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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

SRC 06 233 51556

Office: TEXAS SERVICE CENTER

Date:

JUL 30 2008

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

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

The petitioner is a home repair company. It seeks to employ the beneficiary permanently in the United States as a stone mason. 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 March 6, 2007, decision, 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal 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 either be 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 February 11, 2004. The proffered wage as stated on the Form ETA 750 is \$16.00 per hour or \$33,280 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., 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.¹ Relevant evidence submitted on appeal includes counsel's statement and copies of the 2000, 2001, 2002, 2003, 2004, and 2006 pay checks issued by the petitioner on behalf of the beneficiary.² Other relevant evidence includes copies of the petitioner's 2002 through 2005 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and copies of the 1998 through 2004 Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary.³ The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2004 and 2005 Forms 1120S reflect ordinary incomes or net incomes from Schedule K, line 17(e), of -\$282,113 and -\$378,095, respectively. The petitioner's 2004 and 2005 Forms 1120S also reflect net current assets of -\$207,656 and -\$413,995, respectively.

The 2004 Form 1099-MISC issued by the petitioner on behalf of the beneficiary reflects wages paid to the beneficiary of \$4,456.95 in 2004.⁴

The pay checks issued by the petitioner on behalf of the beneficiary in 2006 (from May 31, 2006 through October 27, 2006) totaled \$24,166.13 in 2006.⁵

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage, that the petitioner has employed the beneficiary for several years, and that CIS did not consider the financial evidence submitted in this case.

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

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 pay checks for the years 2000 through 2003 were for years prior to the priority date of February 11, 2004; and, therefore, have limited value when determining the petitioner's continuing ability to pay the proffered wage of \$33,280 from the priority date. Therefore, the AAO will not consider the pay checks for the years 2000 through 2003 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.

³ Again, since the 2002 and the 2003 Forms 1120S and the 1998 through 2003 Forms 1099-MISC were for the years preceding the priority date, they will not be considered 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 The petitioner did not submit a Form 1099-MISC for the beneficiary in 2005 and did not explain the small amount of wages paid to the beneficiary in 2004 with respect to the wages paid to the beneficiary on the Forms 1099-MISC in the previous years (1998 through 2003). The wages paid to the beneficiary in the previous years ranged from a low of \$31,558.96 in 1998 to a high of \$54,164.18 in 2002.

⁵ Pay checks issued by the petitioner on behalf of the beneficiary were not submitted for 2005.

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 February 3, 2004, the beneficiary claims to have been employed by the petitioner from April 1998 to the present (February 3, 2004). In addition, counsel has submitted a copy of the 2004 Form 1099-MISC and copies of the 2006 pay checks (May 31, 2006 through October 27, 2006) issued by the petitioner on behalf of the beneficiary to corroborate the beneficiary's claim. Therefore, the petitioner has established that it employed the beneficiary in 2004 and part of 2006.

The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$33,280 and the actual wage paid to the beneficiary of \$4,456.95 in 2004 and \$24,166.13 in 2006. In 2004, that difference was \$28,823.05 in 2004 and \$9,113.87 in 2006. Neither a Form 1099-MISC nor copies of pay checks were submitted for 2005; therefore, the petitioner is obligated to establish that it had sufficient funds to pay the entire proffered wage of \$33,280 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. *See 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. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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.

Where 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) or line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (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 additional income and deductions shown on its Schedule K, the petitioner's net income is found on Schedule K of the petitioner's IRS Form 1120S.

In the instant case, the petitioner's net income was -\$282,113 in 2004 and -\$378,095 in 2005. The petitioner could not have paid the difference of \$28,823.05 in 2004 between the proffered wage of \$33,280 and the actual wages paid to the beneficiary of \$4,456.95 from its net income in 2004. In addition, the petitioner could not have paid the entire proffered wage of \$33,280 from its net income in 2005. Furthermore, since the 2006 tax return was not submitted (was not available at the time of the appeal), the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$9,113.87 in 2006 between the proffered wage of \$33,280 and the actual wages paid to the beneficiary of \$24,166.13 from its net income in 2006.

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. 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. 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 net current assets in 2004 and 2005 were -\$207,656 and -\$413,995, respectively. The petitioner could not have paid the difference of \$28,823.05 in 2004 between the proffered wage of \$33,280 and the actual wages paid to the beneficiary of \$4,456.95 from its net current assets in 2004. In addition, the petitioner could not have paid the entire proffered wage of \$33,280 from its net current assets in 2005. Furthermore, since the 2006 tax return was not submitted (was not available at the time of the appeal), the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$9,113.87 in 2006 between the proffered wage of \$33,280 and the actual wages paid to the beneficiary of \$24,166.13 from its net current assets in 2006.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$33,280, that it has employed the beneficiary for several years, and that CIS did not consider the financial evidence submitted in this case.

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.

Counsel is mistaken. Although the petitioner had employed the beneficiary in years (1998 through 2003) prior to the priority date of February 11, 2004 and had paid wages close to or exceeding the proffered wage of \$33,280 during those years, the petitioner must establish its ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). In the instant case, the petitioner has not shown that it had sufficient funds to pay the proffered wage in any of the pertinent years, 2004 through 2006.⁷ 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). 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 addition, counsel's claim that CIS did not consider the financial evidence submitted in this case is without merit. The director specifically listed the evidence submitted by the petitioner and also explained the deficiencies of that evidence. Although the petitioner realized gross receipts between \$3 and \$4 million dollars in 2004 and 2005, it also experienced high cost of goods sold. The mere fact that the petitioner showed high gross receipts and paid wages between \$200,000 and \$400,000 is not sufficient alone to establish the petitioner's continuing ability to pay the proffered wage of \$33,280 from the priority date of February 11, 2004.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, 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 has provided its tax returns for 2004 and 2005, with neither of those tax returns establishing the petitioner's ability to pay the proffered wage of \$33,280. 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

⁷ It is noted that the petitioner's gross receipts have steadily declined from \$4,967,983 in 2002 to \$3,072,053 in 2005.

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 and the evidence submitted 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.