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U.S. Citizenship
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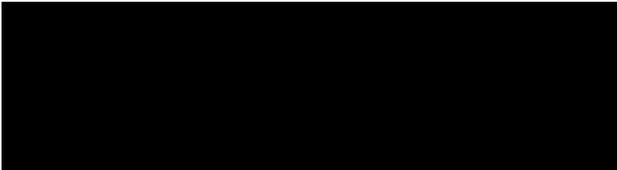
Petitioner:

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 for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference 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 beauty salon. It seeks to employ the beneficiary permanently in the United States as a beauty salon manager. 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 2001 priority date of the visa petition, or during tax years 2003 and 2004 based on the beneficiary's wages, the petitioner's net income or the petitioner's net current assets. 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 August 24, 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor,¹ 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(l)(3) provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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.

¹ The director, in his request for further evidence, noted that the petitioner appeared to have filed for the wrong classification of professional or skilled worker, as the ETA Form 750 only required one year of work experience in the proffered wage. Counsel requested in its response to the director's request that the petition reflect the unskilled worker classification, Section 203(B)(3)(A)(iii) of the Act.

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 CFR § 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 11, 2001. The proffered wage as stated on the Form ETA 750 is \$20.87 per hour (\$43,409.60 per year). The Form ETA 750 states that the position requires one year of work experience and the completion of grade school and high school.

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 appeal². On appeal, counsel submits a brief and a second letter from ██████████ Montrenes Consulting, Cypress, California. This letter states that the petitioner's income tax returns establish that the petitioner had the ability to pay the proffered wage to the beneficiary from 2001 to 2004.

██████████ describes how the petitioner hires hair stylists on an independent contractor basis, and how the gross fees received from customers is split on a percentage basis with the petitioner. ██████████ states that since the stylists are paid from revenue or off the top, they have priority over other expenses or cash outflows. ██████████ further states that the stylists' share of revenues are paid and charged by the corporation to account classifications identified as "professional fees" and "outside services" and are included in line 26-"other deductions," on the petitioner's Form 1120. ██████████ notes that the petitioner's stylists were paid the following amounts for the relevant tax years: in 2001, \$199,560; in 2002, \$265,605; in 2003, \$340,098; and in 2004, \$307,120.³ ██████████ states that the beneficiary was a contracted hair stylist and the concurrent salon shop manager for the petitioner. As such, ██████████ asserts that the beneficiary had priority over choice of hours and schedule in which to work, and that his Form 1099 income was included in the previously described "other deductions" line item on the petitioner's tax returns. ██████████ states that the proffered wage minus the beneficiary's Form 1099 income is easily recoverable from the professional fees described previously without affecting the petitioner's profitability.

Counsel also submits a letter from the petitioner's owner, ██████████ reiterates the amounts of money paid as professional fees or outside services to hairstylists. He also notes that the petitioner's ability to pay the proffered wage is not an issue since the petitioner has grown to include three locations, Hollywood, Panorama City, and Van Nuys, California. ██████████ states that the petitioner now seeks the services of the beneficiary as a salon manager. ██████████ also states that that the difference between the proffered wage and the beneficiary's Form 1099 non-employee compensation was easily recoverable from the amounts paid to other hairstylists without affecting the petitioner's profitability. Counsel also resubmits evidence previously submitted to the record in response to the director's request for further evidence dated April 25, 2005. In his

² 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).

³ ██████████ arrives at these figures by adding the sums for professional fees and outside services on the attachment "Other deductions" in each of the petitioner's tax returns submitted to the record.

response, counsel submitted copies of the petitioner's IRS Forms 1120 for tax years 2001 to 2004, along with the beneficiary's Forms 1099-MISC non-employee compensation for tax years 2001 to 2004. These documents indicate the petitioner paid the beneficiary non-employee compensation of \$18,410.78 in 2001, \$20,689.12 in 2002, \$25,056.26 in 2003 and \$11,573.59 in 2004. The record also contains the beneficiary's Forms 1040 for tax years 2001 to 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 in February 1, 2000, to have a gross annual income of \$720,000 and to currently employ twelve workers. On the Form ETA 750B, signed by the beneficiary on March 20, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) erred because the petitioner's net operating loss in certain fiscal years included the wages and commissions already paid to the beneficiary, and that the proffered wage assumes a 40 hour week, 52 weeks/year schedule which does not reflect the beneficiary's actual work hours.⁴ Counsel states that the proffered wage minus the non-employee compensation paid to the beneficiary is easily recoverable from the amounts already paid out as "professional fees and "outside services" without affecting the petitioner's profitability. Counsel also asserts that the ability to pay the beneficiary the proffered wage is not an issue as the petitioner has grown to include three locations in southern California. Counsel states that these salons regularly hire hair stylists on an independent contractor basis but the petitioner now seeks the beneficiary's fulltime services as salon manager. Counsel concludes by stating that CIS assumes that because the petitioner's taxable income before net operating loss deductions was less than the beneficiary's full proffered wage, the petitioner has not met the minimum requirements necessary to establish eligibility for the petition classification as of the time of filing. Counsel states that a detailed analysis of the tax returns would rather indicate that the petitioner has already paid the wages and compensation as "professional fees" and "outside services."

