

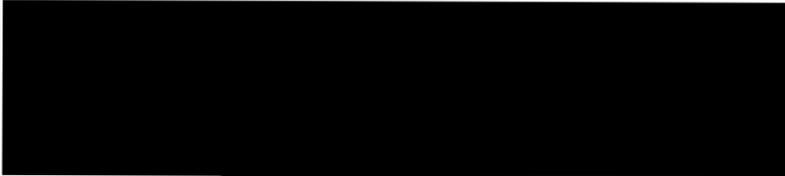
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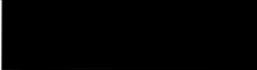
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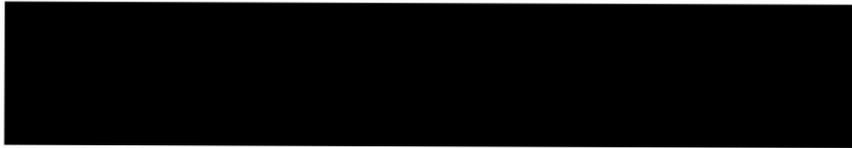
Office: CALIFORNIA SERVICE CENTER

Date:

JUN 12 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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 pottery manufacturer. It seeks to employ the beneficiary permanently in the United States as a pottery thrower (molder, shaper and caster). 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 based on the petitioner's net income for tax years 2001 to 2004. 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 January 11, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), 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 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 19, 2001. The proffered wage as stated on the Form ETA 750 is \$20.92 per hour (\$43,513.60 per year). The Form ETA 750 states that the position requires four years of work experience in the proffered position, or four year of work experience in the related occupation of sagger maker.

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, the petitioner submits a statement, with no new evidence.² The record also contains the first page of the petitioner's Forms 1120 for tax years 2002, 2003, and 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 C corporation. On the petition, the petitioner claimed to have been established on June 3, 1985, to have a gross annual income of \$584,381, and to currently employ ten workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary claimed that he had worked for the petitioner from 1995 to the date that the beneficiary signed the Form ETA 750, Part B, namely, April 1, 2001.

On appeal, the petitioner states that tax returns for tax years 2002 and 2003 lacked minor parts, and that the petitioner submitted its 2004 tax return. The petitioner then states that while the director's statement that "federal tax returns for 2004 reflected a taxable income of zero," may be true, the petitioner has sufficient cash flow. The petitioner notes that the 2004 return shows gross receipts of \$589,253 and total income of \$179,219. The petitioner also notes that there is sufficient taxable income because of the special deductions that are listed on Schedule C and include depreciation which does not involve a cash outlay.

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

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 On Form I-290B, the petitioner indicated that it would send a brief and/or evidence to the AAO within 30 days. The petitioner dated the appeal February 9, 2006. The AAO received no further evidence. On May 2, 2007, the AAO sent a fax to the petitioner informing the petitioner that no separate brief and/or evidence was received and to confirm whether or not the petitioner would send anything else in this matter. As a courtesy, the AAO provided the petitioner with five days to respond. To date, more than five weeks later, the AAO has received no response from the petitioner. Therefore the AAO will review the petition based on the record as presently constituted.

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).

The AAO notes that the director in his decision incorrectly stated that the petitioner had zero net income for tax year 2004 based on the petitioner's 2004 tax return. This statement is incorrect, and the AAO will comment further on this issue more fully further in these proceedings.

On appeal, the petitioner asserts that the petitioner's cash flow is sufficient to establish the petitioner's ability to pay the proffered wage. With regard to this issue, the petitioner's cash flow is related to gross receipts, which is addressed below. The petitioner also appears to assert that it can use depreciation deductions as a source of additional funds with which to pay the proffered wage. With regard to depreciation, the AAO will examine this issue more fully further in these proceedings.

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. Although the beneficiary indicated that he worked for the petitioner since 1995, and the petitioner provided a letter of work verification of its previous employment of the beneficiary, the petitioner provided no evidence, such as W-2 Forms, Forms 1099-MISC, or pay checks with stubs identifying the beneficiary and hours worked, that established it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2004.

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, contrary to the petitioner's assertion, 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). Contrary to the petitioner's assertion, 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.

It is noted that the director requested the petitioner's signed and certified tax returns for tax years 2002 to 2004 in his request for further evidence dated September 27, 2005. It is not clear why the director did not request the petitioner's tax return for tax year 2001, which is the priority year for the instant petition.³ Furthermore the director requested complete signed and certified tax returns for tax years 2002 to 2004 in his request for further evidence dated September 27, 2005. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide complete copies of its tax returns for the three years following the 2001 priority. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

It is also noted that the petitioner on appeal appears to reference its Schedule C for an unidentified tax year; however, the record contains no Schedule C. The record also does not contain any Schedules L for the pertinent years which would contain probative evidence as to the petitioner's net current assets in the period of time in question. Based on this lack of complete tax returns for tax years 2001 to 2004, the AAO can only examine whether the petitioner had sufficient net income during the tax years 2001 to 2004 to establish its ability to pay the proffered wage. Thus, the AAO will examine the first pages of the petitioner's tax returns. The AAO will then for illustrative purposes also comment on how a petitioner may establish its ability to pay the proffered wage based on its net current assets.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$43,513.60 per year from the priority date:

- In 2001, the petitioner submitted no Form 1120 to the record. Thus the petitioner's net income⁴ during the priority year is unknown.

³ As previously stated, the priority date for the instant petition is April 30, 2001. Therefore the petitioner has to establish its ability to pay the proffered wage as of this date and until the beneficiary obtains lawful permanent residence.

⁴The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported

- In 2002, the Form 1120 stated a net income of -\$571.
In 2003, the Form 1120 stated a net income of -\$9,892.
In 2004, the Form 1120 stated a net income of \$21,639.⁵

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net income to pay the proffered wage.

As stated previously, because the petitioner did not submit its complete tax returns for the years 2001 to 2004, the AAO cannot examine whether the petitioner had sufficient net current assets to pay the proffered wage. However, for illustrative purposes only, the AAO will address how it analyzes the petitioner's net current assets. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current 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.

As previously stated, the record is devoid of any information as to the petitioner's net current assets for the years 2001 to 2004. Therefore the petitioner cannot establish it had sufficient net current assets during this period of time 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, or its net income or net current assets.

on Line 28 of the Form 1120.

⁵ It is not clear why the director stated the petitioner's net income for tax year 2004 was 0 (zero). Line 28 of the first page of the petitioner's tax return indicates a net income of \$21,639. Nevertheless, the director's determination that the petitioner had zero net income in tax year 2004 will be withdrawn.

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.

As previously stated, the petitioner's assertions with regard to using depreciation deductions or the petitioner's cash flow as sources of additional funds with which to pay the proffered wage are not viewed as persuasive. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 2001 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.