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U.S. Citizenship
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Services

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FILE:

[REDACTED]
WAC 04 131 52706

Office: CALIFORNIA SERVICE CENTER

Date: FEB 06 2007

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

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:

[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.

1 .
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the third preference immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a construction general contractor. It seeks to employ the beneficiary permanently in the United States as a combination welder. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) 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 was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$13.85 per hour, which equals \$28,808 per year.

The Form I-140 petition in this matter was submitted on April 2, 2004. On the petition, the petitioner stated that it was established on December 4, 1992 and that it employs 30 workers. The petition states that the petitioner's gross annual income is \$1,579,948 and that its net annual income is \$24,469.99. On the Form

ETA 750, Part B, signed by the beneficiary on May 8, 2001, the beneficiary did not claim to have worked for the petitioner.

The approved Form ETA 750 indicates that the petitioner would employ the beneficiary in Dededo, Guam. The Form I-140 petition indicates that the petitioner would employ the beneficiary in Harmon, Guam. This office notes that both Harmon and Dededo are located in Guam County. As such, the Form ETA 750 approved for employment in Dededo is valid for employment in Harmon.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) a letter dated March 25, 2004 from [REDACTED] who is identified as a corporate officer of the petitioner, (2) the petitioner's 2001, 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (3) the petitioner's 2004 W-3 wage transmittal, (4) the petitioner's Guam Department of Revenue and Taxation Employer Quarterly State Wage Report, (5) Guam monthly tax returns for February, March, April, May, June, and July 2005, (6) letters dated March 11, 2004 and July 22, 2005 from the petitioner's accountant, (7) the petitioner's compiled financial statements for 2004 and the first half of 2005, (8) contracts and other documents pertinent to the petitioner's construction projects, both pending and underway, (9) monthly statements pertinent to the petitioner's bank account at the end of January, February, April, May, and June of 2005, and (10) various documents pertinent to the promising future of the construction industry in Guam. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In his March 25, 2004 letter [REDACTED] cited the petitioner's gross receipts and its depreciation deductions, along with its pending construction projects and its profits, as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on December 4, 1992, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2001 tax return shows that during that year the petitioner declared a loss of \$68,144.77 as its taxable income before net operating loss deductions and special deductions. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2002 tax return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$6,280.89 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's 2003 tax return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$24,469.99 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2004 tax return shows that the petitioner declared taxable income before net operating loss deductions and special deductions of \$106,274 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$98,272 and current liabilities of \$45,444, which yields net current assets of \$52,828.

The petitioner's 2004 W-3 wage transmittal shows that it paid \$750,609.45 to its employees during that year. The petitioner's quarterly wage report covers the second quarter in 2005. It shows that the petitioner employed 48 workers during that quarter but does not show that it employed the beneficiary.

The monthly returns submitted show cash basis gross receipts ranging from \$75,563 to \$263,280.96 during the months they cover.

The petitioner's accountant's March 11, 2004 letter notes that a depreciation deduction does not require any expenditure during the year taken. That letter further stated that, "the poor state of the economy on Guam in 2001 was a result of world events that had greatly affected the construction industry and can explain the loss for that year." Finally, the accountant stated, "Additionally, as of December 31, 2003 the tax returns show that [REDACTED] had net assets of \$157,842.80."

The petitioner's accountant's July 22, 2005 letter cited the petitioner's depreciation deductions during the salient years, added to its net income, as evidence of its ability to pay the proffered wage. The accountant further asserted that the construction industry was depressed in Guam during 2001 but had improved during 2004 and the first half of 2005.

The evidence pertinent to the construction industry on Guam in general included a news release from a congresswoman's office. That news release announced passage by the house of representatives of a bill doubling defense spending in Guam. That spending includes a planned Naval Station and a National Guard Facility. Counsel also provided a copy of the bill, H.R. 1815.

An article dated November 15, 2004 notes that a large construction company is coming to Guam. That article also notes that spending on large Federal projects on Guam has recently been approved.

An article dated January 19, 2006 from the Marianas Business Journal states that skilled labor is in high demand and short supply on Guam due to an increase in construction business.

