

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



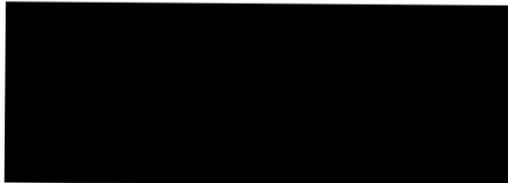
FILE: LIN 06 050 51008 Office: NEBRASKA SERVICE CENTER Date: OCT 18 2007

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 Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a financial planner. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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. 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 May 1, 2006 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 DOL. 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 DOL 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 November 17, 2003. The proffered wage as stated on the Form ETA 750 is \$101,150.00 per year. The Form ETA 750 states that the position requires a 4-year bachelor's degree in accounting/finance and two years of experience in the job offered or as a financial analyst/accountant.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted upon appeal¹. On appeal, counsel submits a brief, the petitioner's previously submitted IRS Form 1120X, Amended U.S. Corporation Income Tax Return, for 2004, the petitioner's previously submitted IRS Form 1120, U.S. Corporation Income Tax Return, for 2004, the petitioner's compiled financial statements for 2003 and 2004,² the petitioner's quarterly tax filing records for the fourth quarters of 2003, 2004, 2005 and the first quarter of 2006, a copy of a Demand Promissory Note dated September 30, 2002 payable to Citibank, F.S.B., in the principal amount of \$1,200,000.00 with the petitioner named as the borrower, the beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the petitioner in 2004, and the beneficiary's previously submitted IRS Form W-2, Wage and Tax Statement, issued by the petitioner in 2005. Relevant evidence in the record includes two of the beneficiary's paychecks issued by the petitioner. 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 personal services corporation. On the petition, the petitioner claimed to have been established on September 1, 2001, to have a gross annual income of \$9,000,000.00, to have a net annual income of \$1,500,000.00, and to currently employ 43 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 November 11, 2003, the beneficiary claimed to have worked part-time for the petitioner from May 2002 to July 2003, and full-time for the petitioner from July 2003 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the director erred in its calculation of the petitioner's 2004 net income, that the petitioner's tax returns do not reflect the value of pending litigation lawsuits, and that due to the petitioner's S corporation status, the petitioner's tax returns do not accurately reflect its financial worth.³ Counsel also states that the fact that the beneficiary is not currently being paid the proffered wage is irrelevant to the petitioner's ability to pay the proffered wage. Counsel further asserts that the petitioner's financial statements are prepared in accordance with United States Generally Accepted Accounting Principles (GAAP), that they show the petitioner's net earnings and total assets for 2003 and 2004, and that the statements reflect that the

¹ 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).

² The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted on appeal are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

³ Counsel is incorrect in his assertion that the petitioner is an S corporation.

petitioner maintains a cash balance at a financial institution which is insured by the Federal Deposit Insurance Corporation (FDIC) up to \$100,000.00. Counsel asserts that the statements provide that the petitioner's cash balances exceed \$100,000.00 in 2003 and 2004.⁴ Further, counsel asserts that the petitioner's quarterly tax filings demonstrate its ability to pay salaries to all of its employees.

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 beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2004 and 2005 show compensation received from the petitioner, as shown in the table below.

- In 2004, the Form W-2 stated compensation of \$71,640.92.
- In 2005, the Form W-2 stated compensation of \$72,129.87.

Therefore, for the years 2003, 2004 and 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2004 and 2005. Since the proffered wage is \$101,150.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$29,509.08 and \$29,020.13 in 2004 and 2005, respectively. For 2003, the petitioner must establish that it can pay the entire 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. 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.

⁴ The petitioner provided no evidence of cash balances in its bank accounts, and the petitioner's 2003 and 2004 IRS Forms 1120 Schedule Ls show that the petitioner had no cash at the end of either tax year.

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 Chang* at 537

The record before the director closed on February 14, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2005 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2004 is the most recent return available. The petitioner's tax returns demonstrate its end-of-year net income, as shown in the table below.

- In 2003, the Form 1120 stated net income⁵ of -\$38,260.00.
- In 2004, the Form 1120 stated net income of \$205,128.00.⁶

Therefore, for the year 2003, the petitioner did not have sufficient net income to pay the proffered wage. For the year 2004, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and 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. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁵ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁶ As counsel notes in his brief, the director erroneously stated that the petitioner's net loss was \$205,128.00 in 2004. The petitioner's 2004 amended tax return stated net income of \$233,177.00. This amount is also sufficient to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

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 Form 1120 stated net current assets of -\$920,932.00⁸ in 2003. Therefore, for the year 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, 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 2004.

Finally, 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. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, 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 Sonogawa*, the 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, 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 the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonogawa, supra*, the AAO notes that the petitioner's personal service corporation status is a relevant factor to be considered in determining its ability to pay. A personal service corporation is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed

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.

⁸ The director erroneously stated that the petitioner's net current assets were -\$126,070.00 in 2003.

to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The documentation presented here indicates that [REDACTED] holds 55 percent of the company's stock and performs personal services of the firm. According to the petitioner's IRS Forms 1120 Schedule E (Compensation of Officers), [REDACTED] elected to pay himself \$573,464.00 in 2003, and \$625,680.00 in 2004. We note here that the compensation received by the company's majority owner during these years was not a fixed salary. In the present case, CIS would not be examining the personal assets of [REDACTED] but, rather, the financial flexibility that he as the majority owner has in setting his salary based on the profitability of his personal service corporation law firm. While there is no evidence that [REDACTED] would be willing or able to forego his officer's compensation in order to pay the proffered wage, a review of the other factors discussed in *Matter of Sonogawa* establishes the petitioner's ability to pay the proffered wage.

Specifically, the petitioner was established in 2001, its gross receipts were substantial in 2003 and 2004,⁹ it paid large amounts in officer compensation in 2003 and 2004¹⁰ and it paid substantial salaries and wages in 2003 and 2004.¹¹ Further, according to documents submitted to the record, [REDACTED] is a former Justice of the Illinois Appellate Court and a former Judge of the Circuit Court in Cook County, Illinois, positions which likely advance the petitioner's reputation within the community. Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has established that it had the continuing ability to pay the proffered wage as of the priority date of the petition.

The evidence submitted establishes 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 met that burden.

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

⁹ The petitioner's gross receipts were \$6,794,739.00 in 2003 and \$7,165,415.00 in 2004.

¹⁰ The petitioner paid officer compensation of \$1,062,614.00 in 2003 and \$1,171,982.00 in 2004.

¹¹ The petitioner paid salaries and wages of \$3,582,716.00 in 2003 and \$3,665,620.00 in 2004.