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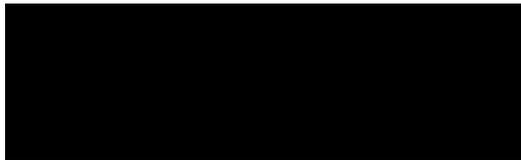
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FILE: LIN-03-200-50767 Office: NEBRASKA SERVICE CENTER Date: NOV 16 2005

IN RE: Petitioner: [Redacted]
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:



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, Director
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 rejected.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the director issued the decision on June 21, 2004. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. Although the beneficiary dated the appeal July 19, 2004, it was received by Citizenship and Immigration Services (CIS) on August 5, 2004, 45 days after the decision was issued¹. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO.

The AAO notes that if the appeal would not be rejected for being untimely, it would otherwise be rejected because it was not properly filed by a party with standing in accordance with 8 C.F.R. § 103.3(a)(2)(v)(A)(1). CIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Counsel indicates that he represents the petitioner in the instant case, Farmington Alteration Inc., however, did not attach a notice of Entry of Appearance (Form G-28) with the appeal. The record of proceeding contains a copy of Form G-28 which was signed by the beneficiary, [REDACTED] on May 15, 2003 although the form lists Farmington Alteration, Inc. as the petitioner and Nahla Israel as the beneficiary. A properly executed Form G-28 signed by the petitioner's authorized representative must be submitted for any subsequent proceedings if an attorney represents.

The AAO also notes that if the appeal would not be rejected for being untimely or improperly by the beneficiary or her representative, it would otherwise be dismissed because counsel's assertions on appeal with evidence submitted do not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner is a tailoring operation. It seeks to employ the beneficiary permanently in the United States as a weaver/tailor. 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.

On appeal, counsel submits a brief statement and copies of the documents submitted before.

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

¹ The record of proceeding indicates that the Form I-290B, Notice of Appeal was filed with the service center on July 20, 2004, however, it was returned by the director because the counsel provided incorrect file number on Form I-290B.

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 CFR § 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).

Here, the Form ETA 750 was accepted on January 2, 2002. The proffered wage as stated on the Form ETA 750 is \$12.98 per hour (\$26,998 per year²). The Form ETA 750 states that the position requires 4 years college, Bachelor's degree in English literature, 2 years training in designing/tailoring/couturier and 2 years experience in the job offered.

On the petition, the petitioner claimed to have been established in 1997, and to currently employ 2 workers. According to the tax returns in the record, the petitioner's fiscal year is based on calendar year. On the Form ETA 750B, signed by the beneficiary on December 27, 2001, the beneficiary did not claim to have worked for the petitioner.

With the petition, the petitioner submitted the following documents: supporting letters from [REDACTED] President of the petitioner, the beneficiary's degree, transcripts and experience letters from current and previous employers.

On January 28, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and the beneficiary's qualification prior to the priority date, the director issued a request for additional evidence (RFE) pertinent to that ability and qualification. The director specifically requested evidence to establish that the petitioner had the financial ability to pay the offered wage as of January 2, 2002 and continue to have such ability, and an advisory evaluation of the beneficiary's credentials.

In response, the petitioner submitted an evaluation report from Multinational Education & Information Services, Inc., a letter from Metrobank for line of credit, the petitioner's Form I-120S for 2000 through 2003,

² It is based on \$12.98 per hour x 40 hours per week x 52 weeks. However, the Form I-140 indicates that the wage per week is \$488.00, i.e. \$25,376 per year.

financial statements as of December 31, 2003 and bank statements for the petitioner's accounts with Meltrobank.

The director denied the petition on June 21, 2004, finding that the evidence submitted with the petition and in response to its RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the evidence presented, the overall fiscal condition of the petitioner, establish that Farmington Alteration, Inc has the ability to pay the proffered wage.

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 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 in 2002 and 2003. Therefore, the petitioner is obligated to demonstrate that it could pay the beneficiary the proffered wage in 2002 and 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.

Counsel claims that the petitioner in the instant case is a sole proprietorship, therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Counsel's

assertion has no evidence submitted to support. Instead, the evidence indicates that the petitioner is an S corporation. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax returns each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. However, the petitioner filed S corporation tax return (Form 1120S) instead of Form 1040. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000 through 2003³.

In the instant case, the petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,998 per year from the priority date.

In 2002, the Form 1120S stated net income⁴ of \$7,359.

In 2003, the Form 1120S stated net income of \$5,094.

Therefore, for the years 2002 through 2003, the petitioner did not have sufficient net income to pay 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, CIS will review the petitioner's assets. We reject, however, the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.⁵ 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 the years in 2002 and 2003 were \$2,095 and \$2,977 respectively. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage for the years 2002 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not 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.

³ Item D of the form 1120S shows that the business entity was incorporated on December 22, 1997 and Item A of the form 1120S shows that it was elected as an S corporation effective on January 1, 1998.

⁴ Ordinary income (loss) from trade or business activities as reported on Line 21.

⁵ 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.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel's reliance on the balance 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.

Counsel states that a Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the \$4 million personal assets of the corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. Counsel does not state how DOL precedent is binding in these proceedings. Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner's net income (\$7,359 in 2002 and \$5,094 in 2003) and net current assets (\$2,095 in 2002 and \$2,977 in 2003) remained the level far from meeting the proffered wage. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals

(BALCA) precedent is binding on the AAO. Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with an S corporation.

Counsel is also citing *O'Conner v. Attorney General of the United States*, 1987 WL 18243 (D>Mass. Sept. 29, 1987)(unpublished), for the premise that entire financial circumstances of a sole proprietorship employer should be considered when considering the ability to pay the wages relating to permanent alien labor certification application. Counsel does not state how the unpublished decision is binding on the AAO. Moreover, *O'Conner v. Attorney General of the United States* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with an S corporation.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions and unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).⁶

Counsel's assertions on appeal would not be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the AAO would dismiss the appeal if the appeal would not be rejected for being untimely or improperly by the beneficiary or her representative.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.

⁶ See, Memorandum, from Lawrence J. Weinig, Acting Associate Commissioner, to Terrance M. O'Reilly, [then] Director of the AAO, dated February 17, 1993, and stating that "in cases that have been certified by [DOL] where the beneficiary has no work experience other than working for the petitioning employer in the same job for which the beneficiary is currently being petitioned," CIS may not "go behind the labor certification process" and such facts would not "be grounds to deny the petition."