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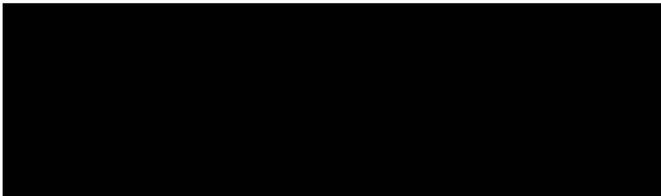
U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: LIN-06-068-53310 Office: NEBRASKA SERVICE CENTER

Date: JUL 30 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 Acting Director (Director), Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a soccer league and training service. It seeks to employ the beneficiary permanently in the United States as a coach (soccer goalie coach). 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 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 April 26, 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 May 9, 2003. The proffered wage as stated on the Form ETA 750 is \$47,842 per year. The Form ETA 750 states that the position requires two years of experience in the job offered or in the related occupation of soccer player-goaltender.

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 any additional evidence. Relevant evidence in the record includes the petitioner's Form 1065 federal income tax returns for 1998 through 2004. 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 limited liability company (LLC). On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$27,770, and to currently employ 3 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 February 21, 2003, the beneficiary claimed to have worked for the petitioner since January 2001.

On appeal, counsel asserts that the petitioner has submitted relevant, probative, and credible evidence to show that it had the ability to pay the proffered wage, and that the director applied an overly restrictive interpretation of "ability to pay."

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 beneficiary claimed to have worked for the petitioner since January 2001, however, the petitioner did not submit any evidence showing that the petitioner paid the beneficiary any compensation in the relevant years 2003 to the present. The petitioner claimed that the beneficiary worked as an independent contractor and was paid directly by the parents of students he coached. However, the record does not contain any evidence of such payment, such as W-2 forms, 1099 forms, payroll records, cancelled checks or any similar documents from the parents of the students and any evidence showing that the parents of the students are related to the petitioner. In general, wages already paid to others or paid by some one other than the petitioner 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. 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*

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).

of *Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner failed to establish that it paid the beneficiary the proffered wage during the relevant years 2003 to the present. The petitioner is obligated to demonstrate that it could pay the proffered wage of \$47,842 in 2003 onwards 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 the petitioner'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 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 record contains the petitioner's Form 1065, U.S. Return of Partnership Income for 1998 through 2004. The record before the director closed on February 15, 2006 with the receipt by the director of the petitioner's submissions in response to the request for evidence (RFE). As of that date the petitioner's federal tax return for 2005 was not available yet. Therefore, the petitioner's 2004 tax return was the most recent available tax return at that time. The priority date in the instant case is May 9, 2003, and thus the petitioner's tax returns for 1998 to 2002 are not necessarily dispositive. The petitioner did not submit any other regulatory-prescribed documentary evidence, such as annual reports or audited financial statements, for the relevant years. Therefore, the AAO will review the petitioner's tax returns for 2003 and 2004 only in determining the petitioner's ability to pay the proffered wage.

The petitioner's tax returns for 2003 and 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$47,842 from the priority date:

- In 2003, the Form 1065 stated net income² of \$5,280.
- In 2004, the Form 1065 stated net income of \$7,983.

Therefore, for the years 2003 and 2004, 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.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 15 through 17 of the Form 1065. 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 2003 were \$2,882.
- The petitioner's net current assets during 2004 were \$(8,976).

Therefore, for the years 2003 and 2004, 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 wages paid to the beneficiary, its net income, or its net current assets in 2003 and 2004.

² Where a LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on Line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Partnership Income, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22." Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K (page 3 of Form 1065) is a summary schedule of all the partners' shares of the partnership's income, credits, deductions, etc. The net income is reported on Analysis of Net Income (Loss) line 1 Net income (loss). See Internal Revenue Service, Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

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.

Counsel 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 urges the consideration of the petitioner's reasonable expectations of an increase in business and increase in profits once it is able to make an offer of permanent employment to the beneficiary. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states: "I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal." Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a coach will significantly increase profits for the petitioner since he has already been coaching for years. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel cites *Matter of Oriental Pearl restaurant*, 92-INA-59 (BALCA 1993) to support his assertions. However, counsel does not state how this case holding issued by the Department of Labor's Board of Alien Labor Certification Appeals (BALCA) is applicable to the instant petition before the Department of Homeland Security's AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). 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.

Counsel asserts that the beneficiary's compensation paid directly by the parents of students should be considered as wages actually paid to the beneficiary in determining the petitioner's ability to pay the proffered wage. However, counsel does not submit any evidence that the alleged compensation from the parents of students directly to the beneficiary was a part or all of the wage offered by the petitioner. The petitioner's tax returns for 2003 and 2004 do not indicate that any amount of compensation was paid to the beneficiary by the petitioner and the record does not contain any evidence showing how much the parents of students paid to the beneficiary as an employee of the petitioner and that the parents of students are part of the petitioner and paid the beneficiary on behalf of the petitioner. Counsel asserts that in 2001 and 2002 the petitioner's income was \$203,324 and \$100,286 respectively. By paying the beneficiary directly by the member teams, the petitioner's income was reduced in 2003 and 2004. Once the beneficiary is able to begin permanent employment, the petitioner will revert to its 2001 and 2002 system and will clearly have the ability to pay the proffered wage to the beneficiary. Counsel's assertion is misplaced. The petitioner's 2002 tax return indicates that the petitioner paid wages of \$31,075 that year. The petitioner did not submit any evidence showing all or any portion of the wages paid was paid to the beneficiary. Even if the petitioner had proven that all the wages of \$31,075 had been paid to the beneficiary, the petitioner's net income of \$(4,677) in 2002 would not have been sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage that year, nor would either of the net income in 2003 and 2004 been sufficient to cover the difference.

Counsel also asserts that the petitioner has been in business since 1997 and suggests considering the petitioner's longevity, and totality of circumstances in determining its 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).⁴ The petitioner was formed as a LLC in 1997 and employs 3 employees. However, its annual gross receipts were \$83,738, \$1356,963, \$190,544, \$207,558, \$100,286, \$16,888 and \$27,770 from 1998 to 2004, respectively, and its annual net income was \$14,874, \$22,217, \$(658), \$(2,369), \$(4,677) \$5,280, and \$7,983 respectively during the years from 1998 to 2004. The petitioner paid salaries and wages of \$28,862 in 1999, \$41,873 in 2000, \$54,979 in 2001 and \$31,075 in 2002 to its employees but did not pay any salaries and wages in 1998, 2003 and 2004. There is no evidence in the record of proceeding of an unusual disruption to the petitioner's business in any relevant year or of the petitioner's reputation. Thus, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2003 and 2004 were uncharacteristically unprofitable years for the petitioner. Further, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has the ability to pay the proffered wage.

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 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.

⁴ *Matter of Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.