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U.S. Citizenship
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Services

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FILE:

SRC 03 127 52571

Office: TEXAS 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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner provides oil and gas exploration services. It seeks to employ the beneficiary permanently in the United States as an oil and gas lease appraiser. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has the financial ability to pay the proffered salary.

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 at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$1,800 per month. On the Form ETA 750B, signed by the beneficiary on January 9, 2002, the beneficiary claims to have worked for the petitioner since March 2001.¹

Part 5 of the petition, filed on April 1, 2003, indicates that the petitioner was established in January 1989, has a gross annual income of \$690,298 and currently employs nine workers. In support of its continuing ability to pay

¹ On the biographic information form (G-28) signed by the beneficiary on March 19, 2003, and submitted with the beneficiary's application for adjustment to permanent residence, the beneficiary also claims employment with the petitioner since March 2001.

the proffered wage, the petitioner provided copies of an internally generated unaudited financial statement covering 2002 and copies of Form 1120, U.S. Corporation Income Tax Return for 1999, 2000 and 2001.² They indicate that the petitioner files its taxes using a standard calendar year. As the priority date is April 25, 2001, the 2001 return is the most relevant. It contains the following information:

	2001
Taxable income before net operating loss (NOL) deduction ³ (Form 1120)	-\$70,970
Current Assets (Schedule L)	\$76,812
Current Liabilities (Schedule L)	-\$ 1,997
Net Current Assets	\$74,815

Besides net income, and as an alternative method of reviewing a petitioner's ability to pay a certified wage, CIS will examine a petitioner's net current assets in determining the ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.⁴ A corporation's year-end current assets and current liabilities are shown on line(s) 1(d) through 6(d) and line(s) 16(d) through 18(d) of Schedule L of its federal tax return. If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The director denied the petition on August 4, 2004. The director determined that the -\$70,970 of net income reported on the petitioner's 2001 tax return failed to establish its continuing ability to pay the beneficiary's proposed wage offer of \$21,600. The director noted that the petitioner had not provided information relevant to its ability to pay in 2003. The director erred with regard to the petitioner's ability to pay the proffered salary in 2001. As set forth above, the petitioner's net current assets of \$74,815 could cover the certified wage during that year. Additionally, since the record indicated that the petitioner employs the beneficiary, the director could have issued a request for additional evidence pursuant to 8 C.F.R. § 103.2(b)(8) and is now being remanded, in part, for that purpose.

On appeal, counsel submits an affidavit from an accountant, "[REDACTED]" an affidavit from the petitioner's principal shareholder, "[REDACTED]" copies of the petitioner's summary of its "Transactions by Account" as of July 2001 and November 2002, a copy of an unaudited financial statement covering the first six months of 2004, a copy of the petitioner's 2003 corporate tax return, and a copy of a March 2004 Internal Revenue Service (IRS) application to request an extension of time to file the petitioner's 2003 tax return. The 2003 tax return indicates the following:

² The 1999 and 2000 returns predate the priority date of April 25, 2001. For that reason, the review will focus on the 2001 return.

³ For the purpose of this review, taxable income before the NOL deduction will be treated as net taxable income.

⁴ 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.

	2003
Taxable income before net operating loss (NOL)	
deduction (Form 1040)	\$ 6,596
Current Assets (Schedule L)	\$40,956
Current Liabilities (Schedule L)	\$93,327
Net Current Assets	-\$52,371

Citing the regulation at 8 C.F.R. § 204.5(g)(2), Vermont Service Center guidelines that are attributed to an immigration treatise, but which were originally part of the minutes of a 2003 teleconference with the American Association of Immigration Lawyers (AILA), counsel asserts that the director erroneously relied on the federal tax returns in determining the petitioner's ability to pay the proffered wage. Counsel also states that the director justified its analysis by reference to *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986). Counsel further maintains that because of the volatility of the oil and gas business and economic fluctuations, a petitioner's tax returns may not be the best indicator of an ability to pay the proffered salary. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in support of the claim that the increase in growth and profit can also form a basis for the petition's approval.

s affidavit merely states that the principal shareholder loaned \$85,443.84 to the petitioner in 2001 and loaned \$125,609.81 to the petitioner in 2002. He adds that he looked at the 2003 tax return and financial reports for year-to-date for 2004 and concludes that the petitioner should be able to pay the proffered wage. affidavit also states that he loans money to the petitioner when cash flow is low. He adds that the company did not require any loans in 2003 and that thus far, in 2004, it has been profitable.

Until the remand is completed, the AAO will reserve its opinion as to the applicability of *Matter of Sonogawa* in this matter, but would observe that loans to the corporate petitioner are not probative of its own ability to pay the proffered wage.⁵ The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

With regard to the Vermont Service Center minutes, it is noted these statements do not to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.⁶

Contrary to counsel's assertion, the director's decision makes no reference to the *Elatos* case. While the AAO concurs that the regulation at 8 C.F.R. § 204.5(g)(2) does not bar the consideration of additional evidence in appropriate cases, it also requires that the evidence of a petitioner's continuing ability to pay the proffered wage

⁵ Shareholder loans are also reflected within the liabilities itemized on Schedule L of the corporate tax return.

⁶See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

includes federal tax returns, annual reports, or audited financial statements. The unaudited financial statements provided to the record and on appeal cannot be considered determinative of the petitioner's ability to pay the proffered wage for the year represented. The plain language of 8 C.F.R. § 204.5(g) (2) provides that where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. This is not inconsistent with the language in *Elatos*, which refers to the submission of *certified* financial statements. It cannot be concluded that either unaudited financial statements or a component part thereof, should be considered as probative of a petitioner's ability to pay the proffered wage in lieu of one of the required forms of evidence. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The statements submitted in this matter are uncertified representations of management and are not probative of the petitioner's ability to pay a proffered salary during a given period.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, as noted above, the case will be remanded to the director to solicit additional evidence of the payment of compensation to the beneficiary during the pertinent period.

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 taxable income figure reflected on the **petitioner's federal income tax return, without consideration of depreciation or other expenses**. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1053 ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 and *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D.Ill 1982), *aff'd mem.*, 703 F.2d 571 (7th Cir. 1983)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), 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 that were submitted in support of the ability to pay, 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. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 536.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary, beginning at the priority date. As noted above, the case will be remanded to the director for further investigation of any wages paid to the beneficiary and the petitioner's continuing ability to pay the certified wage in all relevant years consistent with the regulatory requirements.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.