

Identifying data deleted to
prevent clear and warranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B8



FILE:



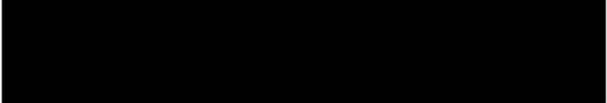
Office: VERMONT SERVICE CENTER

Date: JUL 3 2007

EAC-05-217-52226

IN RE:

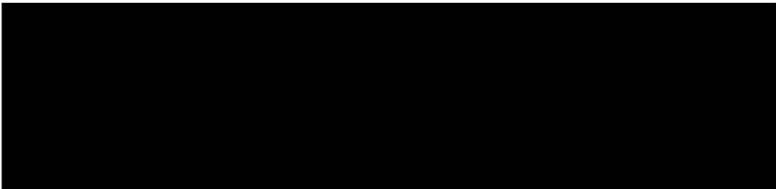
Petitioner:



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

The petitioner is a dry cleaning and tailoring company. It seeks to employ the beneficiary permanently in the United States as a custom tailor (tailor and alteration). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established its 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 March 8, 2006 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 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 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 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.14 per hour (\$29,411.20 per year). The Form ETA 750 states that the position requires two 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 appeal¹. On appeal counsel submits a brief without additional evidence. Relevant evidence in the record includes the petitioner's corporate tax return for its fiscal years 2000 through 2003, and an affidavit of the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 to September 30. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$143,263, to have a net annual income of \$7,515, and to currently employ 5 workers. On the Form ETA 750B, signed by the beneficiary on March 22, 2001, the beneficiary claimed to have worked for the petitioner since July 1998.

On appeal, counsel asserts that the petitioner is currently employing the beneficiary on a full time basis and is paying him the proffered wage, that the petitioner has successfully proven financial ability with its net current assets, and that the petitioner's current ratio establishes 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 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. The AAO concurs with counsel's assertion that the petitioner is not obligated to pay the proffered wage until the beneficiary's legal permanent residence is granted. However, 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 did not submit W-2 forms, 1099 forms, payroll records, cancelled checks or any other documentary evidence to show that the petitioner paid the beneficiary in 2001 through the present despite that the beneficiary claimed to have worked for the petitioner since July 1998. On appeal counsel asserts that the petitioner is currently employing the beneficiary on a full time basis, and is paying the proffered wage. However, counsel does not submit any evidence to support his assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel's reliance on assertions that the petitioner is currently paying the beneficiary the proffered wage to

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).

establish the petitioner's continuing ability to pay the proffered wage beginning on the priority date in 2001 is misplaced. The petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2001 onwards. The petitioner is obligated to demonstrate that it could pay the full proffered wage in 2001 through the present with its net income or its net current assets.

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 contrary to counsel's assertions. 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. On appeal counsel's reliance on depreciation to establish the petitioner's ability to pay asserting that depreciation is not considered a loss not an actual cash expense is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years 2000 through 2003. The petitioner's 2000 through 2003 tax return demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$29,411.20 per year for the year of the priority date:

- In the fiscal year 2000 (10/1/2000-9/30/2001), the Form 1120 stated a net income² of \$6,134.
- In the fiscal year 2001 (10/1/2001-9/30/2002), the Form 1120 stated a net income of \$(2,452).
- In the fiscal year 2002 (10/1/2002-9/30/2003), the Form 1120 stated a net income of \$3,658.
- In the fiscal year 2003 (10/1/2003-9/30/2004), the Form 1120 stated a net income of \$7,515.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

Therefore, for the fiscal years 2000 through 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$29,411.20.

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.

On appeal counsel asserts that the petitioner's "*net current assets* for FY 2001 is \$158,489; \$157,164 for FY 2001; \$151,436 for FY 2002, and \$153,721 for FY 2003." Counsel miscalculated the petitioner's net current assets. In fact, these figures reflect the petitioner's total assets. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage.

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. 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 its fiscal year 2000 were \$3,181.
- The petitioner's net current assets during its fiscal year 2001 were \$1,147.
- The petitioner's net current assets during its fiscal year 2002 were \$2,109.
- The petitioner's net current assets during its fiscal year 2001 were \$(890).

Therefore, for the fiscal years 2000 through 2003, the petitioner did not have sufficient net current assets to pay the proffered wage of \$29,411.20.

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 wages paid to the beneficiary, its net income or its net current assets.

The petitioner asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel claims that the current ratio, current assets/current liabilities, shows that the petitioner has the ability to pay the proffered wage in each relevant year. 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

³According 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.

company's financial condition, its operations, and attractiveness as an investment. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.⁴

While counsel argues that the current ratio shows the petitioner has the ability to pay the proffered wage, he provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. In addition, he 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. Moreover, because the current ratio is not designed to demonstrate an entity's ability to take on the additional, new obligations such as paying an additional wage, this office is not persuaded to rely upon it.

In addition, counsel asserts that the petitioner has been in continuing business since 1997 and its over-all business performance has sustained its financial requirements, thereby allowing employees' wages to be paid accordingly. Counsel urges CIS to consider the totality of circumstance in determining the petitioner's ability to pay the proffered wage. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1997. The petitioner's tax returns submitted in the record show that the petitioner's gross receipts were \$164,197, \$156,589, \$160,743 and \$158,322 in 2000, 2001, 2002 and 2003 respectively; its gross profits were \$150,881, \$144,267, \$146,562 and \$143,263 respectively. The petitioner claimed to employ 5 workers on the petition, however, the tax returns do not reflect that the petitioner paid any salaries and wages or costs of labor in its fiscal years 2000 through 2003 except salaries and wages of \$11,320 in the fiscal year of 2001. Thus, assessing the totality of circumstances in this individual case, it cannot be concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

The petitioner'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.

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.

⁴ The observation that a particular ratio is high or low depends on the purpose for which the ratio is being observed. 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. 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).