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U.S. Citizenship
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Services

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FILE:

EAC 06 071 52644

Office: NEBRASKA SERVICE CENTER

Date: OCT 28 2008

IN RE:

Petitioner:

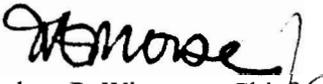
Beneficiary:

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 Acting Director (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 landscape contractor. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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).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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 17, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary filed prior to July 16, 2007 retains the same priority date as the original ETA 750. Memo. From Donald Neufeld, Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (CIS), to Regional Directors, *et al.*, *Interim Guidance Regarding the Impact of the [DOL's] final rule, Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, <http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf> (accessed February 26, 2008).

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 January 14, 1999. The proffered wage as stated on the Form ETA 750 is \$10.06 per hour (\$20,924.80 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or two years of experience as a "Landscape laborer, Gardening/Agricultural/Farming experience." Other special requirements for the proffered job include: verifiable job/character references; able to work overtime, weekends, Saturdays and holidays during peak season; willing to work outdoors in heat/cold; physically able to do heavy lifting, kneeling, stooping, etc.; arrange own transportation; and do not smoke/drink on 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.² On appeal, counsel submits a brief, a letter dated December 14, 2006 from [REDACTED] CPA; and copies of the petitioner's website pages. Relevant evidence in the record includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for 1999 through 2005.³ 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 petition, the petitioner claimed to have been established in 1951,⁴ and to currently employ 60+ workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 27, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that during 2000, the petitioner changed ownership,⁵ and that it reported depreciation and amortization totaling \$142,278. Therefore, counsel asserts that most of the petitioner's loss that year was a "paper" loss and that only \$22,000 was an actual loss. Counsel states that one "bad year" does not prevent the petitioner from making its payroll or continue to thrive in subsequent years. Further, pursuant to a letter dated December 14, 2006, [REDACTED], CPA states that the petitioner's lack of taxable

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 record also contains a copy of IRS Form 1120, U.S. Corporation Income Tax Return, for the petitioner for 1998. Evidence preceding the priority date in 1999 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

⁴ This office notes that the petitioner's tax returns indicate that it was incorporated on December 29, 1986.

⁵ The petitioner's tax returns indicate that in 1999, the petitioner was owned by [REDACTED] (44.14%), [REDACTED] (27.93%) and [REDACTED] (27.93%). In 2000, the petitioner was owned by [REDACTED] (50%) and [REDACTED] (50%). The petitioner has provided no evidence to establish how the departure of [REDACTED] negatively affected the profitability of the business. The assertions of counsel do not 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).

income is not an indicator of the petitioner's ability to pay the proffered wage; that two of the three tax returns relied upon by the director are over four years old and should not be relied upon;⁶ that cash flow from operations is sufficient to cover the proffered wage in all years except 2000; and that the petitioner's depreciation expense should be considered in the determination of its 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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage 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 as suggested by counsel and ██████████ on appeal. 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

⁶ The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date in 1999. *See* 8 C.F.R. § 204.5(d).

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, U.S. Corporation Income Tax Return. The record before the director closed on October 4, 2006 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 income tax return for 2005 is the most recent return available. The petitioner's tax returns demonstrate its net income for 1999 through 2005, as shown in the table below.

- In 1999, the Form 1120 stated net income of \$41,683.00.
- In 2000, the Form 1120 stated net income of -\$164,780.00.
- In 2001, the Form 1120 stated net income of \$108,731.00.⁷
- In 2002, the Form 1120 stated net income of \$149,177.00.
- In 2003, the Form 1120 stated net income of \$15,686.00.
- In 2004, the Form 1120 stated net income of \$31,952.00.
- In 2005, the Form 1120 stated net income of \$257,100.00.

Therefore, for the years 2000 and 2003, the petitioner did not have sufficient net income to pay the proffered wage. For the years 1999, 2001, 2002, 2004 and 2005, the petitioner had 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.⁸ 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 2000 and 2003, as shown in the table below.

⁷ The petitioner's accountant, [REDACTED], asserts that the director made an error in his determination of the petitioner's net income for 2001. [REDACTED] is correct. The director also incorrectly stated the petitioner's net income for 1999 and 2002.

⁸ 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.

- In 2000, the Form 1120 stated net current assets of -\$273,291.00
In 2003, the Form 1120 stated net current assets of \$19,441.00.⁹

Therefore, for the years 2000 and 2003, 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 except for 1999, 2001, 2002, 2004 and 2005.

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.

In the instant matter, the petitioner was incorporated in 1986 and has been in business for over 20 years. From 1998 to 2005, the petitioner's gross receipts totaled \$3,065,942; \$3,462,004; \$4,261,507; \$4,551,219; \$3,224,810; \$4,170,126; \$4,116,207; and \$4,857,012, respectively. From 1998 to 2005, the petitioner's salaries totaled \$32,821; \$73,665; \$185,350; \$236,086; \$143,750; \$200,107; \$151,847; and \$160,634; and its costs of labor totaled \$1,197,526; \$1,336,794; \$1,971,980; \$0¹⁰; \$1,222,918; \$1,671,363; \$1,755,118; and \$1,887,491, respectively. While counsel states that the petitioner changed ownership in 2000, the record does not demonstrate how that change negatively affected the petitioner's profitability that year. However, it is likely that the loss of [REDACTED] from [REDACTED] c. would have had some negative effect on the business that year. Thus, assessing the totality of the circumstances in this individual case, including the petitioner's substantial gross receipts and wages/costs of labor from 1998 through 2005, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

⁹ The director incorrectly stated the petitioner's net current assets for 2003.

¹⁰ It appears that the petitioner's costs of labor may have been included elsewhere on Schedule A to its IRS Form 1120S for 2001.

The evidence submitted establishes 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 met that burden.

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