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).

On appeal, counsel asserts that the director did not consider the payment of non-employee compensation to the beneficiary in his analysis of the petitioner's ability to pay the proffered wage. Counsel's assertions with regard to the director's analysis are without merit. The director clearly stated that the amounts of non-employee compensation would be considered in his decision and also used the non-employee compensation sums in his consideration of whether the petitioner's net income or net current assets were sufficient to pay

⁴ The Form ETA 750 indicates that the work schedule for the proffered position is 10:00 a.m. to 7:00 p.m. for 40 hours per week. The petitioner certified in a letter dated June 15, 2005 that the beneficiary has worked for the petitioner as a beauty salon manager since April 1, 2001.

the difference between the beneficiary's actual wages and the proffered wage. The AAO will again examine the petitioner's net income and net current assets 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. In the instant case, based on the Forms 1099-MISC submitted to the record, the petitioner has established that it paid the beneficiary non-employee compensation in the following amounts during the relevant tax years: \$18,410.78 in 2001, \$20,689.12 in 2002, \$25,056.26 in 2003 and \$11,573.59 in 2004. Thus, while the petitioner established that it did compensate the beneficiary in tax years 2001 to 2004, the petitioner did not establish that it paid the beneficiary the entire proffered wage of \$43,409.60 as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to the difference between the beneficiary's actual wages and the proffered wage in tax years 2001 to 2004. In the relevant years, the difference between the beneficiary's actual wages and the proffered wage is \$24,998.82 in tax year 2001, \$22,720.48 in 2002, \$18,353.34 in 2003, and \$21,836.01 in 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, 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 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$43,309.60 per year from the priority date:

- In 2001, the Form 1120 stated a net income⁵ of -\$11,340.
- In 2002, the Form 1120 stated a net income of \$12,980.
- In 2003, the Form 1120 stated a net income of -\$23,500.
- In 2004, the Form 1120 stated a net income of \$ 3,484.

As previously stated, the difference between the beneficiary's actual wages and the proffered wage in tax years 2001 to 2004 was \$24,998.82 in tax year 2001, \$22,720.48 in 2002, \$18,353.34 in 2003, and \$21,836.01 in 2004. Therefore, for the years 2001 to 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.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.

- The petitioner's net current assets during 2001 were \$13,565.
- The petitioner's net current assets during 2002 were \$31,347.
- The petitioner's net current assets during 2003 were \$7,847.
- The petitioner's net current assets during 2004 were \$11,330.

As previously stated, the difference between the beneficiary's actual wages and the proffered wage in tax years 2001 to 2004 was \$24,998.82 in tax year 2001, \$22,720.48 in 2002, \$18,353.34 in 2003, and \$21,836.01 in 2004. Therefore, for the year 2002, the petitioner did have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage of \$43,409.60, namely \$22,720.48. Thus, the petitioner established its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2002. However, the petitioner did not establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage based on the petitioner's net current assets for tax years 2001, 2003, or 2004. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁶According 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.

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 except for tax year 2002.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel, the petitioner's owner and Mr. [REDACTED] all state that the proffered wage minus the beneficiary's Form 1099 compensation is easily recoverable from the professional fees provided to other hair stylists or employees without affecting the petitioner's profitability. However, no further evidentiary documentation is submitted to the record to further substantiate this assertion. With regard to counsel, 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). With regard to counsel, the petitioner's owner, and [REDACTED] appearing 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)).

Furthermore, if counsel or the petitioner is stating that the wages already paid to other hair stylists or other employees could be used to pay the difference between the beneficiary's actual wages and the proffered wage, in general, wages or compensation already paid to others 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. If the petitioner or counsel is suggesting that other contracted labor or employees would be replaced by the beneficiary and therefore their wages would be available to pay the difference between the beneficiary's actual wages and the proffered wage, the petitioner would have to submit further documentation to support this assertion.

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 evidence submitted does not establish that the petitioner had 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 not met that burden.

ORDER: The appeal is dismissed.