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U.S. Citizenship
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FILE:

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Office: TEXAS SERVICE CENTER

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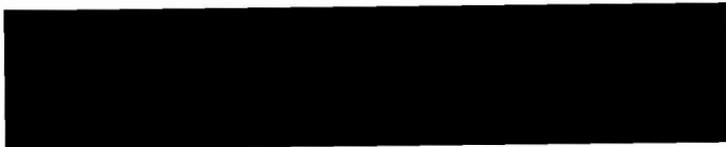
Petitioner:

Beneficiary:



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

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.

John F. Grissom, Acting 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 baby bamboo farm. It seeks to employ the beneficiary permanently in the United States as a supervisor of farm workers. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.¹ 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 June 8, 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.

On the appeal form, the petitioner indicated that a brief or additional evidence would be submitted within 30 days. The record does not contain the brief or any additional evidence. Subsequently, this office sent a fax to counsel, inquiring after the promised brief or evidence. No response to the fax was received. Therefore, the appeal will be adjudicated based on the evidence of record.

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

¹ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

training or experience), 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 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 November 15, 2001. The proffered wage as stated on the Form ETA 750 is \$20.00 per hour or \$41,600 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 appeal². Relevant evidence submitted on appeal includes a statement from the petitioner's president, a statement of financial condition, dated July 31, 2005, for [REDACTED]" and [REDACTED], a copy of a portfolio management account for the period May 12, 2006 through June 13, 2006 for [REDACTED] and [REDACTED] and copies of the beneficiary's certifications of degree conferral for a Bachelor of Science in Agriculture and a Master of Science in Food Science and Technology. Other relevant evidence includes copies of the petitioner's 2002 through 2004 Forms 1065, U.S. Returns of Partnership Income. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2002 through 2004 Forms 1065 reflect ordinary incomes or net incomes from Schedule K of -\$1,000,372, -\$695,237, and -\$488,533, respectively. The petitioner's 2002 through 2004 Forms 1065 also reflect net current assets of \$178,536, -\$58,826, and -\$64,135, respectively.

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).

The compiled financial statement for [REDACTED] and [REDACTED] reflects a net worth of \$14,851,193.³

The portfolio management account for [REDACTED] and [REDACTED] for the period May 12, 2006 through June 13, 2006 reflects a checking account balance of \$351,091.73, a savings account balance of \$2,005.14, and a credit card balance of \$1,534.74. The portfolio management account also reflects **available credit as: personal, \$15,000 and credit card, \$13,965**. The portfolio management account further reflects interest paid to [REDACTED] and [REDACTED] as: checking, \$4,769.74, savings, \$4.89, and interest paid by [REDACTED] and [REDACTED] as \$648.46.

On appeal, the petitioner states:

I am the owner of [the petitioner]. . . .

In the statement of financial condition as of July 31, 2005 (attachment I), you can see assets I have, including bank account, loan receivable, investments and others. The amount of my asset is far enough to pay wage to the beneficiary not only for the past five years but also for the next 30 years. Besides, the crop grown on the farm hasn't been included in the asset on that statement. The value of bamboo on the farm now is about eight million dollars (attachment II). Here I also offer the document of my portfolio management account (attachment III), in which you can see the cash flow of my bank account between May 12, 2006 to June 13, 2006. Based on these informative evidence, it is not too hard to understand how I can pay the proffered wage to the beneficiary, even though the taxable incomes are low.

Here I also want to mention the necessity of why I need an expert to manage my [farm]. In 1992, my company introduced bamboo from Taiwan into America in the form of tissue culture, the technique developed by many scientists and doctors. Bamboo is one of the economy-valued crops. The bamboo itself can be used as decoration; its shoots is [sic] eatable. The tissue culture technique and economic value of bamboo let me be the first and only person who can get the certificate of selling bamboo in from American government. However growing bamboo is the very complicated and time-consuming process, which only can be done by an expert. We tired [sic] to hire an expert in America before but we could not find such kind of expert. Therefore, we have to hire the expert abroad to manage my farm. [The beneficiary] coming from Taiwan have very good academic background and work

³ 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 report that accompanied those financial statements makes 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**. Therefore, the AAO will not consider the compiled financial statement for [REDACTED] and [REDACTED] when determining the petitioner's ability to pay the proffered wage of \$41,600.

experience in growing bamboo. He has two degrees in agriculture. One is bachelor degree in Plat [sic] Pathology and Entomology (attachment IV); the other is master degree in Food Science Technology (attachment V). In addition, after graduation, he worked several years in bamboo farm. Therefore, he is well-qualified to manage my bamboo farm.

