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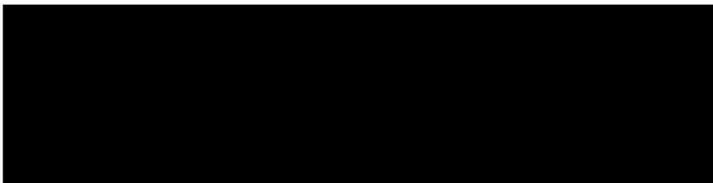
U.S. Department of Homeland Security
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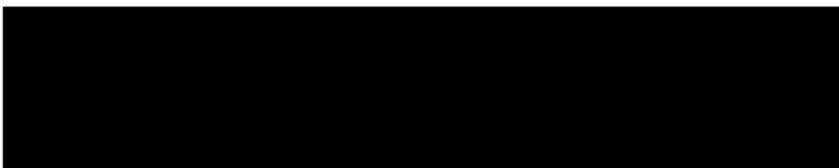
Date: MAY 29 2007

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 acting director, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile repair company.¹ It seeks to employ the beneficiary permanently in the United States as a master automobile 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. 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. 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 September 28, 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 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 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).

¹ Page two of the petitioner's 2002 Form 1120, Schedule K, indicates the petitioner's business activity is junk yard sales, auto parts, while pages two of the petitioner's 2003 and 2004 Forms 1120S, Schedules B indicate the petitioner's business is wholesale auto parts.

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$845 a week, or \$43,940 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 second letter from ██████████ C.P.A., Odeh & Associates, Chicago, Illinois. In his letter, ██████████ states that the net operating loss indicated in the petitioner's 2002 U.S. Corporation tax return was based on a loan of \$209,443 from the petitioner's owner to the petitioner that allowed the company to commence work, pay its operating expenses and to pay its payroll and employee compensation during tax year 2002. ██████████ notes the petitioner's operating income of \$198,524 during the four months of operations, and its positive ending bank balance of \$6,235 at the end of the 2002 calendar year. ██████████ also states that the petitioner also maintained substantial inventory and achieved depreciation expenses that should be added back to the operating losses. Other relevant evidence in the record includes the petitioner's tax returns for 2002, 2003, and 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 in tax year 2002, the petitioner is structured as a C corporation, while in tax years 2003 and 2004, the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 7, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director's decision only focused on the petitioner's 2002 tax return, and that there was no discussion of the petitioner's financial standing in the years 2001, 2003, and 2004. Counsel refers to ██████████ statement with regard to the loan, which counsel describes as "special and extraordinary" and states that the loan was made to develop the building housing the petitioner and to expand the business. Counsel notes that during this same period of time, the petitioner generated operating income close to \$200,000. Since the loan to the petitioner's owner was discretionary, counsel asserts that the petitioner would have otherwise had sufficient funds to have paid the proffered wage to a new employee.

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

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).

circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Therefore the petitioner has to establish its ability to pay the entire proffered wage from tax year 2001 and onward.

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, contrary to the petitioner's accountant, 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 AAO notes that the name of the corporation listed on the petitioner's tax returns, namely, [REDACTED], is different than the name of the petitioner on the I-140 petition and on the Form ETA 750. These two documents identify the petitioner as [REDACTED].³ The AAO further notes that the petitioner has not established that it operates under a fictitious name. In addition, the petitioner claims it was established in 2000 on the I-140 petition, but its tax returns show that it was incorporated on August 26, 2001.

³ It is noted, however, that the corporate address and Employer Identification Number (EIN) are the same on the tax returns, I-140 petition, and the Form ETA 750.

Thus, the labor certification, filed on April 30, 2001, was filed before the petitioner was incorporated. If the petitioner was a sole proprietor prior to its incorporation, there is no evidence of this and also no evidence in the record of a successor in interest relationship.

Although the petitioner must establish its ability to pay the proffered wage as of the 2001 priority date, the record only contains the petitioner's tax returns for tax years 2002, 2003, and 2004. Therefore the AAO will only examine the petitioner's tax returns for tax years 2002, 2003, and 2004. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$43,940 per year from the priority date:

- In 2002, while the petitioner was structured as a C corporation, the Form 1120 stated taxable income⁴ of -\$97,744.
- In 2003, the Form 1120S stated net income⁵ of \$19,809.
- In 2004, the Form 1120S stated net income of \$41,342.

Therefore, for the years 2002, 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage of \$43,940.

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, including real property that counsel asserts should be considered. 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

⁴The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁵ 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) and line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2003 and 2004, the petitioner's net income is found on line 21 of page 1 of its tax returns.

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.

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 2002 are \$26,985.
- The petitioner's net current assets during 2003 are \$297,654.
- The petitioner's net current assets during 2004 are \$179,978.

With regard to the 2001 priority year, as stated previously, the petitioner has not submitted its 2001 tax return to the record, or provided any regulatory-prescribed evidence for 2001. *See* 8 C.F.R. § 204.5(g)(2). It is further noted that the petitioner's 2002 Form 1120S indicates it is an initial tax return. Therefore, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the proffered wage in 2001. Based on the examination of the petitioner's 2002 tax return, the petitioner did not have sufficient net current assets to pay the proffered wage of \$43,940. With regard to tax years 2003 and 2004, the petitioner did have sufficient net current assets to pay the proffered wage.

However, 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).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has 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 2003 and 2004.

On appeal, counsel asserts that the discretionary loan that the petitioner made to its owner in 2002 adversely affected its net income, although the petitioner had operating income close to \$200,000. Counsel states that the AAO should take these facts and circumstances into account when reviewing the matter.

The AAO in fact does consider the totality of circumstances when viewing a petition in which the petitioner has experienced an unprofitable year followed by profitable years. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), 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*. The petitioner has submitted no further evidence to the record with regard to such factors as the petitioner's longevity in business, its reputation within its industry or any other unique factors, such as those outlined in *Sonogawa*.

Furthermore, as stated previously, the petitioner has not submitted its 2001 tax return to the record, which is the relevant tax return for the 2001 priority year. Thus, the record does not reflect whether the 2001 priority year was a profitable year, with the following 2002 tax year the unprofitable year for the petitioner, or whether both tax years 2001 and 2002 were unprofitable years for the petitioner.

Furthermore, the AAO notes that the shareholder loan is reflected on the petitioner's Schedule L in its tax return and is not treated as cash or as cash assets available to pay the proffered wage. Although debt is an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

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 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.