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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

BL

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: JUN 30 2008

SRC 07 015 51795

IN RE:

Petitioner:

[REDACTED]

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:

[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 painting and wallpapering company. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 November 17, 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 nature, for which qualified workers are not available in the United States.

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 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 DOL. *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 DOL 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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$23.82 per hour (\$49,545.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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 On appeal, counsel submits a brief, bank statements for ZLE, Inc. from March 31, 2001 to May 31, 2001 and for the petitioner from May 23, 2001 to November 30, 2006, and copies of the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002, 2003, 2004 and 2005. The AAO notes that the bank statements for ZLE, Inc. from March 31, 2001 to May 31, 2001 and for the petitioner from May 23, 2001 to July 31, 2006, and copies of the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002, 2003, 2004 and 2005 had been previously submitted. Other relevant evidence in the record includes a letter dated May 17, 2006 from [REDACTED], CPA. 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 was structured as a C corporation in 2001 and has been structured as an S corporation since 2002. On the petition, the petitioner claimed to have been established on May 21, 2001 and to currently employ zero employees and 9-10 subcontractors. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 8, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) did not consider the totality of the evidence provided in determination of the petitioner's ability to pay. Specifically, counsel asserts that the petitioner has shown that it can afford to pay the proffered salary from 2001 to the present time based on its bank records. Counsel also notes that monies paid to contractors should be considered when evaluating the company's ability to pay, and that ZLE, Inc. sponsored the applicant so that the company could grow and lessen its reliance upon subcontractors.

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 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 not established that it employed and paid the beneficiary the full proffered wage in 2001, 2002, 2003, 2004 or 2005.

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).

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 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 record before the director closed on October 19, 2006 with the receipt by the director of the petitioner's Form I-140, Immigrant Petition for Alien Worker.² As of that date, the petitioner's 2006 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004 and 2005 as shown in the table below.

- In 2001, the Form 1120 stated net income³ of -\$9,832.⁴
- In 2002, the Form 1120S stated net income⁵ of -\$15,638.
- In 2003, the Form 1120S stated net income⁶ of -\$1,953.
- In 2004, the Form 1120S stated net income⁷ of -\$1,169.

² The AAO notes that the petitioner had filed a prior Form I-140 for the same beneficiary that was denied by the Vermont Service Center on August 15, 2006 due to abandonment.

³ Taxable income before net operating loss deduction and special deductions as reported on line 28.

⁴ The AAO notes that the record also includes a 2001 IRS Form 1120S for ZLE, Inc. with a stated net income of -\$3,301.

⁵ Ordinary income (loss) from trade or business activities as reported on line 21.

⁶ *Id.*

⁷ *Id.*

- In 2005, the Form 1120S stated net income of \$1,918.⁸

Therefore, for the years 2001, 2002, 2003, 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage of \$49,545.60 per year.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004 and 2005, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$1,206.¹⁰
- In 2002, the Form 1120S stated net current assets of \$0.
- In 2003, the Form 1120S stated net current assets of \$1,288.
- In 2004, the Form 1120S stated net current assets of \$1,204.
- In 2005, the Form 1120S stated net current assets of \$3,897.¹¹

Therefore, for the years 2001, 2002, 2003, 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, 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.

On appeal, counsel asserts in her brief that bank account statements can be used in determining the petitioner's ability to pay. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced.

⁸ 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 17e 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 deductions shown on its Schedule K for 2005, the petitioner's net income is found on Schedule K of its tax return.

⁹ 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.

¹⁰ The AAO notes that the record also includes a 2001 IRS Form 1120S for ZLE, Inc. with stated net current assets of \$5,239.

¹¹ The AAO notes that the Director incorrectly stated the net current assets to be \$2,043. However, this error does not affect the ultimate outcome of the appeal.

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 returns, such as the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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 *Sonogawa*, CIS may, at its discretion, consider evidence relevant 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, 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 relevant to the petitioner's ability to pay the proffered wage. The petitioner has been doing business since 2001. The petitioner's tax returns do not establish a historical growth of the business, nor do its tax returns note any salaries and wages paid. The AAO also notes that the record does not include any documentation, such as media publications, which support the petitioner's reputation. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001, 2002, 2003, 2004 and 2005 were uncharacteristically unprofitable years for the petitioner. Counsel asserts that the petitioner employs subcontractors and outside labor, and that the beneficiary will replace these outside workers. The AAO observes that counsel's statement contradicts the Form I-140 filed on behalf of the beneficiary which lists the proposed employment to be a new position. Regardless, neither counsel nor the petitioner identifies the contractor to be replaced or the contractor's current duties and wages. If that contractor performed other kinds of work, then the beneficiary could not have replaced him or her.

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.

The AAO also notes that the petitioner was not incorporated in Connecticut at the time the ETA 750 was filed.¹² A corporation with the name of ZLE, Incorporated filed the ETA 750 and was issued the labor certification.¹³ The Form I-140 petition was filed by ZL, Inc. The record contains no evidence that the petitioner qualifies as a successor-in-interest to ZLE, Inc. The DOL does not issue a Form ETA 750 labor certification to a potential employee/beneficiary, but to a potential employer/petitioner. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the original employer is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change of ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1986). The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. Counsel has failed to provide evidence that the petitioner in this matter is the successor-in-interest to the original employer. Counsel has failed, therefore, to demonstrate that the petition may be approved.

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 DOL.

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.

¹² According to the Connecticut Secretary of State's website, the petitioner was incorporated on May 3, 2001, after the Form ETA 750 was filed on April 30, 2001. See <http://www.concord-sots.ct.gov/CONCORD/InquiryServlet?eid=14&businessID=0680560>.

¹³ According to the Connecticut Secretary of State's website, ZLE, Inc.'s corporate status has been dissolved. See <http://www.concord-sots.ct.gov/CONCORD/InquiryServlet?eid=14&businessID=0680560>.