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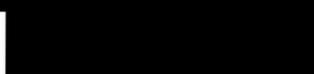
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAY 04 2006**

WAC 03 185 52635

IN RE:

Petitioner:



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:



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 Director, California Service Center denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a painting contractor. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. 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 and that the petitioner had not established that the beneficiary met the requirements of the labor certification as of the priority date.

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 December 9, 2004 denial, the issues in this case are 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 and whether or not the beneficiary meets the requirements of the labor certification as of the priority date.

Section 203(b)(3)(A)(i) of 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 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 January 15, 1998. The proffered wage as stated on the Form ETA 750 is \$20.15 per hour or \$41,912 annually.

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<sup>1</sup>. On appeal, counsel submits a brief. Relevant evidence in the record includes copies of the petitioner's payroll records for three pay periods, January 10, 2003, January 17, 2003, and January 24, 2003, a copy of the petitioner's 1998 Form 1065, U.S. Partnership Return of Income, a copy of the petitioner's 1999 Form 1120, U.S. Corporation Income Tax Return, copies of the petitioner's 2000, 2001, and 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and copies of the beneficiary's 1999, 2000, 2002, and 2003 Forms W-2, Wage and Tax Statements.

The petitioner's payroll records reflect wages paid to the beneficiary of \$640 per pay period for the three pay periods, January 10, 2003, January 17, 2003, and January 24, 2003.

The petitioner's 1998 Form 1065 reflects an ordinary income or net income of -\$85,842 and net current assets of -\$113,855. Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065, U.S. Income Tax Return for a partnership, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 22."

Where a partnership 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 1065 states that a partnership's total income from its various sources are to be shown not on page one of the Form 1065, but on lines 1 through 7 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. In this case, the petitioner's net income is \$45,858. Therefore, in 1998, the petitioner had a net income of \$45,858 and net current assets of -\$113,855.

The petitioner's 1999 Form 1120 reflects a taxable income before net operating loss deduction and special deductions of \$38,468 and net current assets of \$250,960.

The petitioner's 2000, 2001, and 2003 Forms 1120S reflect ordinary incomes or net incomes of -\$333,640, \$34,949, and -\$104,227, respectively. 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

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<sup>1</sup> 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).

the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). Therefore, in this case, the petitioner's net income in 2000, 2001, and 2003, was -\$333,640, \$34,451, and \$90,298. The petitioner's 2000, 2001, and 2003 Forms 1120S also reflect net current assets of -\$5,728, \$218,085, and \$76,974, respectively.

The beneficiary's 1999, 2000, 2002, and 2003 Forms W-2 issued by the petitioner reflect wages paid to the beneficiary of \$19,000.64, \$30,819.64, \$27,925.00, and \$29,773.60, respectively. The petitioner is obligated to demonstrate that it has sufficient funds to pay the difference between the wages actually paid to the beneficiary and the proffered wage of \$41,912. In this case, that difference is \$22,911.36 in 1999, \$11,092.36 in 2000, \$13,987.00 in 2002, and \$12,138.40 in 2003.

The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

On appeal, counsel alleges that the petitioner has established its ability to pay the proffered wage in 1998 through 2003. Counsel states:

The appellant has the ability to structure its income and expenses in any fashion it desires or deems necessary to pay the proffered wage. Appellant desires and feels that it is necessary to hire the beneficiary for the continued success of the business. Thus, the appellant is willing to rearrange its expenses and income in order to facilitate payment of the beneficiary[']s wages.

\* \* \*

The Notice of Decision sets forth that the Tax returns submitted for 1998 through 2003 show a net income of less than the proffered wage. Although this conclusion is accurate, it does not correctly reflect the total income of appellant as it appears on schedule k-1. [CIS] fails to consider the petitioner's total financial profile. It limits its review solely to net income tax returns. This is a narrow and inaccurate analysis, [CIS] must perform a more complete and thorough review of the petitioner's financial capability.

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 present matter, the petitioner did not establish that it employed the beneficiary at a salary equal to or greater than the proffered wage in 1998 through 2003. The beneficiary's Forms W-2 reflect earnings of \$19,000.64 or \$22,911.36 less than the proffered wage of \$41,912 in 1999; \$30,819.64 or \$11,092.36 less than the proffered wage of \$41,912 in 2000; \$27,925 or \$13,987 less than the proffered wage of \$41,912 in 2002, and \$29,773.60 or \$12,138.40 less than the proffered wage of \$41,912 in 2003. The 1998 and 2001 Forms W-2 for the beneficiary were not submitted. The petitioner is obligated to

show that it has sufficient funds to pay the difference between the wages actually paid to the beneficiary and the proffered wage of \$41,912.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on 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." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

