have been utilized by the petitioner to pay the proffered wage. Counsel further asserts that the petitioner's bank statements establish the petitioner's ability to pay the proffered wage.

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

¹ 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).

² The record also contains a copy of the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 1997. Evidence preceding the priority date in 1998 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 1998 or subsequently.

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 wage expense is misplaced. 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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. For an S corporation, CIS generally considers net income to be the figure shown on Line 21 of the Form 1120S, U.S. Income Tax Return for an S Corporation. The record before the director closed on November 27, 2002. As of that date, the petitioner's income tax return for 2001 is the most recent return available. The petitioner's tax returns demonstrate its net income for 1998, 1999, 2000 and 2001, as shown in the table below.

- In 1998, the Form 1120 stated net income of \$14,209.00.
- In 1999, the Form 1120 stated net income of \$15,248.00.
- In 2000, the Form 1120 stated net income of \$18,271.00.
- In 2001, the Form 1120S stated net income of \$356.00.

Therefore, for the years 1998, 1999, 2000 and 2001, the petitioner did not have sufficient net income to pay the proffered wage of \$42,960.00.

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. 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 and include cash-on-hand. 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 tax returns demonstrate its end-of-year net current assets for 1998, 1999, 2000 and 2001, as shown in the table below.

- In 1998, the Form 1120 stated net current assets of -\$49,299.00.
- In 1999, the Form 1120 stated net current assets of -\$66,928.00.
- In 2000, the Form 1120 stated net current assets of \$12,007.00.
- In 2001, the Form 1120S stated net current assets of \$29,847.00.

Therefore, for the years 1998, 1999, 2000 and 2001, the petitioner did not have sufficient net current assets to pay the proffered wage of \$42,960.00.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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.⁴

On appeal, counsel asserts that the funds paid by the petitioner for legal and professional services and outside services from 1998 through 2001 are available funds that could have been utilized by the petitioner to pay the

³ 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.

⁴ CIS electronic records show that the petitioner filed at least 14 other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2). Six of the other petitions submitted by the petitioner in May 2000, June 2000 (two petitions), September 2000, May 2002 and December 2002 were approved in September 2000, September 2000, August 2002, January 2001, August 2002 and July 2003, respectively. The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions or about the current immigration status of the beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

proffered wage. However, counsel does not state how funds paid for legal and professional services and outside services would have been available to pay the proffered wage for an art director.⁵ The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further asserts on appeal that the petitioner's bank statements establish the petitioner's ability to pay the proffered wage. However, 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the 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 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 relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 1994. The petitioner's gross receipts were \$606,783.00, \$855,534.00, \$911,286.00, \$1,065,771.00, \$1,136,676.00 in 1997, 1998, 1999, 2000 and 2001, respectively. However, the petitioner paid minimal salaries in each relevant year, and the petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service.⁶ Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

⁵ In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

⁶ The petitioner paid salaries and wages of \$52,324.00, \$63,622.00, \$103,067.00, \$125,184.00 and

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 DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.⁷

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.

\$111,167.00 in 1997, 1998, 1999, 2000 and 2001, respectively.

⁷ This office notes that the record does not establish that the beneficiary holds a U.S. bachelor's degree or a foreign equivalent degree as required by the Form ETA 750. The record indicates that the beneficiary holds a Bachelor of Fine Arts (Applied Art) degree from the University of Delhi in India. The petitioner failed to submit the beneficiary's university transcripts, which would have shown the number of years the beneficiary attended the University of Delhi and the number of college credits he received. In any future proceeding, the petitioner should submit evidence to establish that the beneficiary holds a U.S. bachelor's degree or a foreign equivalent degree as required by the Form ETA 750.