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U.S. Citizenship
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Services

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AUG 10 2007

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC 06 800 05909

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

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.

A handwritten signature in black ink, appearing to read "RWiemann".

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 petitioner is a supermarket. It seeks to employ the beneficiary permanently in the United States as an executive secretary. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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

As set forth in the director's original March 8, 2006, 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 or seasonal nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is December 2, 2005. The proffered wage as stated on the Form ETA 9089 is \$36,504 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a copy of the petitioner's 2004 Form 1120X, Amended U.S. Corporation Income Tax Return, a copy of the corrected 2004 Form 1120, U.S. Corporation Income Tax Return, and a copy of the petitioner's 2005 Form 1120. Other relevant evidence includes a copy of the petitioner's original 2004 Form 1120 and a copy of the petitioner's unaudited 2004 profit and loss statement.² The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's original 2004 Form 1120 reflects a taxable income before net operating loss deduction and special deductions or net income of \$53,007, and the original 2004 Form 1120 also reflects net current assets of \$906.

The petitioner's 2004 Form 1120X reflects a change in total income from \$346,617 to \$398,736, and the petitioner's corrected Form 1120 reflects a taxable income before net operating loss deduction and special deductions or net income of \$99,539 with net current assets of \$47,438.

The petitioner's 2005 Form 1120 reflects a taxable income before net operating loss deduction and special deductions or net income of \$44,051 and net current assets of \$47,797.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage of \$36,504 based on the inclusion of its net operating loss (NOL) in prior years, total assets, and growth from 2004 to 2005. Counsel states:

Please observe that there is no taxable income on line 30 [2004], because this company had a carried loss from prior years, but if you look on line 28 you will find that this company was profitable during this fiscal year and the profit was for US\$99,539.00 (ninety nine thousand five hundred and thirty nine dollars). Also, you will find that the inventory was not properly recorded on original return, and as result of this [sic] changes the new total assets recorded on Schedule L is in the amount of US\$113,815 (one hundred and thirteen thousand and eight hundred and sixteen dollars), also an adjustment to the current accounts payables as of December 2004 was done in the amount of US\$35,780 (thirty five thousand seven hundred and eight dollars) also as of December 2004, [the petitioner] has currently [sic] liabilities to it's [sic] shareholders in the amount of US\$135,998 (one hundred thirty five thousand nine hundred and ninety eight dollars). This amendment has been filed with the Department of Treasury and all necessary changes have been made (Please see the copy of the Post Office envelope attached – Doc. 1)

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).

² Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In reference to Income Tax Return for 2005, you will observe a considerable growth in the business sales. This business has increased in sales from US\$946,496 (nine hundred forty six thousand and four hundred and ninety six dollars) to US\$1,378,152 (one million three hundred seventy eight thousand and one hundred and fifty two dollars). Also on Schedule L, the total assets properly recorded, including inventory is in the amount of US\$158,535 (one hundred and fifty eight thousand five hundred and thirty five dollars).

In regards to the taxable income on line 30, this entity is still benefiting from carryover losses from prior years, but has recorded a profit in the amount of US\$49,812 (forty nine thousand eight hundred and twelve dollars). The current accounts payable as of December of 2005 is US\$74,830 (seventy four thousand eight hundred thirty dollars) also as of December of 2005 the petitioner has current liabilities to it's [sic] shareholders in the amount of US\$98,852 (ninety eight thousand eight hundred and fifty two dollars), which shows a start on return of initial investments. (Please see 2004 and 2005 income tax return – Doc. 2)

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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 9089, signed by the beneficiary on December 16, 2005, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary, to demonstrate that it employed the beneficiary in the pertinent year, 2005. Therefore, the petitioner has not established that it employed the beneficiary from the priority date of December 2, 2005.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by 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. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no

precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054. *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* at 537.

For a “C” corporation, CIS considers net income to be the figure shown on line 28 of the petitioner’s Form 1120, U.S. Corporation Income Tax Return. The petitioner’s tax returns demonstrate that its net incomes in 2004 and 2005 were \$53,007 (original 2004 Form 1120), \$99,539 (corrected 2004 Form 1120), and \$44,051, respectively. The petitioner has established that it could have paid the proffered wage of \$36,504 from its net income of \$99,539 in 2004 and \$44,051 in 2005.³

Nevertheless, the petitioner’s net income is not the only statistic that can be used to demonstrate a petitioner’s ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner’s assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the

³ It is noted that the director used line 30 of the Forms 1120 in determining the petitioner’s ability to pay the proffered wage of \$36,504. However, the net operating loss (NOL) deduction is an exception to the general income tax rule that a taxpayer’s taxable income is determined on the basis of its current year’s events. This deduction allows the taxpayer to offset one year’s losses against another year’s income. The NOL for a company can generally be used to recover past tax payments or reduce future tax payments. When carried back, the NOL reduces the taxable income of the relevant earlier year, resulting in a recomputation of the tax liability and a refund or credit of the excess amount paid. Carryovers produce a similar reduction in the taxable income of later years, and this reduces the tax payable when the return is filed. The primary purpose of the NOL deduction is to ameliorate the effect of the annual accounting period by treating businesses with widely fluctuating income more nearly in accord with steady-income businesses.

If a corporation carries forward its NOL, it enters the carryover on Schedule K, Form 1120, line 12. It also enters the deduction for the carryover on line 29(a) of Form 1120 or line 25(a) of Form 1120-A. However, the carryover cannot be more than the corporation’s taxable income after special deductions. See 26 C.F.R. §1.172-4 and 26 C.F.R. §1.172-5. See also Corporations, I.R.S. Pub. No. 542, at 15-16 (2006), <http://www.irs.gov/pub/irs-pdf/p542.pdf> (accessed April 2, 2007). Because a petitioner’s NOL is related to another year’s outcome, it should be omitted from the analysis of the petitioner’s “bottom line” ability to pay the proffered wage in a certain year. CIS disregards NOL in C corporations by using Line 28 (taxable income before NOL deduction and special deductions) of the IRS Form 1120 in our computation of net income.

proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2004 and 2005 were \$47,438 (corrected 2004 Form 1120), and \$47,797, respectively. The petitioner could have paid the proffered wage of \$36,504 from its net current assets in 2004 and 2005.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$36,504 based on the inclusion of its net operating loss (NOL) in prior years, total assets, and growth from 2004 to 2005.

Counsel is correct for the wrong reasons. As stated above, the petitioner has shown that it had sufficient funds to pay the proffered wage of \$36,504 for either its net income or its net current assets in 2004 and 2005.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The director's decision of March 8, 2006 is withdrawn. The petition is approved.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.