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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 02 2009
WAC 06 122 52633

IN RE: Petitioner:
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting 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 dismissed.

The petitioner is a tree service business. It seeks to employ the beneficiary permanently in the United States as a tree surgeon. 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 November 13, 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 August 14, 1997.

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 [U.S. Citizenship and Immigration Services (USCIS)].

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 C.F.R. § 204.5(d). The priority date in the instant petition is August 14, 1997. The proffered wage as stated on the Form ETA 750 is $8.75 per hour or $18,200 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 brief and a partial copy of the petitioner's previously submitted 2005 Form 1120, U.S. Corporation Income Tax Return. Other relevant evidence includes partial copies of the petitioner's 1997 through 2002 and the 2004 Forms 1120, copies of the 2002 through 2004 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, and copies of pay stubs, issued by the petitioner on behalf of the beneficiary for the time periods ending December 9, 2005 and January 20, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 1997 through 2002 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of $88,760, -$91,613, -$47,447, -$29,477, $51,674, and -$103,799, respectively.

The petitioner's 2004 and 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of $39,440 and $53,337, respectively. The petitioner's 2005 Form 1120 also reflects net current assets of -$31,021. The petitioner did not submit Schedule Ls for the 1997 through 2002 and 2004 tax returns. Therefore, the AAO is unable to determine the petitioner's net current assets for those years.

The 2002 through 2004 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid by the petitioner to the beneficiary of $22,139.00, $5,376.00, and $33,504, respectively.

The 2005 pay stub issued by the petitioner on behalf of the beneficiary reflects year-to-date wages of $32,080 as of December 9, 2005, and the 2006 pay stub issued by the petitioner on behalf of the beneficiary reflects year-to-date wages of $2,816 as of January 20, 2006.[2]

On appeal, counsel asserts:

> It should be noted that the employer has been in business for approximately 11 years and has consistently grossed between 2 ½ to over 3 million dollars each year. Like

[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).

[2] It is noted that the rate of pay listed on the 2006 pay stub is $16.00 per hour. Therefore, if the petitioner continued paying the beneficiary at this rate of pay, the beneficiary would have earned more than the proffered wage in 2006 ($16 per hour x 40 hours per week = $640 per week; $640 per week x 52 weeks = $33,280 per year).

every other business, they take advantage of legal tax deductions that apply, making the amount they pay taxes on much smaller than the gross income.

It is common for corporations to show either no taxable income or a loss for tax purposes. In this case, the employer shows for the year 2005 Schedule L corporation end-of-the year net current assets as $384,769.

It's [sic] year end liabilities for 2005 16(d) through 18(d) as [sic] $132,584. Thus, the employer could have paid the preoffered [sic] wage for 2005. It should also be noted that this has also been the case since the original job offer was made [in] April 1997.

It is also noteworthy at this time to bring out the fact that Congress has requested an amendment to 8 C.F.R. § 204.5(g)(2) by eliminating specific reference to ability to pay and replacing it with the staturoty [sic] requirement that petitioner establish its bona fides as a U.S. employer which includes viability, length of time in business, and high gross income, which in this case would be approximately 3 million per year.[3]

It is our understanding that Congress intends to implement this change as soon as a new Immigration Law is acted upon, in addition to other changes.

It should also be noted that when the employer originally made the job offer in 1997, they were aware that it would be at least 5 to 6 years before a labor certification could be obtained and at least an additional 2 years before a petition could be filed and processed.

They were aware at filing time that they would be losing qualified employees in the above period of time either by retirement or other reasons, such as resident relocations. In this respect, the beneficiary would assume the income of the departing employees.

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, USCIS 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).

[3] The AAO is bound to follow the current regulations and statutes as they are currently written.

