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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: **MAY 16 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a lodging facilities manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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. 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.¹ 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 October 20, 2005 denial, the single issue in this case is whether 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 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.

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 is accepted for processing by any office within the employment system of the DOL. *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 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 23, 2002. The proffered wage as stated on the Form ETA 750 is \$37,669 annually. The Form ETA 750 indicates that the position requires two years of experience as a lodging facilities manager or as a manager or supervisor in any industry.

¹ Included in the record, duly executed by the petitioner's manager and by counsel, is the Form G-28, Notice of Entry of Appearance as Attorney or Representative. However, on the Form I-290B filed by counsel, counsel indicated that she represents the beneficiary in this matter. This is not correct. It is the petitioner and petitioner's counsel, not the beneficiary nor beneficiary's counsel, who may appeal the denial of an immigrant petition. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). As counsel has previously properly filed the Form G-28 signed by the petitioner, this office will accept the appeal as filed on behalf of the petitioner.

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 on appeal.² Relevant evidence in the record includes: the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for the years 2002, 2003 and 2004; the beneficiary's Form W-2, Wage and Tax Statement, for 2002, 2003 and 2004; 2005 pay stubs for the beneficiary; and a letter from [REDACTED] a Certified Public Accountant (C.P.A.), dated January 4, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed that it was established in 1995 and that it currently employs nine workers. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, which was signed by the beneficiary on January 14, 2002, the beneficiary claims to have worked for the petitioner since 2001.

On appeal, counsel asserts that the director erred in denying the petition. Counsel indicates that the market value for the beneficiary's housing, an "optional" benefit of her employment with the petitioner according to the Form ETA 750, is \$800 per month or \$9,600 annually. Counsel claims that this \$9,600 amount should be viewed as funds available to pay the wage. Counsel also asserts that depreciation and depletion amounts as listed on the petitioner's Form 1120S should also be considered funds available to pay the proffered wage. In conclusion, counsel determines that Citizenship and Immigration Services (CIS) should find that the petitioner has demonstrated the ability to pay the wage from the priority date onwards.

Mr. [REDACTED] the C.P.A. for the petitioner, suggests in his letter dated January 4, 2006 that CIS should consider the petitioner's gross income and total salaries paid when determining the petitioner's ability to pay. Mr. [REDACTED] also suggests that any rent which the petitioner pays the petitioner's owners should be viewed as funds available to pay the wage. Mr. [REDACTED] concludes that in his professional judgment the petitioner is capable of paying the proffered wage after taking into consideration gross income, total salaries paid and rent paid to the petitioner's owners as well as after taking into consideration his long-term familiarity with the petitioner's financial condition.

At the outset, this office notes that contrary to assertions made on appeal, the Form ETA 750 at item 13 lists "free lodging and utilities" as a benefit which *might* be added to the proffered salary as an *option*. (Emphasis added.) The Form ETA 750 as certified by the DOL does not require the beneficiary to receive lodging and utilities valued at \$9,600 annually in lieu of or in addition to salary. Any assertion that the market value of this housing benefit offered as an option to the beneficiary might be considered funds available to pay the wage will not be considered further.³

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 this 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 This office also notes that the record contains no evidence to support the assertion that the market value of the housing provided to the beneficiary is \$9,600 per year. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 establishes a priority date for any immigrant petition later based on that Form 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 this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe from the priority date through the present. However, the Forms W-2 for the beneficiary and pay stubs in the record do indicate that the petitioner paid the beneficiary: \$16,100 during 2002, or \$21,569 less than the proffered wage; \$15,851 during 2003, or \$21,818 less than the proffered wage; \$16,101 during 2004, or \$21,568 less than the proffered wage; and \$17,604.15 during January through October 15, 2005, or \$20,064.85 less than the proffered wage.