In sum, my financing condition shows that I have capability of paying the proffered wage to the beneficiary from past five years to the next 30 years even with the low taxable income. In addition, my company really needs an expert to manage the cultivation of bamboo and the beneficiary, [. . .], is well qualified.

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 Sonegawa*, 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, no Form ETA 750B, signed by the beneficiary, was submitted to the record. Therefore, the record of proceeding contains no evidence that the petitioner employed the beneficiary in the pertinent years, 2001 through 2004. Therefore, the petitioner must establish that it had sufficient funds to pay the entire proffered wage of \$41,600 in 2001 through 2004.

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 federal case law. *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.

The petitioner is organized as a limited partnership (LP). A LP is an entity formed under state law (in this case, California) by filing articles of organization.

For a partnership, where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed November 21, 2008). In the instant case, the petitioner's 2002 through 2004 Schedule Ks have relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K. The petitioner's net incomes in 2002 through 2004 were -\$1,000,372, -\$695,237, and -\$488,533, respectively. The petitioner could not have paid the proffered wage of \$41,600 in 2002 through 2004 from its net incomes in 2002 through 2004. In addition, the petitioner is obligated to establish that it had sufficient funds to pay the proffered wage from the priority date, November 15, 2001, and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). In the instant case, the petitioner did not submit its 2001 tax return, and, therefore, it has not established its ability to pay the proffered wage of \$41,600 in 2001 from its net income in 2001.

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.⁴ 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 15 through 17. If a partnership'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 2002 through 2004 were \$178,536, -\$58,826, and -\$64,135, respectively. The petitioner could have paid the proffered wage of \$41,600 from its net current assets in 2002, but not in 2003 and 2004. In addition, the petitioner did not submit its 2001 tax return, and,

⁴ 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.

therefore, it has not established its ability to pay the proffered wage of \$41,600 from its net current assets in 2001.

On appeal, the petitioner contends that the assets of [REDACTED] should be considered when determining the petitioner's ability to pay the proffered wage of \$41,600. The petitioner further contends that the estimated production value of the bamboo grown on the farm was not included in his financial statement of net worth and, therefore, it should be considered as additional assets when determining the petitioner's ability to pay the proffered wage of \$41,600.

The petitioner is mistaken. Although [REDACTED] claims to be the petitioner's owner, there is no evidence in the record that corroborates this claim. The only place that [REDACTED]'s name appears is on the Form I-140 as president of the petitioner and on the petitioner's tax returns under other liabilities as loans payable. In fact, the tax returns list the general partner of the petitioner as Suilo Investment Corporation, and the remaining partners are listed as foreign partners. In the instant case, the general partner, Suilo Investment Corporation, appears to have only a profits interest in the partnership, while the individual partners share the capital interest. Even if [REDACTED] is a shareholder of Suilo Investment Corporation, his assets cannot be considered in the determination of the petitioner's ability to pay the proffered wage as Suilo Investment Corporation is a corporation, and its shareholders are not personally liable for corporate obligations. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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 started in 1996 (approximately 12 years ago). The petitioner has provided tax returns for the years 2002 through 2004. However, the petitioner's gross receipts have steadily decreased since 2002, and only one tax return (2002) reflects sufficient funds (from its net current assets) to pay the proffered wage of \$41,600. The one tax return

that establishes the petitioner's ability to pay the proffered wage is 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. 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.

Beyond the decision of the director, the record in this case also lacks part B of Form ETA 750 signed by the current beneficiary. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To substitute one beneficiary for another, the employer must submit a Form I-140 (or new I-140 if one with the prior beneficiary was submitted); part B of the Form ETA 750 (ETA 750) signed by the new beneficiary; proof that the new beneficiary met all requirements of the position at the time the labor certification was initially filed; the original ETA 750 and Department of Labor certification or if previously submitted to CIS (with prior I-140), photocopies of the ETA 750 and Department of Labor certification; and a written notice of withdrawal of the first I-140 if previously filed. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). In the instant case, the petitioner did not submit a part B of ETA 750 signed by the new beneficiary. Therefore, the record of proceeding is incomplete, and the visa petition may not be approved.⁵

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.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

⁵ The AAO notes that the director failed to request part B of the ETA 750 signed by the new beneficiary.