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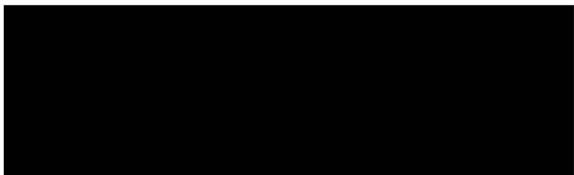
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 06 062 50307

Office: VERMONT SERVICE CENTER

Date: FEB 20 2008

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.

A handwritten signature in black ink, appearing to read "Wiemann".

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 nature of the petitioner's business activity is **graphic design**. It seeks to employ the beneficiary permanently in the United States as a graphic designer. 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. 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 demonstrated that the appeal was properly filed, timely and made 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 denial dated June 8, 2006, 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 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 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 25, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$978.80 per week (\$50,897.60 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position as well as experience in PowerPoint, Coral and Print Shop programs.

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 new evidence properly submitted upon appeal.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2001 and 2004; cover letters dated December 1, 2005, and April 27, 2006, from counsel; a memorandum dated July 27, 2006, from counsel; listings of the beneficiary's customers; a letter from [REDACTED] Paterson, New Jersey; a letter of appreciation from [REDACTED], Young Men's Christian Association dated March 15, 2004; a letter from [REDACTED], Paterson, New Jersey dated March 5, 2004; a letter from [REDACTED], Paterson, New Jersey dated March 18, 2004; a letter from [REDACTED] Passaic, New Jersey; the beneficiary's personal federal tax information; a listing of business assets made by the petitioner dated March 27, 2006; a letter from the petitioner dated November 23, 2005; the beneficiary's personal federal tax returns and the W-2 Wage and Tax statements from the petitioner to the beneficiary for tax years 2001, 2002, 2003, 2004 and 2005 in the amounts of \$24,216.00, \$25,600.00, \$28,600.00, \$28,120.00 and \$29,680.00 respectively; and W-3 statements for the petitioner for tax years 2001 and 2002.

The evidence in the record of proceeding shows that the petitioner is structured as a C³ corporation. On the petition, the petitioner claimed to have been established in 1981 and to currently employ 3 workers. According to the tax returns in the record, the petitioner's fiscal year begins August 1st and ends July 31st each year. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary claimed to have worked for the petitioner from 1997 to the present (i.e. April 21, 2001). According to the W-2 statements found in the record, the beneficiary continued in the petitioner's employ through 2005.

On appeal the petitioner asserts that the director incorrectly analyzed the facts presented by the petitioner according to applicable law.

¹ It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

³ Several times in the record of proceeding, counsel has stated that the petitioner is an "S" corporation. There is evidence submitted that indicates, and the petitioner's tax returns demonstrate, that the petitioner is a "C" corporation that filed IRS Form 1120 tax returns (the "personal service corporation" election was not checked on the tax returns submitted).

In a memorandum later submitted by counsel dated July 27, 2006 in support of the appeal, counsel makes several additional contentions. Counsel points out the beneficiary's wage payments received from the petitioner and the amount of the proffered wage and states that the petitioner has shown the continued ability to pay employees as is evidenced by the W-3 statements submitted.

Counsel states that the petitioner has been in business since 1981. Further counsel states that the totality of the petitioner's circumstances demonstrate the petitioner's ability to pay the proffered wage and, he cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and *Ranchito Coletero*, 2002-INA-104 (2004 BALCA).

Counsel also distinguishes the cases of *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980) cited by the director in his decision for the proposition that a corporation is a distinct and separate legal entity from its owners and shareholders. According to counsel "none of the cases advanced directly bear on the practical consideration of whether this petitioner has the ability to pay [the proffered wage]."⁴

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 (BIA 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. The W-2 Wage and Tax statements from the petitioner to the beneficiary for tax years 2001, 2002, 2003, 2004 and 2005 evidenced wage payments in the amounts of \$24,216.00, \$25,600.00, \$28,600.00, \$28,120.00 and \$29,680.00 respectively. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$50,897.60 from the priority date, however it did establish that it paid partial wages in each relevant year. Thus, the petitioner must establish that it is able to pay the differences

⁴ Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its 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." Counsel asserts that the personal assets of the petitioner's owner and shareholder are available to pay the proffered wage. Thus, cases cited by the director are relevant and apropos to that issue.

between the wages paid to the beneficiary and the proffered wage, which are \$26,681.60, \$25,297.60, \$22,297.60, \$22,777.60 and \$21,217.60 respectively.

