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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 06 081 50180 Office: NEBRASKA SERVICE CENTER Date: OCT 25 2007

IN RE: Petitioner: [redacted]
Beneficiary:

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a homemade meat and kielbasa business. It seeks to employ the beneficiary permanently in the United States as a butcher. As required by statute, a Form ETA 750, Application for Alien 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 proffered wage from the priority date. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original September 20, 2006 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of January 2, 2004.

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 either 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 750 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 May 23, 2003. The proffered wage as stated on the Form ETA 750 is $16.43 per hour or $34,174.40 annually.

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[1]. Relevant evidence submitted on appeal includes counsel's statement, a copy of the petitioner's 2005 Form 1120, U.S. Corporation Income Tax Return, for the fiscal year July 1, 2005 through June 30, 2006, copies of the 2004 and 2005 Forms W-2, Wage and Tax Statements, for [redacted], issued by the petitioner on behalf of [redacted] copies of the 2004 and 2005 Forms W-2 for [redacted] issued by the petitioner on behalf of [redacted] copies of the 2003 through 2005 Forms W-2 for [redacted] issued by the petitioner on behalf of [redacted], and copies of the petitioner's previously submitted 2003 and 2004 Forms 1120 for the fiscal years July 1 through June 30 each year. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2003 through 2005 Forms 1120 for the fiscal years July 1 through June 30 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of $5,804, $5,999, and $16,080, respectively. The petitioner's 2003 through 2005 Forms 1120 also reflect net current assets of -$33,517, -$11,231, and $3,899, respectively.

The 2004 and 2005 Forms W-2 for [redacted] reflect wages paid by the petitioner to [redacted] of $33,968.27 in 2004 and $35,721.37 in 2005.

The 2004 and 2005 Forms W-2 for [redacted] reflect wages paid by the petitioner to [redacted] of $35,009.58 in 2004 and $31,902.80 in 2005.

The 2003 through 2005 Forms W-2 for [redacted] reflect wages paid by the petitioner to [redacted] of $36,392.50 in 2003, $38,342.50 in 2004, and $39,195.00 in 2005.

On appeal, counsel asserts:

> [that] the petitioner has the ability to pay the prevailing wage. In the first place, the petitioner's Federal Tax Returns for 2003 and 2004 show gross profit of more than $350,000. Additionally, the AAO has broadened its view of the "ability to pay" by holding that as long as the employer is actually paying the proffered wage when the priority date is established (2003), the case should not be denied for lack of financial ability to pay the proffered wage. *See Matter of Quintero-Martinez,* 8 C.F.R. § 204.5(g)(2). Thus, where the foreign worker has been employed, copies of payroll check, W-2 Forms should evidence the employer's ability to pay such wage. The employer's ability to pay must be a figure "reasonably determined to have been the prevailing wage." *Masonry Masters, Inc. v. Thornburgh,* 742 F.Supp. 682 (D.D.C. 1990). Since the beneficiary is not in the United States and has not worked for the petitioner, the only other means of determining the petitioner's ability to pay are payroll records of his present employees who are working the same employment capacity as an instant offer of employment. We are submitting copies of employment records of the 3 current employees of the petitioner: [redacted] who are employed as meat cutters and their salaries are respectively $36,392.50,

[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).

> $33,968.27, & $31,902.80, which is about $34,174 as stated on the labor certification. Therefore, the petition should be granted.

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).

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 750, signed by the beneficiary, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2 or Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, as evidence that the petitioner employed the beneficiary in the pertinent years (2003 through 2005). Therefore, the petitioner has not established that it employed the beneficiary in 2003 through 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 2003 through 2005 were $5,804, $5,999, and $16,080, respectively. The petitioner could not have paid the proffered wage of $34,174.40 out of its net income in those years.

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 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.[2] 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 2003 through 2005 were -$33,517, -$11,231, and $3,899, respectively. The petitioner could not have paid the proffered wage of $34,174.40 from its net current assets in those years.

On appeal, counsel points to the salaries of three of the petitioner's current employees and claims "the only other means of determining the petitioner's ability to pay are payroll records of his present employees who are working in the same employment capacity as the instant offer of employment." Counsel cites *Masonry Masters, Inc. v. Thornburg* and *Matter of Quintero-Martinez* in support of his contention.

Counsel contends that the petitioner need not pay the proffered wage if it has paid the prevailing wage, citing *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990), *remanded* in 875 F.2d 898 (D.C. Cir. 1989). That holding is not binding outside the District of Columbia, and it does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns. The Court held that CIS should not require a petitioner to show the ability to pay more than the prevailing wage. Counsel has not shown a difference between the proffered wage and the prevailing wage in this proceeding, and the petitioning organization is not located in the District of Columbia. *See also, Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

Counsel cites *Matter of Quintero-Martinez* and states that "the AAO has broadened its view of the "ability to pay" by holding that as long as the employer is actually paying the proffered wage when the priority date is established (2003), the case should not be denied for lack of financial ability to pay the proffered wage." Counsel claims that because the petitioner has been paying similar wages to three other employees in a similar position, the petitioner has shown its ability to pay the proffered wage of $34,174.40.

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[2] 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.

Counsel is mistaken. In the instant case, a review of the record of proceeding does not show, in the context of the beneficiary's employment, that the record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage. Counsel has not submitted any Forms W-2 or Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, that establish that the proffered wage of $34,174.40 was actually paid to the beneficiary. In fact, counsel admits that the beneficiary is not in the United States and has never worked for the petitioner. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, although counsel states that the petitioner is already paying similar wages to three other employees in a similar position, wages already paid to others are generally not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Furthermore, counsel has not suggested nor is there is any evidence that the beneficiary will replace these three workers or receive their wages. Therefore, it would be inappropriate to consider the wages paid to the three workers as evidence of the petitioner's ability to pay the proffered wage.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 1970. The petitioner has provided tax returns for the years 2003 through 2005 with none of those tax returns establishing the petitioner's ability to pay the proffered wage of $34,174.40. There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, there is no evidence of the petitioner's reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

For the reasons stated above, the petitioner has not established its ability to pay the proffered wage of $34,174.40 from the priority date of May 23, 2003 and continuing to the present.

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 not been met.

ORDER: The appeal is dismissed.