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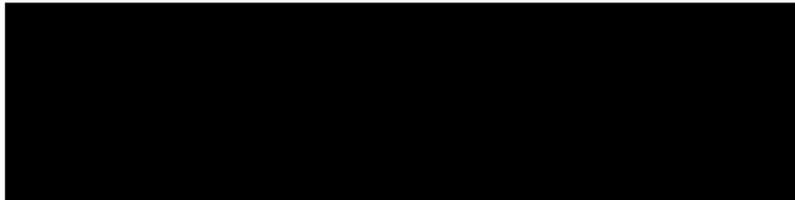
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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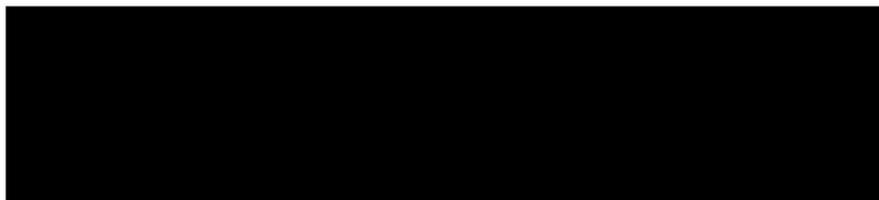
FILE: EAC 05 241 52558 Office: VERMONT SERVICE CENTER Date: JUL 25 2008

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.

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 travel agency. It seeks to employ the beneficiary permanently in the United States as a program coordinator (market research analyst). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original January 24, 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 or seasonal 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 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 29, 2002. The proffered wage as stated on the Form ETA 750 is \$26.29 per hour or \$54,683.20 annually.

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.*,

Officer salary 2001-2004	127,000
[The beneficiary's] gross salary paid 2001-2004	<u>\$ 101,929</u>
Adjusted net income 2001-2004	262,156
[The beneficiary's] target salary 2001-2004 (54,683 X 4)	<u>(218,732)</u>
Remaining surplus at 6/30/05	\$ 43,424

The letter dated February 6, 2006 from [REDACTED] states:

In our letter dated November 23, 2005 (copy enclosed), we prepared an analysis showing the Company's ability to pay the target salary of \$54,683.20 to [the beneficiary] for the years 2001 through 2004. It is our understanding that this target salary was not required to be paid to [the beneficiary] until she actually received her green card. During the period under consideration, the Company employed [REDACTED] and [REDACTED] [REDACTED] retired during the third quarter of 2005; [REDACTED] left the industry during the third quarter of 2004. [The beneficiary] has assumed all the responsibilities and performed all the duties of these two women. She has become a vital and necessary part of the ongoing operations of the Company. Without her services the functioning of the Company would be at serious risk. In addition to the 2004 Federal tax return for the period ended June 30, 2005, I have enclosed copies of the W-2's for [REDACTED] and [REDACTED] for the years 2001 through 2004, as well as the quarterly breakdown. Their salaries totaled \$153,646.78 during that time period. It is our contention that by cutting costs through the departure of these two women as well as other cost containing decisions by management, [the petitioner] has had, does have and based on historical results should have in the future the funds necessary to pay [the beneficiary's] target salary of \$54,683.20 once she receives her green card.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$54,683.20 based on its bank statements and on the analysis submitted by the petitioner's CPA of the petitioner's ability to pay the wage. Counsel cites several non-precedent decisions and *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support of his contention.

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, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on April 22, 2002, the beneficiary claims to have been employed by the petitioner from April 2001 to the present (April 22, 2002). In addition, the petitioner has submitted copies of the 2001 through 2005 Forms W-2 issued by the petitioner on behalf of the beneficiary. Therefore, the petitioner has established that it employed the beneficiary in 2001 through 2005.

The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$54,683.20 and the actual wages paid to the beneficiary of \$21,168 in 2001, \$24,049.02 in 2002, \$25,906.39 in 2003, \$30,805.54 in 2004, and \$36,468.31 in 2005. Those differences are \$33,515.20 in 2001, \$30,634.18 in 2002, \$28,776.81 in 2003, \$23,877.66 in 2004, and \$18,214.89 in 2005.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS 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*, 719 F. Supp. at 537.

