

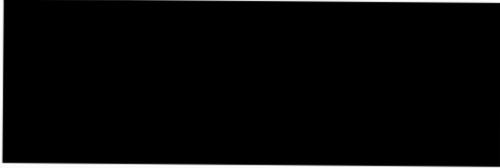
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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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*B/fo*

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **MAY 22 2007**  
EAC-04-210-51746

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

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:  
[REDACTED]

**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 Acting Center Director (Director), Vermont Service Center. The subsequent motion to reopen was granted by the director and the previous decision of the Director was affirmed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a construction equipment mechanic (maintenance mechanic). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 December 2, 2004 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.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$20.22 per hour (\$42,057.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. The I-140 petition was submitted on July 1, 2004. The record shows that the petitioner claimed to have been established in 1997, to have a gross annual income of \$618,116 in 2001, and

to have a net annual income of \$40,835 in 2001. The petitioner did not provide information about the number of current employees. On the Form ETA 750B signed by the beneficiary on February 27, 2001, the beneficiary did not claim to have worked for 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 upon appeal<sup>1</sup>. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2001 through 2003 and 2005, and W-2 forms issued by the petitioner for 2001 through 2003, 2005 and 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage to the beneficiary at the time of filing up to the continuing present.<sup>2</sup>

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 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 the instant case, the petitioner submitted W-2 forms issued by the petitioner to its employees for 2001 through 2003, and W-2 forms issued to John Taibi for 2005 and 2006. Among these W-2 forms, only the W-2 form issued to the beneficiary in 2001 can be considered as evidence of the petitioner's ability to pay the proffered wage in the instant case. The W-2 form shows that the petitioner paid the beneficiary \$664.56 as employee compensation in 2001. In general, wages already paid to others including the officers of the company 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. Counsel advises that the beneficiary will replace previous workers. The record contains W-2 forms for some workers for 2001 through 2003, however, the record does not name the workers who will be replaced by the beneficiary, does not verify their full-time employment, or provide evidence that the

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<sup>1</sup> 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).

<sup>2</sup> Counsel indicated on the Form I-290B that evidence would be submitted within 60 days. On March 14, 2007 the AAO sent a fax to counsel requesting that a copy of the additional evidence and/or brief be sent along with evidence of the date it was originally filed with the AAO. In response, counsel submitted a letter from John Taibi, the president of the petitioner, his W-2 forms for 2005 and 2006, and the petitioner's 2005 tax return.

petitioner has replaced or will replace them with the beneficiary. Moreover, there is no evidence that the positions of those workers involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Therefore, the petitioner failed to establish that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. The petitioner is obligated to demonstrate that it could pay the difference of \$41,393.04 between wages actually paid to the beneficiary and the proffered wage in 2001, and the full proffered wage of \$42,057.60 per year in each year from 2002 to the present.

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. 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). The petitioner claimed that it had the ability to pay the proffered wage with its increasing gross receipts or sales and wages paid to officers. The petitioner's reliance on its total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is also misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 Chang* at 537.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The petitioner's tax returns for 2001 through 2003, and 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$42,057.60 per year from the priority date:

- In 2001, the Form 1120 stated a net income<sup>3</sup> of \$0.

<sup>3</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

- In 2002, the Form 1120 stated a net income of \$(10,435).
- In 2003, the Form 1120 stated a net income of \$16,624.
- In 2005, the Form 1120 stated a net income of \$0.

Therefore, for 2001 the petitioner did not have sufficient net income to pay the difference of \$41,393.04 between wages actually paid to the beneficiary and the proffered wage that year; for 2002, 2003 and 2005, the petitioner did not have sufficient net income to pay the proffered wage of \$42,057.60 each of these years.

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.<sup>4</sup> 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 \$(37,949).

The petitioner's net current assets during 2002 were \$(89,862).

The petitioner's net current assets during 2003 were \$(40,328).

The petitioner's net current assets during 2005 were \$1,498,624.

Therefore, for 2001 the petitioner did not have sufficient net current assets to pay the difference of \$41,393.04 between wages actually paid to the beneficiary and the proffered wage that year; for 2002 and 2003, the petitioner did not have sufficient net current assets to pay the proffered wage of \$42,057.60; however, for 2005 the petitioner has sufficient net current assets to pay the beneficiary the proffered wage.

The petitioner did not submit its tax return or other regulatory-prescribed evidence for 2004. Therefore, the AAO cannot determine whether the petitioner has sufficient net income or net current assets to pay the proffered wage in 2004. The petitioner failed to establish its ability to pay the proffered wage in 2004 because it did not submit any regulatory-prescribed evidence for the ability to pay that year.

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

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<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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, its net income or its net current assets except for 2005.

On appeal the petitioner asserts that it has been a viable business entity since April 23, 1997 implicitly to suggest that CIS consider the longevity of the business. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 through 2003 and 2005 were uncharacteristically unprofitable years for the petitioner in a framework of profitable or successful years. The record does not establish the historical growth of the petitioner's business<sup>5</sup> or the petitioner's reputation in the instant case. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and does not have the ability to pay the proffered wage.

Finally, while the compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income, to show the petitioner's ability to pay the proffered wage in certain circumstances, there is no evidence that the officer, John Taibi, would forgo his compensation to pay the proffered wage.

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.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>5</sup> This office notes that while the petitioner's gross receipts increased between 2001 and 2003, its gross profits in 2005 were less than its gross receipts in 2003.