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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 0 6 2007

EAC 04 103 51813

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:

SELF-REPRESENTED

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

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a jewelry company. It seeks to employ the beneficiary permanently in the United States as a stone setter. 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 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed,[1] 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 July 29, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 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 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).

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[1] Counsel in its cover letter with the initial I-140 petition states that he submitted a Form G-28 with the petition. The AAO found no Form G-28 for counsel in the record, and on May 18, 2007, sent a FAX to the attorney who submitted the I-140 petition and appeal with regard to submitting a proper G-28 to the record. The AAO has received no response, and thus considers the petitioner to be self-represented.

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $19.81 per hour ($41,204.80 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 appeal.[2] On appeal, The petitioner's complete Forms 1120S for tax years 2001, 2002, and 2003 with attachments and statements, are submitted. A copy of a Citizenship and Immigration Services (CIS) interoffice memorandum that addresses the adjudication of petitions involving determination of the petitioner's ability to pay the proffered wage is submitted,[3] as well as a letter previously submitted to the record from [redacted][4] the petitioner's owner. This letter, dated March 23, 2005, states the petitioner had more than enough income to pay the beneficiary's proffered wage as of the 2001 priority date. The petitioner's owner states that the petitioner's 2003 tax return showed ordinary income of $31,678, with gross sales in excess of $500,000, current assets of $209,270 and current liabilities of $1,759. The petitioner's owner also states that the business was organized on March 27, 1989, and that it currently employed two stone setters, who are currently paid in the range of $16 to $20 an hour.[5] Other relevant evidence in the record includes the first page of the petitioner's Forms 1120S for tax year 2001, 2002, and 2003, submitted in response to the director's request for further evidence. 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 an S corporation. On the petition, the petitioner claimed to have been established on May 1, 1998, to have a gross annual income of $1,148,471, and to currently employ 20 workers. On the Form ETA 750B, signed by the beneficiary on February 16, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that in response to the director's request for further evidence, the petitioner submitted the first page of its Forms 1120S for tax year 2001, and 2002, and the first four pages of its Forms 1120S for tax year 2003. The petitioner states that based on the net income identified in the petitioner's Forms 1120S, the petitioner had sufficient net income in these two years to pay the beneficiary's entire wage.[6] The petitioner refers to the Yates memo, and states that this memo established that a company can establish its ability to pay the proffered if either its net income is equal to or greater than the proffered wage, or the initial evidence reflects that the petitioner's net current assets are equal to or great than the proffered wage.

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[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 reason to preclude consideration of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will address this issue further in these proceedings.

[3] 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).

[4] The petitioner's tax returns indicate that the two shareholders are identified as Cyrus Namdar and Ramin Namdar.

[5] The petitioner's tax returns indicate that the petitioner paid $8,100, $0, and $11,750 in salaries and wages in 2001, 2002 and 2003, respectively.

[6] Counsel identifies the figure on line 21 on the front page of both tax returns as the petitioner's ordinary or net income. The front pages of the petitioner's Forms 1120S for tax years 2001, 2002, and 2003 indicate the following ordinary income: $85,195, in tax year 2001, $63,798 in tax year 2002, and $31,678 in tax year 2003.

Counsel states that the petitioner submitted its first four pages of its tax return for 2003 which established that while its net income was $31,678 in that year, its current assets were $209,170 and its current liabilities were $1,750. Counsel states that these figures would clearly establish the petitioner's ability to pay the proffered wage in tax year 2003, even with insufficient net income. Counsel states that sufficient initial evidence was submitted to the record to establish the petitioner's ability to pay the proffered wage for the period of time in question, and that the petitioner has met its burden of establishing eligibility for the benefits sought.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Although the petitioner on appeal states that it submitted sufficient initial evidence to establish the petitioner's ability to pay the proffered wage, and also asserts that the petitioner submitted the first pages of its tax returns for 2001 and 2002, and the first four pages of its tax return for 2003 in response to the director's request for further evidence, the record does not further substantiate the petitioner's assertions. The record reflects that the petitioner submitted the first page of its 2001 Form 1120S tax return with the initial petition, which is clearly insufficient to determine whether the petitioner has the ability to pay the proffered wage as of the 2001 priority date and to the date the beneficiary receives lawful permanent residence. Furthermore the record reflects that the director requested the petitioner's complete federal income tax returns, with all schedules and attachments for tax years 2000, 2001, 2002, and 2003. The record further reflects that in response to the director's request, the petitioner resubmitted the first page of its 2001 tax return, and then submitted for the first time the first page of its 2002 and 2003 tax returns. The record does not reflect that the petitioner submitted its tax returns for tax years 2000, 2001, 2002, and 2003, with attachments and schedules as requested by the director. [7]

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry may be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant petition, it is noted that the petitioner did submit part of the evidence requested by the director, and that the first page of complete tax returns submitted on appeal are identical to the first pages submitted with the initial petition, or in response to the director's request for further evidence. While the petitioner provides no explanation on appeal for why it did not submit the complete tax returns earlier, there does not appear to be any misrepresentation with regard to the tax returns in question. Therefore, the AAO will accept the complete tax returns submitted on appeal in these proceedings.

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

[7] The AAO notes that it is not clear why the director requested the petitioner's tax return for tax year 2000. Since the priority date for the instant petition is April 2001, the petitioner's tax return for 2000 would not be considered probative evidence in these proceedings.

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 during any relevant timeframe including the period from the priority date in 2001 or subsequently. Thus, the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2003.

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 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.

Where 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For purposes of these proceedings, in the instant petition, the AAO will consider the sums identified on lines 23, Income (loss), Schedules K, as the petitioner's net income for tax years 2001 and 2002.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $41,204.80 per year from the priority date:

- In 2001, the Form 1120S, Schedule K, stated net income[8] of $83,085.
- In 2002, the Form 1120S, Schedule K, stated net income of $60,582.
- In 2003, the Form 1120S stated net income of $31,678.

Therefore, for the years 2001 and 2002, the petitioner did have sufficient net income to pay the proffered wage; however, the petitioner did not have sufficient net income, based on its net income in tax year 2003, to pay the proffered wage of $41,204.80 in tax year 2003.

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, including real property that counsel asserts should be considered. 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.[9] 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 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 2003 were $207,420. Therefore, for the year 2003, the petitioner did have sufficient net current assets to pay the proffered wage.

Therefore from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has 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.

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.

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[8] The petitioner's income (loss) identified on line 23, Schedule K, of the respective tax return.

[9] 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.