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U.S. Citizenship
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Services

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FILE:

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Office: TEXAS SERVICE CENTER

Date: **SEP 26 2008**

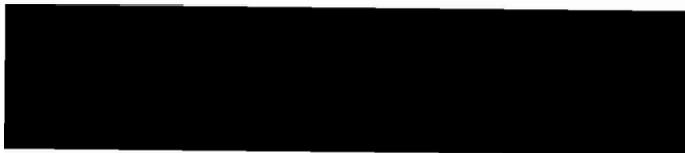
IN RE:

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, Texas 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 wholesaler/consolidator of airline tickets. It seeks to employ the beneficiary permanently in the United States as a travel agent. 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 December 19, 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 12, 1998. The proffered wage as stated on the Form ETA 750 is \$2,823.00 per month (\$33,876.00 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 customer service travel agent, plus the ability to speak Tagalog/English.

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 of Administration filed in the Los Angeles California Superior Court on October 31, 1997 indicating that [REDACTED] was appointed as administrator of the Estate of [REDACTED] who died intestate on August 21, 1997; a court order filed in the Los Angeles California Superior Court on August 21, 2001 indicating that City Tours and Travel, together with the cash and non-cash assets of the business, shall be distributed to [REDACTED] an Affidavit filed in the Los Angeles California Superior Court on November 27, 2001 by [REDACTED] indicating that the property and assets of the [REDACTED] have been distributed by the estate administrator; Articles of Incorporation of JAC Travel, Inc. dated October 31, 2001; Fictitious Name Statement filed in Los Angeles, California indicating that JAC Travel, Inc. operates under the fictitious name of City Tours & Travel, Inc.; IRS Forms 1120, U.S. Corporation Income Tax Returns, for JAC Travel, Inc. dba City Tours & Travel for 2002, 2003, 2004 and 2005; IRS Forms 1041, U.S. Income Tax Returns for Estates and Trusts, for the Estate of Virgilio Teves Pacana for 1998, 1999, 2000 and 2001; and various bank statements for JAC Travel, Inc. dba City Tours & Travel, Inc. from Bank of America and Wells Fargo. 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 was structured as a sole proprietorship until November 7, 2001, and has been structured as a C corporation since November 7, 2001.³ On the petition, the petitioner claimed to have been established in 1978, to have a gross annual income of \$20,711,482, and to currently employ 11 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 February 24, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner has been in business since 1978 and that the sole proprietor died in 1997, at which time the business was placed under the management of a court-appointed administrator. Pursuant to a court order dated August 21, 2001, counsel states that the petitioner's business, including its cash and non-cash assets, was distributed to [REDACTED]. Counsel states that [REDACTED]

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 sole proprietor died on August 21, 1997, and therefore, the sole proprietor's estate's administrator filed tax returns on behalf of the petitioner for tax years 1998, 1999, 2000, and 2001. JAC Travel, Inc. has established that it is the successor-in-interest to City Tours & Travel.

incorporated the petitioner in November 2001 under the name JAC Travel, Inc. and that the petitioner, City Tours and Travel, is the fictitious name of JAC Travel, Inc. Counsel states that the downturn in profitability in 1998 and 1999 was merely of a temporary nature and the result of the death of the petitioner's owner. Counsel further asserts that the petitioner's business experienced a downturn in 2001 due to the events of September 11, 2001. Counsel states that the airline and tourism industries were particularly affected by those events. Counsel further states that the petitioner is one of five U.S. sales agencies for Philippine Airlines in the Los Angeles, California area and that it also has travel agreements with other airlines to serve as an airline ticket consolidator. Counsel further states that the petitioner maintains substantial checking accounts with two separate banks.⁴ Based on all of these factors, counsel asserts that 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, 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. 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

⁴ This office notes that 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.

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 business overseen by the administrator of a sole proprietor's estate, the petitioner's business-related income and expenses are reported on Schedule C and are carried forward to the first page of the Form 1041, U.S. Income Tax Return for Estates and Trusts. Like a sole proprietor, the estate administrator must show that the petitioner can cover its existing expenses as well as pay the proffered wage out of its adjusted total income or other available funds. For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 1998 through 2005, as shown in the table below.

- In 1998, the Form 1041 stated adjusted total income of \$29,026.00.
- In 1999, the Form 1041 stated adjusted total income of \$98,498.00.
- In 2000, the Form 1041 stated adjusted total income of \$79,780.00.
- In 2001, the Form 1041 stated adjusted total income of \$20,564.00.
- In 2002, the Form 1120 stated net income of \$29,448.00.
- In 2003, the Form 1120 stated net income of \$55,286.00.
- In 2004, the Form 1120 stated net income of \$48,455.00.
- In 2005, the Form 1120 stated net income of \$50,505.00.

Therefore, for the years 1998, 2001, and 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$33,876.00. For the years 1999, 2000, 2003, 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. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. In 2002, the petitioner's Form 1120 stated net current assets of \$175,706.00. Therefore, for

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the year 2002, the petitioner had sufficient net current assets to pay the proffered wage. The petitioner did not submit evidence establishing its net current assets for 1998 and 2001.

Therefore, in 1998 and 2001, 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.

However, 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.

On appeal, counsel asserts that the petitioner has been in business since 1978 and that the sole proprietor died in 1997, at which time the business was placed under the management of a court-appointed administrator. Counsel states on appeal that the downturn in the petitioner's profitability in 1998 was merely of a temporary nature and the result of the death of the petitioner's owner. Counsel further asserts that the petitioner's business experienced a downturn in 2001 due to the events of September 11, 2001. Counsel states that the airline and tourism industries were particularly affected by those events. The petitioner's tax returns indicate that it had substantial gross receipts of \$3,203,843, \$5,232,202, \$5,472,883, \$2,692,379, \$2,003,546, \$11,869,682, \$16,865,925, and \$16,813,956 in 1998, 1999, 2000, 2001, 2002, 2003, 2004 and 2005, respectively. Although the petitioner did not establish its ability to pay the proffered wage in 1998 and 2001 through its net income or net current assets, the petitioner experienced uncharacteristic business losses both years. The petitioner maintained substantial gross receipts and continued to pay its employees despite the downturn in both years, and the petitioner has been in business for 30 years. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing 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.