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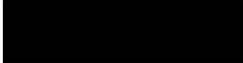
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER Date:

OCT 01 2008

EAC 06 114 50406

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 director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as an assistant manager.¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 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 January 23, 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. . . . 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 the [Citizenship and Immigration Service].

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 U.S. Department of Labor. 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The beneficiary is a substituted beneficiary for the ETA Form 750. The petitioner originally filed the ETA Form 750 for [REDACTED]

In the instant matter, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$31,200 per year. The Form ETA 750 states that the position requires two years of experience 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 relevant evidence in the record, including new evidence properly submitted on appeal.²

Relevant evidence submitted on appeal includes counsel's brief. Counsel submits no new evidence on appeal. With the initial petition, the petitioner submitted the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2001 to 2004; copies of the petitioner's owner's and sole shareholder's Forms 1040 for tax years 2001 to 2002; and bank statements for the petitioner's two business checking accounts with Northfield Savings Bank, Staten Island, from 2001 to 2005.³ The petitioner also submitted a document that lists the monthly balances, combined monthly balances, average monthly balance, and the difference between the monthly balance and the monthly proffered wage for tax years 2001 to 2004.

In response to the director's Request for Further Evidence (RFE) dated October 6, 2006, the petitioner submitted the petitioner's Form 1120S for tax years 2000 and 2005. The petitioner also submitted copies of the beneficiary's earnings statements for May 28, 2006 to October 15, 2006. In the petitioner's RFE response, the petitioner stated that the beneficiary received his Employment Authorization Card (EAD) in May 2006 and began working for the petitioner in June 2006. The petitioner also submitted copies of its accountant's paperwork for the petitioner's quarterly state of New York report on wages paid to each employee for the first and second quarter of tax year 2006, as well as the petitioner's state of New York Form NYS-45-MN that indicated the beneficiary earned \$900 dollars in the second quarter of tax year 2006. The record contains no further evidence with regard to the petitioner's ability to pay the proffered wage.

In the petitioner's response to the director's RFE, counsel stated that it was appropriate to submit the sole shareholder's Forms 1040 to the record as these forms showed the sole shareholder's ability to pay the beneficiary's proffered wage from their personal assets, as "befits their position as sole shareholders of the S Corporation petitioner." Counsel also asserted that based on the petitioner's tax structure and tax liability as an S Corporation, the petitioner's bank statements are not used as the sole basis to prove the petitioner's ability to pay the proffered wage, but rather they are submitted as incontrovertible evidence of the actual availability of funds to pay the petitioner's monthly proffered wage. Counsel stated that the petitioner's bank statements actually represent a valuable and probative objective measure to assess the instant petitioner's ability to pay the proffered wage. Counsel also tracked the petitioner's business operations from the 2001 priority year to tax year 2006, stating that in tax year 2001, the petitioner was affected by the events of September 11; in tax year 2002, it maintained its business operations, in tax year 2003, it increased its business; in tax year 2004, it maintained a

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 The petitioner's checking account, Number [REDACTED] is identified further as the "Lotto" account, while the checking account, Number [REDACTED] is identified as the petitioner.

viable business operation; in tax year 2005, it increased its business operations by 7 percent; and it showed continued stability in tax year 2006. Counsel finally referred to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in which a visa petition was approved when the petitioner's net profit was small and the petitioner showed a loss. Counsel asserted that similar to the petitioner in *Sonogawa*, the instant petitioner has never shown a loss since 2000, and that the petitioner has a reasonable expectation of increased income.

On appeal, counsel states that the director's analysis of the petitioner's tax returns is erroneous and contrary to generally accepted accounting principles. Counsel references the Yates memo⁴ of May 4, 2004, and the Vermont Service Center and American Immigration Lawyers Association (AILA) Liaison Teleconference Minutes of November 16, 1994 in support of the petitioner's ability to pay the proffered wage. Counsel reviews the definitions of net current assets, current assets and current liabilities, and then states that the petitioner's combined net income and net current assets in tax years 2001 through 2004 exceed the proffered wage, while the petitioner's net current assets in tax year 2005 were greater than the proffered wage. Counsel also reiterates that the financial assets of the petitioner are consistent with the petitioner in *Matter of Sonogawa*.

The evidence in the record of proceeding indicates that the petitioner is structured as a S corporation. On the petition, the petitioner claimed to have been established in 1997, and indicated gross annual income of \$593,635 and a net annual income of \$5,668. The petitioner also indicated that it currently employs four workers. On the Form ETA Form 750, Part B, which is not dated, the beneficiary did not claim to have worked for the petitioner.

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).

