

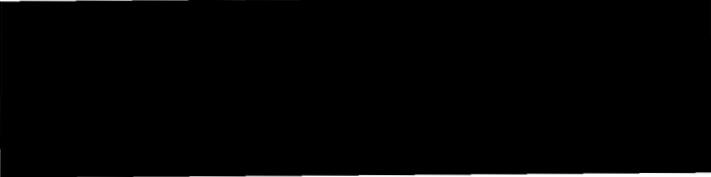


U.S. Citizenship
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MAR 05 2009

FILE: LIN-06-155-53706 Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a laundromat. It seeks to employ the beneficiary permanently in the United States as a Laundromat Attendant. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor 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, 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 March 14, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 labor 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 labor 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).

Here, the labor certification was accepted on December 4, 2005. The proffered wage as stated on the labor certification is \$7.40 per hour (\$15,392.00 per year). The labor certification states that the position requires no prior experience or educational background.

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 in the record of proceeding includes the following: the petitioner's Form 1120-A for 2005; the petitioner's Form W-2 for 2005; an audited financial statement regarding the petitioner's company²; the petitioner's Form 1120-A for 2004; the petitioner's Form 941 for July, August, and September of 2006³; the petitioner's state of New York

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

² 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's 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.

³ This tax return reveals that the petitioner paid \$5,100.00 to two of its part-time employees (not the beneficiary) during this period. The beneficiary's proffered annual salary is \$15,392.00, which would be \$3,848.00 quarterly, \$1,252.00 less than the petitioner paid its part-time employees during this quarter. Counsel advised that the beneficiary will replace the petitioner's two part-time workers with the beneficiary. The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record names these workers, states their wages, and states that the petitioner plans to replace them with the beneficiary who will work full-time. The AAO notes that there is no statement within the record from the petitioner stating that it plans to replace the part-time employees with the beneficiary. Rather, there are just assertions from counsel to this effect. 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 positions of the two part-time employees involve the same duties as those set forth in the Form ETA 9089. The petitioner has not documented the positions, duties, and termination of the workers who performed the

sales and use tax returns⁴; and the petitioner's bank statements from 2006.⁵ 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 a C corporation. On the petition, the petitioner claimed to have been established in May of 2004, to have a gross annual income of \$117,745.00, and to currently employ three workers.⁶ According to the tax returns in the record, the petitioner's fiscal years last from May to April. On the ETA Form 9089, signed by the beneficiary on February 28, 2006, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's federal tax returns and W-2 statements demonstrate its ability to pay the beneficiary's proffered salary. Counsel notes that the petitioner had \$7,172.00 of taxable income listed on the 2005 Form 1120-A, which is \$8,220.00 less than the beneficiary's proffered annual salary, but that U.S. Citizenship and Immigration Services (USCIS) should consider the fact that the petitioner has other assets that can be used to pay that salary. Counsel highlights that the petitioner had \$18,827.00 at the end of the tax year in cash, that the petitioner had no debt, and that the petitioner had \$20,053.00 in retained earnings⁷ listed on the 2005 Form 1120-A.

duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced them.

⁴ The AAO notes that state tax returns do not constitute regulatory-prescribed ability to pay evidence.

⁵ Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

⁶ The AAO notes that this information was on the petition filed in May 2006. However, on the appeal filed in April 2007, nearly one year later, counsel claims that the petitioner employs two workers part-time.

⁷ Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use.

Counsel asserts that the company's stock owner could use the \$20,053.00 of retained earnings to pay the beneficiary's proffered salary. Counsel also asserts that the petitioner has demonstrated its ability to pay the salaries of two part-time workers a total of \$21,000.00 annually. Thus, the petitioner could instead use such funding to pay the beneficiary's salary. Counsel asks USCIS to consider that the petitioner's company is small, but that it pays taxes, provides a service to the community, completed the labor certification process, has the ability to pay the beneficiary's wage, and has the potential to grow. The petitioner submits no other evidence for consideration.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid 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. There is no evidence in the record that the petitioner employed and paid wages to 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 that period, USCIS 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 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. 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

Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

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* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$15,392.00 per year from the priority date.

In 2004⁸, the Form 1120-A stated net income⁹ of \$12,681.00.

In 2005, the Form 1120-A stated net income of \$7,172.00.

Therefore, for the years 2004 through 2005, the petitioner did not have sufficient net income to pay the proffered wage. In 2004, the petitioner reported a net income of \$12,681.00, \$2,711.00 less than the proffered wage. In 2005, the petitioner reported a net income of \$7,172.00, \$8,220.00 less than the 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.¹⁰ A corporation's year-end current assets are shown on Part III, lines 1 through 6. Its year-end current liabilities are shown on lines 13, 14, and 16. 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 did not include Part III of the 2004 Form 1120-A, so USCIS will not be able to make a net

⁸ Evidence preceding the priority date of December 4, 2005 is not necessarily dispositive of the petitioner's ability to pay the proffered salary, but will be considered generally within this analysis.

⁹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

¹⁰ 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.

current assets determination for that year. The petitioner's net current assets during the year 2005, were \$18,827.00.¹¹ Therefore, for the tax year of May 1, 2005 to April 30, 2006, the petitioner had sufficient net current assets to pay the proffered wage.

Therefore, from the date the labor certification was accepted for processing by the U. S. Department of Labor, which was on December 4, 2005, the petitioner has established that it had the continuing ability to pay the beneficiary the proffered wage, as evidenced by its net current assets.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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. The petition is approved.

¹¹ It appears that the director mistakenly wrote in his decision that the petitioner did not include Part III of the 2005 Form 1120-A. The petitioner did include Part III of the 2005 Form 1120-A, but not Part III of the 2004 Form 1120-A. Thus, the director did not go on in his decision to analyze the petitioner's net current assets for the tax year of May 1, 2005 to April 30, 2006, which were \$18,827.00, \$3,435.00 more than the proffered salary.