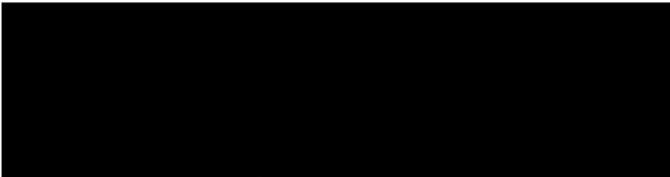


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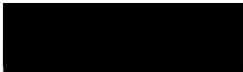
U.S. Citizenship  
and Immigration  
Services

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FILE:



EAC 06 021 51943

Office: VERMONT SERVICE CENTER

Date:

SEP 05 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: SELF-REPRESENTED

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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. 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.

According to the director's June 5, 2006 denial, the 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 DOL accepted the Form ETA 750 for processing on April 28, 2004. The proffered wage as stated on the Form ETA 750 is \$80,000 annually. The Form ETA 750 states that the position requires a bachelor's degree in a quantitative discipline, and two years of experience in the proffered position or two years of experience in a related occupation such as software engineer, systems administrator or systems analyst.

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.<sup>1</sup>

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage:

- the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2004, together with certain attachments filed with these forms;
- a compilation report from the petitioner's accountant dated June 22, 2006 which includes a balance sheet for the petitioner and a statement of income and retained earnings for the petitioner;
- a summary statement from the petitioner's accountant dated June 22, 2006 which utilizes figures from the accountant's compilation;
- the petitioner's internally produced profit and loss statements for January through August 2004 and January through December 2005;
- the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2002 and 2003, two years preceding the priority date;
- the Form W-2, Wage and Tax Statement, for the beneficiary for 2004 issued by [REDACTED];
- copies of the beneficiary's pay stubs from 2005 issued by [REDACTED];
- the petitioner's owner's letter dated March 6, 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 currently structured as an S corporation.<sup>2</sup> On the petition, the petitioner listed 2000 as the date it was established. It stated that it had forty-two employees and a gross annual income of \$4.5 million. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the revised Form ETA 750B, which was signed by the substituted beneficiary on October 8, 2005, the beneficiary claimed to have worked for the petitioner from October 2005 until the date that form was signed. It is noted that a Form I-140, Immigrant Petition for Alien Worker, filed for a substituted beneficiary retains the same priority date as the original Form ETA 750. *See Memorandum from [REDACTED] Immigration and Naturalization Service, to Regional Directors, et al., Immigration and Naturalization Service, Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

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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 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).

<sup>2</sup> The petitioner's tax returns in the record for years preceding the priority date indicate that previously the petitioner was structured as a Subchapter C corporation.

On appeal, the petitioner's owner indicates that its accountant's statements regarding the petitioner's financial strength demonstrate its ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition subsequently 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 beneficiary did indicate on the Form ETA 750 that he began working for the petitioner after the date of the filing of the Form ETA 750. However, there is no documentation of this in the record such as Forms W-2 or pay stubs for the beneficiary issued by the petitioner.<sup>3</sup>

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 not sufficient, contrary to assertions made by the petitioner's owner. It is also insufficient for the petitioner to show that it paid wages in excess of the proffered wage, also contrary to assertions made by the petitioner's owner.

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* stated:

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*

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<sup>3</sup> The Form W-2 and pay stubs for the beneficiary in the record were issued by an entity which the petitioner's owner acknowledged in its letter dated March 6, 2006 is not related to the petitioner.

*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.) 719 F. Supp. at 537.

The petitioner's 2004 tax return demonstrates the following financial information concerning its ability to pay the proffered annual wage of \$80,000 from the priority date of April 28, 2004 onwards:

- Petitioner's 2004 Form 1120S states a net income or loss<sup>4</sup> of \$37,065.<sup>5</sup>

Therefore, for the year 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.<sup>6</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 Schedule L, 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 2004 were \$86,816.

While this amount does cover the proffered wage for one beneficiary, as the director noted in his denial letter, the petitioner in this matter has filed 13 petitions with 2004 priority dates, each at a proffered salary of \$80,000, six of which CIS has approved. Also as noted by the director, the petitioner paid a portion of the six full proffered wages or \$480,000 (6 x \$80,000) to these beneficiaries during 2004. However, the records in those other filings indicate that during 2004 the petitioner fell nearly \$240,000 short of paying the full \$480,000 to the other beneficiaries on the approved petitions. Thus, in order to show an ability to pay the instant beneficiary, the petitioner would need to demonstrate first that it had funds to cover the balance of the proffered wage in 2004 for each of the six other beneficiaries on the approved petitions, as well as \$80,000 to cover the instant beneficiary's wages. The petitioner's net current assets in 2004 fail to cover these amounts.<sup>7</sup>

<sup>4</sup>For purposes of this analysis, net income is equal to ordinary income (loss) from trade or business activities as reported on Line 21 of the Form 1120S.

<sup>5</sup>The petitioner's 2002 and 2003 tax returns cover a period before the priority date and will not be considered here. This office notes that the net income on these forms (line 28 of the Form 1120) fall far below the proffered wage both years.

<sup>6</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>7</sup>This office notes as well that the net current assets as reflected on the Schedule L attached to the Form 1120

Thus, the petitioner has not shown that it had sufficient net current assets in 2004 to pay the proffered wage.

In sum, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, its net income or its net current assets.

Under certain circumstances, CIS will consider the petitioner's expectations for future growth and various other evidence beyond net income and net current assets in keeping with the holding of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), when determining the petitioner's ability to pay the proffered wage. However, in this matter, any reliance on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable years within a framework of profitable years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 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. Also, 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. The instant petitioner has not shown that unusual circumstances, parallel to those in *Sonegawa*, exist in this case, nor has the petitioner established that 2004 was an uncharacteristically low profit year for its software development and consulting business.

Finally, any reliance on the accountant's compilation in the record and statements made by the petitioner's accountant relating to figures in the compilation is misplaced. Unaudited financial statements shall not be used as evidence that the petitioner has the ability to pay the proffered wage. 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. The financial statements submitted were produced pursuant to a compilation rather than an audit. A compilation is the petitioner's management's representation of its financial position, 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. For similar reasons, figures from the petitioner's unaudited profit and loss statements may not be used when analyzing the petitioner's ability to pay the wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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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for 2002 and 2003 submitted into the record, which relate to a period before the priority date, fall far below the proffered wage of \$80,000.