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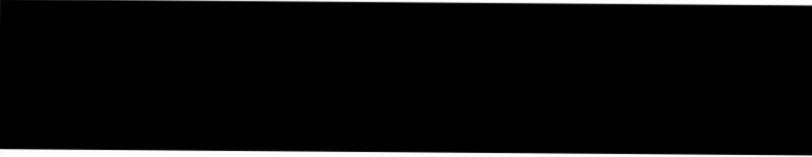


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUL 24 2008**
WAC 06 046 51602

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 E. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a textile and garment import and export company. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 2003 priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence. 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 January 16, 2007 denial, the primary 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)(ii) of the Immigration and Nationality Act (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 either 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 May 23, 2003. The proffered wage as stated on the Form ETA 750 is \$28 an hour or \$58,240 per year. The Form ETA 750 states that the position requires a bachelor's degree in accounting or finance.

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 appeal¹.

On appeal, counsel submits a brief and a document entitled “Premire (sic) Textile, Inc. dba Nutex Fashion (A California Corporation) Financial Statements & Accountant’s Compilation Report December 31, 2006.” This document consists of a letter signed by [REDACTED], C.P.A. Gardena, California dated February 13, 2007. In his letter, Mr. [REDACTED] stated that he compiled the accompanying balance sheet and the statement of income as of December 31, 2006, that he had not audited or reviewed the accompanying financial statements, and that the management had elected to omit substantially all of the disclosures and the statement of cash flows required by generally accepted accounting principles.

The record also contains the petitioner’s Form 1120, U.S. Corporation Income Tax Return for tax years 2001, 2002,² 2003, and 2004, and the petitioner’s Form 1120S, U.S. Income Tax Return for an S Corporation, for tax year 2005, as well as the petitioner’s Financial Statement and Accountant’s Compilation Report, dated June 30, 2004, also written by Mr. [REDACTED].

The record also contains the beneficiary’s IRS Forms W-2 Wage and Tax Statement for tax years 2003, 2004, and 2005 that indicate the petitioner paid the beneficiary \$16,150 in 2003, \$20,400 in 2004, and \$24,180 in 2005. The petitioner also submitted the beneficiary’s Forms 1040, for tax year 2003 in which the beneficiary reported wages of \$20,514, and the beneficiary’s state of California income tax return for tax year 2004. Finally, the petitioner submitted a copy of the beneficiary’s bimonthly paycheck for the last two weeks of November 2005, and copies of two bimonthly checks paid to the beneficiary during October 2005. The checks indicated that the beneficiary received a biweekly salary of \$1,480. In its response to the director’s Request for Further Evidence (RFE), the petitioner also submitted copies of its monthly bank statements from its business checking account with Nara Bank, Los Angeles for the months January 2003 to May 2006. 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 C corporation for tax years 2003, and 2004, and that as of July 1, 2005, the petitioner incorporated as an S corporation.³ On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$2,100,000 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on May 7, 2003, the beneficiary claimed to have worked for the petitioner since October 2001 as an accountant.

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 petitioner’s president in the petitioner’s response to the director’s RFE dated June 26, 2006 stated that for years the petitioner had filed its annual federal tax return on a fiscal year basis covering the period of July of the prior year to June of the current year. He also noted that as of tax year 2006, the petitioner would be using the calendar period of January to December in filing its federal tax return. The priority date in the instant petition is May 23, 2003. Thus, the petitioner’s tax return for tax year 2001 is not dispositive, while the petitioner’s tax return for 2002 would be dispositive as it covers the period of time from January to June 30th 2003 that includes the priority date of May 23, 2003.

³ As indicated on the petitioner’s 2005 federal tax return, page one, Item A.

On appeal, counsel refers to the two tax returns for tax years 2004 and 2005 that show the petitioner's gross receipts or sales were \$207,031 and \$1,666,280 in these two years. Counsel also refers to the petitioner's Financial Statement & Accountant's Compilation Report for December 2006 that counsel submits on appeal. Counsel states that the petitioner's total assets listed on this document were \$203,842 in tax year 2006. Counsel asserts that the petitioner can thus demonstrate its ability to pay the proffered wage to the beneficiary during years 2003 to 2005, and until the beneficiary obtains lawful permanent residence.