In the fiscal years 2001 through 2004, the petitioner was organized as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2004 were \$791, \$16,393, \$15,243, and \$810, respectively. The petitioner could not have paid the differences of \$33,515.20 in 2001, \$30,634.18 in 2002, \$28,776.81 in 2003, and \$23,877.66 in 2004 between the proffered wage of \$54,683.20 and the actual wages paid to the beneficiary of \$21,168 in 2001, \$24,049.02 in 2002, \$25,906.39 in 2003, and \$30,805.54 in 2004 from its net incomes in those years.²

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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.

² It is noted that the petitioner's 2005 Federal Tax Return was unavailable at the time of filing of the appeal. Therefore, the AAO is unable to determine if the petitioner had sufficient funds from its net income in 2005 to pay the difference of \$18,214.89 between the proffered wage of \$54,683.20 and the actual wages paid to the beneficiary of \$36,468.31 in 2005.

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.³ 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's 2001 through 2004 net current assets were -\$20,488, -\$2,881, -\$3,489 and -\$9,112, respectively. The petitioner could not have paid the differences of \$33,515.20 in 2001, \$30,634.18 in 2002, \$28,776.81 in 2003, and \$23,877.66 in 2004 between the proffered wage of \$54,683.20 and the actual wages paid to the beneficiary of \$21,168 in 2001, \$24,049.02 in 2002, \$25,906.39 in 2003, and \$30,805.54 in 2004 from its net current assets in those years.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$54,683.20 based on its bank statements and on the analysis submitted by the petitioner's CPA of the petitioner's ability to pay the wage. Counsel cites several non-precedent decisions and *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support of his contention.

Counsel is mistaken. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all CIS employees in the administration of the Act, unpublished 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). In addition, counsel's reliance on the balances in the petitioner's bank accounts is 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. Therefore, the AAO will not consider the petitioner's bank statements when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.⁴

In the letter, dated February 6, 2006, from [REDACTED], the CPA states that "in lieu of [the petitioner's owner] taking a salary, those monies could have been used to pay salaries or other expenses incurred by the business during this time period." However, counsel has provided no verifiable evidence or notarized affidavit from the owner of the petitioner confirming that he would be willing or able to forego his compensation in order to pay

³ 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.

⁴ Only when the petitioner is a sole proprietorship, will the AAO consider the owner's personal bank statements when determining the petitioner's ability to pay the proffered wage. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of a sole proprietor petitioner's ability to pay.

the proffered wages to the beneficiary. The assertions of counsel (in this case the CPA) 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the letter dated February 6, 2006 from [REDACTED], the CPA also states that “[the beneficiary] has assumed all the responsibilities and performed all the duties of [REDACTED] and [REDACTED].” The letter further states that [REDACTED] retired during the third quarter of 2005 and [REDACTED] left the industry during the third quarter of 2004. The CPA claims that “it is our contention that by cutting costs through the departure of these two women as well as other cost containing decisions by management, [the petitioner], has had, does have and based on historical results should have in the future the funds necessary to pay [the beneficiary’s] target salary of \$54,683.20 once she receives her green card.”

The CPA is mistaken. While the petitioner is not obligated to actually pay the proffered wage until the beneficiary obtains her lawful permanent residence, it is obligated to establish that it had sufficient funds to pay the proffered wage from the priority date of April 29, 2002 and continuing until the beneficiary obtains her lawful permanent residence. *See* 8 C.F.R. § 204.5(e)(2). Even though the beneficiary may have replaced the two employees, [REDACTED] and [REDACTED] after they left the petitioner, the wages paid to those two employees were not available to pay the wage of the beneficiary in 2001 through 2005 as those funds were already expended. In general, wages 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. In addition, the salary expenses saved by the departure of [REDACTED] and [REDACTED] in 2004 and 2005 do not establish the petitioner’s ability to pay the proffered wage in fiscal years 2001 through 2003.

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*, 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 this case, the petitioner’s tax returns indicate it was incorporated on September 9, 1976. The petitioner has provided its tax returns for 2001 through 2004, with

none of the tax returns establishing the petitioner's ability to pay the proffered wage of \$54,683.20. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons discussed above, the assertions of counsel on appeal do not overcome the decision of the director.

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.