



U.S. Citizenship
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Services

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MAR 21 2007

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC 05 027 50564

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

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 appeal will be sustained.

The petitioner is a Vietnamese restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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. Therefore, the director denied the petition.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original April 6, 2005 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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 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. 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, which is the date 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). The priority date in the instant petition is April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$2,000 per month or \$24,000 annually.

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. Relevant evidence in the record

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

includes: counsel's brief; copies of the petitioner's 2001 through 2005 Forms 1120S, U.S. Income Tax Returns for an S Corporation; copies of the petitioner's president's 2001 through 2005 Forms 1040, U.S. Individual Income Tax Returns; a copy of the petitioner's 2002 Form W-3, **Transmittal of Wage and Tax Statements**; a letter, dated June 1, 2005, from the petitioner's majority shareholder, [REDACTED]; and copies of pay stubs for the beneficiary for January 15, 2005, February 15, 2005, and February 28, 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.²

The petitioner's 2001 through 2005 Forms 1120S reflect ordinary incomes or net incomes of \$38,466, \$4,555, -\$5,377, -\$215, and -\$16,237, respectively. The petitioner's 2001 through 2005 Forms 1120S also reflect net current assets of \$51,109, \$39,831, \$22,362, \$27,045, and \$24,606, respectively.

The petitioner's president's 2001 through 2005 Forms 1040 reflect adjusted gross incomes of \$140,290, \$104,825, \$70,465, \$74,242, and \$94,673, respectively.

The pay stubs, issued by the petitioner for the beneficiary, reflect wages paid of \$1,000 on January 15, 2005, \$1,000 on February 15, 2005, and \$1,000 on February 28, 2005.

The letter, dated June 1, 2005, from the majority shareholder states "I, [REDACTED] the majority shareholder of the petitioning company, hereby affirm to support P.Q.H.V.R., Inc. financially and will compensate the beneficiary, [REDACTED] for his services."

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$24,000 based on its net income ("profit"), its compensation of officers, its depreciation, its available cash and its inventory. Counsel also indicates that the petitioner's majority shareholder, [REDACTED] has demonstrated through his Forms 1040 and has affirmed through his letter dated June 1, 2005 that he will pay the proffered wage to the beneficiary, if necessary.

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, 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).

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 This office notes that the evidence before the director did not include the petitioner's Forms 1120S for 2004 and 2005, as those tax returns were not yet available at the time that the record closed before the director. Without that evidence submitted on appeal this office would not have concluded that the petitioner had overcome the director's basis of denial.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 9, 2004, the beneficiary does not claim the petitioner as a past or present employer. Also, the record does not demonstrate that the petitioner employed and paid the beneficiary the full proffered wage during any year in the relevant period of analysis. However, counsel has provided copies of pay stubs, issued by the petitioner for the beneficiary, for January 15, 2005, February 15, 2005, and February 28, 2005. Therefore, the petitioner has established that it employed the beneficiary at those times and paid the beneficiary a portion of the proffered wage or \$3000 during 2005.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Chi-Feng Chang* at 537. *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The record before the director closed on April 5, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2005 were \$38,466, \$4,555, -\$5,377, -\$215, and -\$16,237, respectively. The petitioner could have paid the proffered wage of \$24,000 in 2001 from its net income, but not in 2002 through 2004. The petitioner could not have paid the balance of the proffered wage after the wages actually paid to the beneficiary in that year (\$3,000) are deducted from the proffered wage or \$21,000 from its net income in 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's net current assets in 2001 through 2005 were \$51,109, \$39,831, \$22,362, \$27,045, and \$24,606, respectively. The petitioner could have paid the proffered wage of \$24,000 in 2001, 2002, 2004, and 2005 from its net current assets, but not in 2003. The petitioner's net current assets fell \$1,632 below the proffered wage in 2003.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$24,000 based on its net income ("profit"), compensation of officers, depreciation, cash and inventory in 2001 through 2005. Counsel also indicates that the petitioner's majority shareholder, Sonny Huynh, has properly documented that he will pay the proffered wage, if necessary.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer. While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

With regard to using the compensation of officers to pay the proffered wage, the Forms 1120S are incomplete and do not show the number of officers or the names of the officers of the corporation. In addition, counsel has not provided any notarized affidavit from the petitioner's president stating that he would be willing to forego the officers' compensation in order to pay the beneficiary's salary. 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)).

With regard to the petitioner's inventory and cash, inventory and cash are included in the calculation of net current assets as described above and cannot be considered separately, without being balanced against the petitioner's liabilities. In addition, any claim that the petitioner would sell off its inventory needed to operate the restaurant successfully in order to pay the wages of the beneficiary does not seem reasonable.

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.

With regard to any assertion that the petitioner's majority shareholder, Sonny Huynh, has demonstrated an ability and willingness to pay the proffered wage, if necessary, this office would point out that because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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." Thus, Mr. Huynh's letter affirming his willingness to pay the proffered wage and his Form 1040 tax returns will not be considered further.

If the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance, especially in a borderline case, as is the case here where the petitioner has demonstrated an ability to pay in four of the five years in the relevant period of analysis and has missed showing the ability to pay by only \$1,632 during the remaining year. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a 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 that the petitioner has been doing business or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has been operating as a successful business for over twelve years. While the petitioner's gross receipts did slightly decrease in each year from 2001 through 2004, its gross receipts increased somewhat in 2005. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and that it has the ability to pay the proffered wage. The petitioner has, therefore, based upon the limited and unique factual circumstances of this case, shown the continuing ability to pay the proffered wage beginning on the 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.