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 assertions made on appeal. 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 receipts and gross wage expense is misplaced, also contrary to assertions made on appeal. Showing that the petitioner's gross receipts 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 annual wage of \$37,699 from the priority date:

- In 2002, the Form 1120S states a net income (loss)⁴ of -\$68,731
- In 2003, the Form 1120S states a net income (loss) of -\$65,482.
- In 2004, the Form 1120S states a net income (loss) of -\$6,912.

Therefore, for the years 2002, 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage or to pay the balance of the proffered wage remaining after actual wages paid the beneficiary are deducted.

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 and depletable assets that the petitioner uses in its business. Those depreciable and depletable assets will not be converted to cash during the ordinary course of business and may not, therefore, be considered funds available to pay the proffered wage, contrary to the assertions made on appeal. Also the petitioner's liabilities must be subtracted from the petitioner's total assets, when analyzing the petitioner's ability to pay the proffered wage. Thus, 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.⁵ 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 (liabilities) during 2002 were \$32,354.
- The petitioner's net current assets (liabilities) during 2003 were \$12,670.
- The petitioner's net current assets (liabilities) during 2004 were \$6,843.

In the year 2002, the petitioner had sufficient net current assets to pay \$21,569 or the balance of the proffered wage which remains after deducting the actual wages that the petitioner paid the beneficiary that year. Thus, the petitioner has demonstrated an ability to pay the proffered wage during 2002. However, for the years 2003 and 2004, the petitioner did not have sufficient net current assets to pay the full proffered wage or the balance of the wage remaining after actual wages paid are deducted.

The record in this matter closed on August 29, 2005 when the petitioner provided a response to the director's request for evidence. On that date the petitioner's 2005 tax return was unavailable. Thus, the petitioner is

⁴ For purposes of this analysis, ordinary income (loss) from trade or business activities as reported on Line 21 of the Form 1120S shall be considered the petitioner's net income.

⁵ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

excused at this point in the proceedings from its obligation to demonstrate its ability to pay the proffered wage during 2005 and subsequent years. However, if the matter is pursued on motion, the petitioner should update the record of proceeding with evidence of an ability to pay in subsequent years.

In sum, the petitioner has only established an ability to pay the wage in 2002 or one year of the relevant period of analysis. The petitioner has not established through wages paid to the beneficiary, net income, or net current assets that it had the *continuing* ability to pay the beneficiary the proffered wage as of the priority date and through subsequent years.

In addition, this office notes that contrary to assertions made on appeal, any rent paid by the petitioner is an actual expense, whether paid to the petitioner's owners or to some other entity. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its owners and 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."

Finally, where the petitioner has not demonstrated sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities and the totality of the circumstances concerning a petitioner's financial performance, when determining its ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Sonogawa*, the Regional Commissioner considered an immigrant visa petition that 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 more than the petitioner's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's net profit, including financial data, the petitioner's reputation and clientele, its number of employees, future business plans, news articles, and explanations of the petitioner's temporary financial difficulties. The Regional Commissioner looked beyond the petitioner's inadequate net income for the year of filing 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 proffered wage.

Accordingly, CIS may, in 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, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the only forms of evidence provided by the petitioner which are directly relevant to its ability to pay the wage are the Forms 1120S for 2002, 2003 and 2004 and the beneficiary's pay stubs for 2005 and her Forms W-2 for 2002, 2003 and 2004. This is not sufficient evidence to establish that the petitioner has met all of its obligations in the past or to establish its historical growth. In addition, such evidence is not sufficient to establish whether unusual circumstances exist in this case to parallel those in *Sonogawa*, nor to establish whether 2002 through 2004 were uncharacteristically unprofitable years for the petitioner. Furthermore, any unsupported assertions of Mr. [REDACTED] C.P.A. to the petitioner, in his letter dated January 4, 2006, that the petitioner is in a financial position to pay the wage, despite the information listed on its tax returns, are not sufficient to meet the burden of proof in these proceedings. *See*

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)).

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.