

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090
Mail Stop 2090



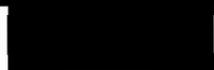
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date: NOV 10 2008

LIN 06 144 51319

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

The petitioner is a full service mechanic shop. It seeks to employ the beneficiary permanently in the United States as an automobile mechanic. 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 December 5, 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 18, 2001. The proffered wage as stated on the Form ETA 750 is \$16.72 per hour or \$34,777.60 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.² On appeal, counsel submits copies of the petitioner's federal income tax returns for 2001 and 2004.³ Additional relevant evidence in the record includes income tax returns for 2002 and 2003, and bank statements covering the period from January 2005 until October 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. On the I-140 petition, the petitioner claimed to have been established in 1980, to have a gross annual income of \$184,972, a net annual income of \$17,778, and to currently employ four workers.⁴ According to the tax returns in the record, the petitioner's fiscal year runs from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner from March 2000 until "present." The record also contains a Form G-325A Biographic Information signed by the beneficiary on April 7, 2006 in which he claimed to have worked for the petitioner from March 2000 until October 2002.

On appeal, counsel asserts that additional funds are available to pay the proffered wage because the sole shareholder of Linden Service, Inc., [REDACTED], plans to retire "upon the hiring" of the beneficiary. Counsel further states that the beneficiary will generate additional revenues for the petitioner, and that these revenues can be used to pay the proffered wage. Finally, counsel asserts that bank statements submitted by the petitioner, which cover the period from January 2005 to October 2006, establish that the petitioner is able to pay the proffered wage.

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).

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. As

² 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).

³ It is noted that counsel previously stated, in response to a Request for Evidence, that the income tax return for Fiscal Year 2004 was not available.

⁴ The tax returns submitted by the petitioner do not show any salaries or wages paid to employees.

noted above, the beneficiary has indicated that he was employed by the petitioner from March 2000 until October 2002. However, in response to a Request for Evidence issued by CIS on August 9, 2006, counsel stated that the beneficiary only began working for the petitioner in 2006. In any event, the petitioner has not submitted any evidence of wages paid to the beneficiary, such as W-2 forms or pay stubs. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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. 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 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* at 537.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for Fiscal Years 2001-2004, as shown in the table below.

- In 2001, the Form 1120 stated net income of - \$526.
- In 2002, the Form 1120 stated net income of \$29,897.
- In 2003, the Form 1120 stated net income of \$17,778.
- In 2004, the Form 1120 stated net income of - \$3,392.

Therefore, for the years 2001, 2002, 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage of \$34,777.60.

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. 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003 and 2004, as shown in the table below.

- In 2001, the Form 1120 stated net current assets of - \$41,772.
- In 2002, the Form 1120 stated net current assets of - \$28,917.⁶
- In 2003, the Form 1120 stated net current assets of - \$10,624.
- In 2004, the Form 1120 stated net current assets of - \$16,683.

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

Therefore, 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Specifically, counsel states that the sole shareholder of Linden Service, Inc., [REDACTED] plans to retire and that [REDACTED]'s annual compensation of \$36,400 will be available to pay the proffered wage. Counsel further states that the beneficiary will generate additional revenues for the petitioner, and that these revenues can be used to pay the proffered wage. Finally, counsel asserts that bank statements submitted by the petitioner, which cover the period from January 2005 to October 2006, establish that the petitioner is able to pay the proffered wage.

Counsel has asserted that the petitioner's sole shareholder, [REDACTED], will retire upon the hiring of the beneficiary, and that this will provide the petitioner with an additional \$36,400 annually with which to pay the proffered wage. It is noted that in his response to the Request for Evidence issued by the Nebraska Service Center, counsel stated that the beneficiary had been employed by the petitioner beginning in 2006. Thus, counsel's assertion that [REDACTED] will retire "upon the hiring" of the beneficiary seems to be inaccurate. Further, there is no indication from [REDACTED] himself that he will retire. The assertions of counsel do not

⁵According 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.

⁶The director incorrectly listed the petitioner's current liabilities for 2002 as \$49,226. It appears that this was due to a misreading of Schedule L, Line 17 "Mortgages, notes, bonds payable in less than 1 year." The amount listed on Line 17 is handwritten and difficult to read. It appears that the director believed the amount listed was \$46,000. However, it appears that the amount written was actually \$80,000. This is also the amount written on line 17 in the "Beginning of tax year" column on the petitioner's 2003 return.

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). Moreover, there is no evidence that [REDACTED] performs the same duties as those set forth in the Form ETA 750. If [REDACTED] performs duties other than those of a mechanic, then the beneficiary would not be a replacement for him. In that case, the petitioner may have to hire another individual to perform the duties previously performed by [REDACTED] and the funds previously used to compensate [REDACTED] **would not be** available to pay the proffered wage. Thus, the petitioner has failed to establish that, by virtue of [REDACTED]'s retirement, the petitioner will have additional funds available with which to pay the proffered wage.

In addition, counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel has provided no detail or documentation to explain how the beneficiary's employment will significantly increase profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. As was stated in *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977):

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel also argues that CIS should have considered the bank statements submitted by the petitioner. These bank statements covered the period from January 2005 to October 2006. 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, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Finally, these bank statements do nothing to establish the petitioner's ability to pay the proffered wage during the years 2001, 2002, 2003 or 2004.

Finally, counsel asserts that CIS must consider the totality of the circumstances in its determination of the petitioner's ability to pay the proffered wage pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. No unusual circumstances have

been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, 2003, and 2004 were uncharacteristically unprofitable years for the petitioner.

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.