With the initial petition and in its response to the director's RFE, the petitioner submitted its bank checking account statements for two Northfield Savings checking accounts to the record. 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, 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 return, such as the petitioner's taxable

⁴ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's assertion that since the petitioner's average monthly balance for the respective tax years is greater than the monthly proffered wage the petitioner has established its ability to pay the proffered wage is also not viewed as persuasive. As noted by the director in her decision, in several months during the tax years 2001 to 2005, the petitioner's monthly balances in its checking account(s) were less than the beneficiary's monthly proffered wage. Further, the record is not clear that the balances for a checking account designated as the "Lotto," which presumably is a separate bank account for Lotto transactions, would ever be considered as available funds to pay the petitioner's salary responsibilities.

On appeal, counsel also asserts that the petitioner's net income and net current assets can be combined to establish the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

In the petitioner's response to the director's RFE, counsel appears to equate the corporate structure of an S corporation with the unincorporated structure of a sole proprietorship petitioner. In making this assertion, counsel contends that the personal assets of the sole shareholder are available to pay the proffered wage. Counsel's assertions are not viewed as persuasive. The AAO notes that these two businesses structures are distinct, and the features of one structure cannot be interchanged when analyzing the petitioner's ability to pay the proffered wage under the second structure. The petitioner as an S Corporation is an entity distinct from its sole shareholder. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, 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."

On appeal, counsel refers to the minutes of a liaison meeting between the Vermont Service Center and AILA, but makes no further reference to these minutes. The AAO notes that transcribed teleconference notes are not precedent. It is also noted that the AAO's authority over a service center is similar to that of a court of appeals and a district court. Even if a service center director had previously approved immigrant petitions based on these minutes, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Since counsel did not extrapolate anything of relevance between the instant petition and the AILA/Vermont Service Center, the AAO will comment no further on counsel's assertion.

With regard to the Yates memo, counsel drew attention to the second criterion outlined in this memo with regard to establishing the petitioner's ability to pay the proffered wage, namely if the petitioner's net current assets are equal to or greater than the proffered wage. The AAO consistently adjudicates appeals in accordance with the Yates memorandum. In the instant petition, as will be illustrated further in these proceedings, the petitioner's net current assets are greater than the proffered wage only in tax year 2005.

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 petitioner in the instant petition established that the beneficiary did not work for it as of the priority date, and that the beneficiary began working for it in June 2006, earning \$900 in the second quarter of tax year 2006.⁵ Thus, the petitioner cannot establish it paid the beneficiary a salary equal to or greater than the proffered wage as of the 2001 priority date. Thus, the petitioner has to establish its ability to pay the entire proffered wage of \$31,200 from either its net income or net current assets, as of the 2001 priority date and through tax year 2005.

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*

⁵ The record of proceeding closed as the petitioner's response to the director's RFE on January 3, 2007. Thus, the petitioner's 2006 tax return would not have been available. Since the petitioner's tax return for 2006 is not in the record, the AAO cannot determine if the petitioner's net income or net current assets in tax year 2006 were sufficient to pay the difference between the beneficiary's actual wages in tax year 2006 and the proffered wage. Thus, the AAO will not further comment on the petitioner's ability to pay the proffered wage in tax year 2006.

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 AAO notes that, as the director correctly pointed out, the petitioner's tax return for tax year 2000 is not necessarily dispositive in these proceedings because the priority date for the petition is April 27, 2001. The petitioner's remaining tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$31,200 per year from the priority date:

- In 2001, the Form 1120S stated a net income⁶ of \$6,630.
- In 2002, the Form 1120S stated a net income of \$5,056.
- In 2003, the Form 1120S stated a net income of \$20,133.
- In 2004, the Form 1120S stated a net income of \$5,668.
- In 2005, the Form 1120S stated a net income of \$1,252.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net income to pay the 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.⁷ 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

⁶Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, 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.). In the instant petition, the petitioner had no additional items to be reported on Schedule K. therefore the petitioner's net income is found on Line 21, of the Form 1120S for all relevant tax years examined in these proceedings.

⁷According 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.

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 net current assets during 2001 were \$24,448.
- The petitioner's net current assets during 2002 were \$29,504.
- The petitioner's net current assets during 2003 were \$29,504.
- The petitioner's net current assets during 2004 were \$29,504.
- The petitioner's net current assets during 2005 were \$77,048.

With regard to tax years 2001 to 2005, the petitioner only has sufficient net current assets to pay the entire proffered wage of \$31,200 in tax year 2005. Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner has 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, and in the petitioner's response to the director's RFE, counsel refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). This decision 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 *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. The petitioner has established that it has been a profitable business since the 2001 priority date and through tax year 2005. The petitioner's net current assets while positive, remained static during tax year 2002 to 2004, despite counsel's assertions of the petitioner's increased gross profits and viability of business operations in these years. The petitioner has not provided any further evidence as to its business profile in the retail store industry, such as the petitioner provided in *Sonogawa*.

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 Department of Labor. 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.