In determining the petitioner's ability to pay the proffered wage, USCIS 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 on May 28, 1997, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has submitted the 2002 through 2004 Forms W-2, issued by the petitioner on behalf of the beneficiary, and pay stubs, issued by the petitioner on behalf of the beneficiary for the time periods ending December 9, 2005 and January 20, 2006, as proof that the beneficiary was employed by the petitioner in 2002 through part of 2006. Therefore, the petitioner has established that it employed the beneficiary in 2002 through part of 2006.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of $18,200 and the actual wages paid to the beneficiary in 2002 through 2005. In 2002, the beneficiary was compensated $22,139 by the petitioner or $3,939 more than the proffered wage of $18,200. Therefore, the petitioner has established its ability to pay the proffered wage of $18,200 in 2002. In 2003, the beneficiary was compensated $5,376 or $12,824 less than the proffered wage of $18,200 in 2003. Therefore, the petitioner is obligated to show that it had sufficient funds to pay $12,824 in 2003. In 2004, the beneficiary was compensated $33,504 or $15,304 more than the proffered wage of $18,200. Therefore, the petitioner has established its ability to pay the proffered wage of $18,200 in 2004. In 2005, the beneficiary was compensated $32,080 (according to pay stubs for the period ending December 9, 2005) or $13,880 more than the proffered wage of $18,200. Therefore, the petitioner has established its ability to pay the proffered wage of $18,200 in 2005. In 1997 through 2001, the petitioner has not submitted any evidence that it employed the beneficiary in those years, and, therefore, it is obligated to show that it had sufficient funds to pay the entire proffered wage of $18,200 during 1997 through 2001. In addition, USCIS records indicate that the petitioner has filed additional immigrant petitions (Forms I-140) with priority dates in the same year or subsequent years. Some of those immigrant petitions have been approved. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the beneficiary and all of the additional beneficiaries with priority dates in the same and subsequent years.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS 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 federal case law. *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 USCIS 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 USCIS 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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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. [USCIS] 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,* 719 F. Supp. at 537

In 1997 through 2005, the petitioner was organized as a "C" corporation. For a "C" corporation, USCIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 1997 through 2001 and 2003 were $88,760, -$91,613, -$47,447, -$29,477, $51,674, and $39,440 respectively. (The petitioner has already established its ability to pay the proffered wage of $18,200 in 2002, 2004, and 2005 by actually paying the beneficiary more than the proffered wage.) The petitioner could not have paid the proffered wage of $18,200 in 1998 through 2000 from its net incomes in 1998 through 2000. In addition, although it appears that the petitioner has sufficient funds to pay the proffered wage of $18,200 in 1997, 2001, and 2003 from its net incomes in those years, the petitioner is also obligated to show that it had sufficient funds to pay the wages of the additional beneficiaries petitioned for as well as the current beneficiary. In the instant case, the petitioner has not done so.

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, USCIS 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, USCIS 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 failed to submit Schedule Ls for its 1997 through 2001 and 2003 tax returns. Therefore, the AAO cannot determine if the petitioner had sufficient funds to pay the beneficiary the proffered wage of $18,200 and the wages to the additional beneficiaries petitioned for during those years from its net current assets. Therefore, the petitioner has not established its ability to pay the proffered wage in 1997 through 2001 and 2003.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage of $18,200 based on its gross receipts, its longevity, and on the wages paid to departing employees.

Counsel is mistaken. While USCIS will consider the petitioner's gross receipts when determining the petitioner's ability to pay the proffered wage, it will not consider those receipts without also considering the petitioner's expenses. 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 USCIS, 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.

Counsel advised that the wages paid to departing workers could be paid to the beneficiary. 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). The record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are 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. Moreover, there is no evidence that the position of the departing workers involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and terminations of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the

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[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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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*, USCIS 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. USCIS 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 USCIS 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 1996. The petitioner has provided tax returns for the years 1997 through 2002 and 2004 and 2005. However, none of the tax returns establish the petitioner's ability to pay the proffered wage of $18,200 and the additional wages of the multiple beneficiaries petitioned for. Instead, the petitioner has established its ability to pay the proffered wage of $18,200 in 2002, 2004, and 2005 by actually paying the beneficiary more than the proffered wage in those years. In addition, the petitioner's tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Furthermore, the petitioner has filed additional immigrant petitions with the same or similar priority dates. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). 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 discussed above, the assertions of counsel on appeal do not 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 not been met.

ORDER: The appeal is dismissed.