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 exceeded the proffered wage 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income (Line 28) of \$479.00.
- In 2004, the Form 1120 stated net income of \$92.00.

Since the proffered wage is \$50,897.60 per year, the petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for years 2001 and 2004.⁵ Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

If the net income the petitioner demonstrates it had available during the 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

⁵ The director requested that the petitioner submit evidence of its ability to pay the proffered wage from the priority date to the present in a request for evidence dated February 3, 2006, but the petitioner failed to submit regulatory required documentation for years 2002, 2003 and 2005.

⁶ 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.

- The petitioner's net current assets during 2001 and 2004 were \$19,953.00 and \$30,854.00.

Therefore, for the year 2001, the petitioner did not have sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage. For the year 2004, the petitioner did have sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage. 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, or its net income or net current assets, except for year 2004.

Counsel states that the petitioner has been in business since 1981. Further counsel states that the totality of the petitioner's circumstances demonstrate the petitioner's ability to pay the proffered wage and, he cites the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 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.

As in the *Sonogawa* case precedent, CIS may at its discretion consider relevant evidence to the 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 the petitioner has been doing business (in this instance 26 years), the established historical growth of the petitioner's business (not shown since only two years of tax returns were submitted), the overall number of the petitioner's employees (three), the occurrence of any uncharacteristic business expenditures or losses (none asserted or shown),⁷ the petitioner's reputation within its industry (not asserted or shown), whether the beneficiary is replacing a former employee (unclear from the evidence) or an out sourced service (none asserted or shown), or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. Since the petitioner declined to submit regulatory prescribed financial evidence for 2002, 2003 or 2005, the petitioner has failed to establish its ability to pay the proffered wage for those years. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). *The non-existence or other unavailability of required evidence creates a presumption of ineligibility.* 8 C.F.R. § 103.2(b)(2)(i).

⁷ Counsel has asserted in a letter dated April 27, 2006, that a comparison of 2001 and 2004 "shows the upward trajectory of the business" and in an additive fashion combines capital stock, retained earnings and loans from shareholders including the net income plus "current value of assets" as proof of the petitioner's ability to pay the proffered wage. For the reasons stated in this discussion for each of these items, counsel's assertion or reliance on these items is misplaced.

Counsel contends that a combination of capital stock,⁸ retained earnings and loans from shareholders⁹ are evidence of the petitioner's ability to pay the proffered wage but cites no case precedent for this assertion.

Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. The petitioner's tax returns indicate that its retained earnings are unappropriated. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are cash or current assets that would be available to pay the proffered wage.

Counsel is citing *Ranchito Coletero*, 2002-INA at 104 for the premise that the petitioner's list of personal assets demonstrates the petitioner's ability to pay the proffered wage "as the pass-through owner of the entity, as he would if a sole proprietor." That case involves entities in an agricultural business that regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO or why it is relevant to a corporation.¹⁰ Counsel's contention that a corporation or the shareholder owner is like a sole proprietor is erroneous and not supported by the case precedent cited.

Further, while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel points out the beneficiary's wage payments received from the petitioner and the amount of the proffered wage and states that the petitioner has shown the continued ability to pay employees as is evidenced by the W-3 statements submitted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Wages

⁸ Capital stock and paid-in capital are not current asset items but rather the equity of the corporation and as such they are unavailable to pay the proffered wage.

⁹ There is no information to indicate that the shareholder loans are current liabilities and it is not clear how a loan can be an asset before payment. Further, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position.

¹⁰ *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

already paid to others 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.

The evidence submitted fails to establish that the petitioner has 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.