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U.S. Citizenship
and Immigration
Services

B6



FILE:

LIN 07 196 52164

Office: NEBRASKA SERVICE CENTER

Date: NOV 25 2008

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a developer of video network products. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 July 18, 2007 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 May 5, 2004. The proffered wage as stated on the Form ETA 750 is \$45,947.00 per year. The Form ETA 750 states that the position requires four years of college in the proffered job.

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 Counsel submits a brief on appeal. Relevant evidence in the record includes the petitioner's corporate federal tax returns for 2003, 2004, and 2005; the beneficiary's Forms W-2 for 2004, 2005, and 2006; the beneficiary's pay stubs for 2007; the petitioner's Business Plan, dated May 30, 2007; and the petitioner's quarterly federal tax returns for 2005 and 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 Form I-140 petition, the petitioner claimed to have been established on January 8, 1998, to have a gross annual income of \$6,115,228.00, and to currently employ 16 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a tax year beginning October 1 and ending on September 30. On the Form ETA 750, signed by the beneficiary on April 30, 2004, the beneficiary claimed to have worked for the petitioner from April 2001 through the present time.

On appeal, counsel asserts that according to generally accepted accounting principles, the petitioner has the ability 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. The record includes copies of IRS Forms W-2 showing wages paid to the beneficiary for 2004, 2005, and 2006.

- In 2004, the petitioner paid the beneficiary wages in the amount of \$38,160.00.
- In 2005, the petitioner paid the beneficiary wages in the amount of \$42,101.09.
- In 2006, the petitioner paid the beneficiary wages in the amount of \$44,424.92.

Therefore, in the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$45,947.00 in 2004 or subsequently. The petitioner is obligated to demonstrate that it

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).

can pay the difference between the wages actually paid and the proffered wage which is \$7,787.00 in 2004, \$3,845.91 in 2005, and \$1,522.08 in 2006.

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 figures reflected on the petitioner's federal income tax returns, 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 Chang* at 537.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120 and Line 24 of the Form 1120-A, U.S. Corporation Income Tax Return. The record before the director closed on August 16, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet due as the petitioner's fiscal year is based on a tax year beginning October 1 and ending on September 30. 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 2003, 2004, and 2005 as shown in the table below.

- In 2003, the Form 1120 stated net income of -\$2,812,409.00
- In 2004, the Form 1120 stated net income of -\$481,143.00
- In 2005, the Form 1120 stated net income of -\$3,821,271.00

Therefore, for the tax year 2003, 2004, and 2005 the petitioner did have sufficient net income to pay the difference between the proffered wage and wages actually paid to the beneficiary.

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.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 for Form 1120 and on Part III, lines 1 through 6 for Form 1120-A and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18 for Form 1120 and on lines 13 through 14 for Form 1120-A. 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 2003 and 2004, as shown in the table below.

- In 2003, the Form 1120 stated net current assets of \$1,444,907.
- In 2004, the Form 1120 stated net current assets of -\$4,630,058.
- In 2005, the Form 1120 stated net current assets of -\$6,335,964.

Therefore, for the tax years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary.

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 in 2004 and 2005.

Counsel states that the beneficiary is being paid \$1,958.33 every two weeks which is approximately \$50,000 per year as evidenced by his 2007 pay stubs. Counsel asserts that since the petitioner has paid the beneficiary at the proffered wage rate since May 16, 2007,³ according to the language in [REDACTED] memorandum, it has established its continuing ability to pay the proffered wage beginning on the priority date. Counsel asserts that [REDACTED] makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges CIS to consider the wage rate paid in 2007 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The [REDACTED] memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the

²According 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.

³Counsel states that the beneficiary is being paid \$1,958.33 every two weeks which is approximately \$50,000 per year as evidenced by his 2007 pay stubs. The AAO notes that the record contains two pay stubs for the beneficiary for the pay periods of May 16, 2007 to May 31, 2007 and June 1, 2007 to June 15, 2007. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 5, 2004. Thus, the petitioner must show its continuing ability to pay the proffered wage in 2004, 2005 and 2006. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel notes that at the time the Form ETA 750 was filed in May 2004, the wage offered for the position was \$38,200. In early 2007, the petitioner amended the wage to \$45,947 in order to comply with the Department of Labor's determination of the prevailing wage for the position at that time. The petitioner paid the beneficiary less than the proffered wage in 2005 and 2006. Counsel notes that only by requiring the petitioner to prove an ability to pay the amended proffered wage from 2004 to the present does an issue arise as to the petitioner's ability to pay the proffered wage in 2005 and 2006. The petitioner must pay the prevailing wage rate established by DOL and certified on the labor certification regardless of amendments to the labor certification prior to DOL's final approval. See 20 C.F.R. §§ 656.21(g)(4) and 656.40(a) and (e). Therefore, the ability to pay is based on the proffered wage of \$45,947 effective May 5, 2004 until the present.

Counsel asserts that the totality of the circumstances shows that the petitioner has the ability to pay the proffered wage. 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 in operation since 1998. Counsel notes that according to the latest tax return, the petitioner generated more than \$6,000,000.00 in gross revenues and paid more than \$2,500,000.00 in payroll in 2005 and 2006 according to the petitioner's Form 941 Quarterly Wage Returns.

In the present case, the petitioner is a developer of video network products that has been in business for ten years and had been in business for six years at the time the Form ETA 750 was filed. The petitioner had \$3,797,433.00 in gross receipts and paid out \$3,132,761.00 in wages and salaries during the year in which the priority date was established, it had \$7,453,699.00 in gross receipts and paid out \$3,656,315.00 in wages and salaries during tax year 2004, and had \$6,115,228.00 in gross receipts and paid out \$3,188,368.00 in wages and salaries during tax year 2005. The petitioner also submitted Form 941 Employer's Quarterly Federal Tax Return records which showed that it employed a total of 29-34 employees in 2005 and 17-29 employees in 2006. As documented in the petitioner's income statements and summarized in its Business Plan dated May 30, 2007, the petitioner had achieved an actual \$3.4 million revenue with \$2 million in chip revenue for the fiscal year ending September 30, 2004, an actual \$7.4 million in revenue with \$3 million in chip revenue for the fiscal year ending September 30, 2005, and an actual \$6.1 million revenue and \$5 million in chip revenue for the fiscal year ending September 30, 2006. The petitioner has more than 30 customers in mass-production among its 300 customers worldwide which include IBM and Samsung. The petitioner has increased its chip revenue more than 150% over the past 3 years. The petitioner's chip revenue had increased from around \$2 million in 2004 to \$3 million in 2005 to \$5 million in 2006 in the past three years. The petitioner's revenue had increased from \$3.4 million in 2004 to \$7.5 million in 2005 and reduced to \$6.1 million in 2006. Although its reliance on significant loans raises concerns, the petitioner has substantial gross receipts, pays substantial wages, has a good enough reputation to attract customers such as IBM and Samsung, has regularly increasing revenues, and only had a shortfall of \$7,787.00 in 2004 and \$3,845.91 in 2005 between wages actually paid to the beneficiary and the proffered wage, which is minimal considering the totality of circumstances in this individual case.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has the ability to pay the proffered wage.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.