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.<sup>2</sup> 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 1998 through 2001 and 2003 tax return reflect net current assets of -\$113,855, \$250,960, -\$5,728, \$218,085, and \$76,974, respectively. The petitioner could not have paid the proffered wage of \$41,912 from its net current assets in 1998 and 2000, but it could have paid the proffered wage from its net current assets in 1999, 2001, and 2003. A tax return for 2002 was not submitted.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, 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 Sonogawa*, 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 the instant case, the petitioner has been in business for nine years, it consistently grosses more than one million dollars, it has paid salaries and wages from a low of \$221,010 in 1999 to a high of \$1,321,240 in 2001, and it has established its ability to pay the proffered wage in every year but 2000 and 2002. The tax return for 2002 was not submitted. Therefore, the AAO finds that the petitioner could pay the proffered wage in 1998 through 2003.

The petitioner's 1998 tax return reflects a net income of \$45,858 and net current assets of -\$113,855. The petitioner could have paid the proffered wage of \$41,912 from its net income in 1998.

The petitioner's 1999 tax return reflects a net income of \$38,468 and net current assets of \$250,960. The petitioner could have paid the difference of \$22,911.36 between the wages actually paid to the beneficiary of \$19,000.64 and the proffered wage of \$41,912 from either its net income or its net current assets in 1999.

The petitioner's 2000 tax return reflects a net income of -\$333,640 and net current assets of -\$5,728. The petitioner could not have paid the difference of \$11,092.36 between the wages actually paid to the beneficiary of \$30,819.64 and the proffered wage of \$41,912 from either its net income or its net current assets in 2000.

The petitioner's 2001 tax return reflects a net income of \$34,451 and net current assets of \$218,085. The petitioner could have paid the proffered wage from its net current assets in 2001. Form W-2 for the beneficiary was not submitted for 2001.

The petitioner did not submit a tax return for 2002. However, the beneficiary's 2002 Form W-2 reflects wages paid to the beneficiary of \$27,925 in 2002. The petitioner would have only needed to pay the difference of \$13,987 between the actual wages paid to the beneficiary and the proffered wage of \$41,912.

The petitioner's 2003 tax return reflects a net income of \$90,298 and net current assets of \$76,974. The petitioner could have paid the difference of \$12,138.40 between the actual wages paid to the beneficiary of \$29,773.60 and the proffered wage of \$41,912 from either its net income or net current assets in 2003.

After a review of the record, the AAO has determined that, when considering the overall magnitude of the petitioner's business, the petitioner has established its ability to pay the proffered wage. *See Matter of Sonogawa.*

The second issue in this proceeding is whether the beneficiary met the experience requirements of the labor certification as of the priority date of January 15, 1998.

The regulation at 8 C.F.R. § 204.5(1)(3) states, in pertinent part:

(ii) *Other documentation* – (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is January 15, 1998.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14, which contains the only pertinent information, requires that the beneficiary have two years of experience in the job offered.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of painter must have two years of experience as a painter.

In the instant case, counsel submitted a letter, dated July 23, 1999, from the beneficiary's prior employer, Gonzalez Paints, stating that it employed the beneficiary from November 1986 to December 1989, or three years and one month. In a request for evidence, dated August 5, 2004, the director requested that the petitioner provide additional evidence of the beneficiary's employment with his prior employer. The petitioner was informed that it needed to provide "letters, contracts, and pay statements to verify the beneficiary worked for the listed employer. Evidence of prior experience should be submitted in letterform on the previous and/or current employer's letterhead showing the name, title and phone number of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week." The director did not explain why the letter previously submitted was insufficient to establish that the beneficiary met the experience requirements of the labor certification at the priority date of January 15, 1998.

In response, counsel informed the director that the documentation requested had been left in Mexico; and, therefore, it was unavailable. In spite of the fact that the beneficiary failed to obtain the documentation, the AAO finds no reason to doubt the integrity of the letter submitted from [REDACTED] as evidence of the beneficiary's work experience. The letter meets all the requirements of 8 C.F.R. § 204.5(1)(3), and it is consistent with the beneficiary's employment history listed on the Form ETA 750B. If the director deems it necessary, he may request additional evidence or an investigation before the Form I-485, Application to Register Permanent Resident or Adjust Status, is adjudicated. According to the record of proceeding, the petitioner has established that the beneficiary met the requirements of the labor certification before the priority date of January 15, 1998.

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 sustained that burden. Accordingly, the previous decision of the director will be withdrawn, and the petition will be approved.

**ORDER:** The director's decision of December 9, 2004 is withdrawn. The appeal is sustained and the petition will be approved.