A letter from the Executive Director of the Guam Contractors' Association dated July 22, 2005 and addressed To Whom This May Concern states that Guam suffered a recession in the construction industry during 2001 and 2002. It also states that 2003 and 2004 appear to have been more promising and that large military spending is projected during the next five to eight years. The purpose for which that letter was issued is unclear.

The director denied the petition on June 20, 2005 finding that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. In that decision the director stated that the petitioner had three other petitions pending and must show the ability to pay the proffered wage of all beneficiaries for whom petitions are pending or approved.

On appeal, counsel reiterated the arguments previously interposed. Counsel also asserted that the petition should be approved pursuant to the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The assertions of counsel and the accountant that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.² Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel's reliance on the unaudited financial statements in the record 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. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered.

The assertion that the petitioner's gross receipts somehow show its ability to pay the proffered wage is unconvincing. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded

² Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

the proffered wage, is insufficient. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses³ or otherwise increased its net income,⁴ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (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 CIS should have considered income before expenses were paid rather than net income.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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. (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the

³ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁴ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁵ shown on lines 16(d) through 18(d). If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

The priority date is March 14, 2001. The proffered wage is \$28,808 per year.

The record indicates that the petitioner had three⁶ other alien worker petitions pending during the pendency of the instant petition. The records pertinent to those other petitions are not readily available to this office. Because the petitioner must show the ability to pay the wage proffered to all of the beneficiaries this office is forced to make an assumption of the amount offered in those other cases. This office will assume, for computation purposes in the instant case, that the wages proffered in those other cases is the same as that offered in the instant case.⁷ The petitioner is obliged to show the ability to pay \$115,232⁸ per year during each of the salient years.

During 2001 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wages out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wages out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal during 2001. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2001 with its tax returns.

⁵ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁶ The decision of denial states that the petitioner had filed three other Form I-140 petitions. The receipt numbers for these petitions are: WAC 04 132 52506, WAC 04 045 52718, and WAC 04 131 50731.

⁷ If this assumption is incorrect and prejudices the petitioner's case the matter may be redressed on motion.

⁸ \$28,808 x 4

During 2002 the petitioner declared taxable income before net operating loss deductions and special deductions of \$6,280.89. That amount is insufficient to pay the aggregate amount of the wages the petitioner has proffered to its alien beneficiaries. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wages out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal during 2002. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2002 with its tax returns.

During 2003 the petitioner declared taxable income before net operating loss deductions and special deductions of \$24,469.99. That amount is insufficient to pay the aggregate amount of the wages the petitioner has proffered to its alien beneficiaries. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wages out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal during 2003. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2003 with its tax returns.

During 2004 the petitioner declared taxable income before net operating loss deductions and special deductions of \$106,274. That amount is insufficient to pay the aggregate amount of the wages the petitioner has proffered to its alien beneficiaries. At the end of that year the petitioner had net current assets of \$52,828. That amount is also insufficient to pay the sum of the wages proffered. The petitioner provided no reliable evidence of any other funds at its disposal during 2004. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage during 2004 with its tax returns.

The tax returns do not show that the petitioner was able to pay the proffered wage beginning on the priority date and continuing throughout the salient years. Counsel asserts, however, that the petition should be approved pursuant to the opinion in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonogawa, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonogawa*, 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 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 that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage.

Although the petitioner's accountant asserted that the recession in construction on Guam during and immediately after 2001 was due to the tragic events of September 11, 2001 in New York, Virginia, and Pennsylvania he provided no additional evidence to support that assertion nor even cited a reasonable basis for believing it. This office is unable to find that a recession in the construction industry in Guam was occasioned by the events near the East Coast of the United States, roughly halfway around the world.

Evidence in the record, however, indicates that the construction business on Guam was very poor during 2001 and 2002, that it is now better, perhaps even booming, and that it is likely to continue to improve further. Evidence in the record shows that the petitioner has been awarded various large construction contracts. Evidence in the record indicates that the petitioner's business is increasing. Further, during each successive year during the salient period the petitioner has been successively more profitable by a large margin.

The cause of the petitioner's low profits during the salient years is unclear. The totality of the factors in the record, however, appears to indicate that the petitioner now has the ability to pay the proffered wage and will continue, through the foreseeable future, to have that ability.

The burden of proof in these proceedings rests solely upon 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.