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).

The AAO notes that the director in her RFE requested that the petitioner submit its bank statements from 2003 to the present date. She then dismissed the bank statements as non-dispositive in her decision. The record is not clear why the director requested this documentation and what reliance the director placed on these documents at the time of sending the RFE to the petitioner.

The director's initial reliance on the balances in the petitioner's bank account and counsel's reliance on the bank balances are misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The AAO also notes that the balances in the petitioner's bank statements would have been reduced each month by the difference between the beneficiary's actual wages and the beneficiary's monthly salary as stipulated by the Form ETA 750, and thus the petitioner's bank statements for the years 2003 to the present may not have been sufficient in the long term to pay the difference in these two amounts.⁴

⁴ For example, in tax year 2005, the beneficiary's paychecks indicate a biweekly salary of \$1,480, or a monthly salary of \$2,960. The beneficiary's proffered wage as stipulated on the ETA Form 750 is \$58,240 per annum, or \$4,853.33 each month. The difference between the beneficiary's actual wages and the proffered wage in tax year 2005, barring any changes in the weekly salary during the year, would have been \$1,893.33. This sum, if subtracted from the ending balance of the petitioner's monthly bank statements in June 2005 would have resulted in a negative ending balance, as in June 2005, which shows an ending balance of \$614.70, or have incrementally reduced the petitioner's ending balance in other months.

The AAO also notes that the petitioner submitted two balance sheets with accountant's accompanying statements for tax year 2004 (covering the period of July 2003 to June 2004) and tax year 2006, covering the period of time January to December 2006. 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 that counsel submitted with the petition are not persuasive evidence. The accountant's reports that accompanied those financial statements make 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.

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 established that it employed and paid the beneficiary during tax year 2003, 2004, and 2005 based on the beneficiary's W-2 Forms. Based on these documents, as stated previously, the petitioner paid the beneficiary \$16,150 in 2003, \$20,400 in 2004, and \$24,180 in 2005. The petitioner therefore did not establish that it paid the beneficiary the proffered wage of \$58,240 as of the 2003 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages in 2003, 2004, and 2005 and the proffered wage of \$58,240, namely \$42,090 in 2003, \$37,840 in 2004 and \$34,060 in 2005.⁵

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. Contrary to counsel's assertions on appeal, 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.

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

⁵ It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated June 26, 2006. At this time, the petitioner's 2006 income tax return would not have been available. The record also does not contain any evidence as to the beneficiary's actual wages in tax year 2006. Therefore the AAO will not examine further the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2006 based on the beneficiary's wages, or the petitioner's net income or net current assets.

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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$58,240 per year from the priority date:

- In 2002, the Form 1120 stated a net income⁶ of \$2,312.
- In 2003, the Form 1120 stated a net income of \$3,131.
- In 2004, the Form 1120 stated a net income of \$2,238.
- In 2005, the Form 1120S stated a net income of \$14,501.

Therefore, for the years 2002 to 2005, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage. As stated previously, the difference between the beneficiary's actual wages and the proffered wage in these years was \$42,090 in 2003, \$37,840 in 2004 and \$34,060 in 2005.

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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

⁶The petitioner's net income is its taxable income before net operating loss deduction and special deductions, as reported on Line 28 of the Form 1120.

⁷According 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.

- The petitioner's net current assets during 2002 were -\$14,966.⁸
- The petitioner's net current assets during 2003 were -\$3,664.
- The petitioner's net current assets during 2004 were -\$83,985.
- The petitioner's net current assets during 2005⁹ were -\$2,359.

Therefore, for the years 2002 to 2005, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that the petitioner's gross receipts and sales should be considered to determine the petitioner's continuing ability to pay the proffered wage from the priority date. However, as stated previously, the AAO does not consider the petitioner's gross receipts and sales when analyzing the petitioner's net income. 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 evidence submitted does not establish 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 not met that burden.

ORDER: The appeal is dismissed.

⁸ The AAO's calculations of the petitioner's net current assets differ from the director's analysis. It appears the director did not include line 6, other current assets, of Schedule L, when she determined the petitioner's net current assets for tax years 2003, 2004, and 2005.

⁹Where 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), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 22, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions or other adjustments, the petitioner's net income is found on line 21, of page one.