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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

EAC 05 078 51935

Office: VERMONT SERVICE CENTER

Date:

NOV 02 2006

IN RE:

Petitioner:

Beneficiary:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont 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 printing company. It seeks to employ the beneficiary permanently in the United States as an assistant press operator, offset. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 February 22, 2005 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)(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 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 DOL. *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 Form ETA 750, Application for Alien Employment Certification, as certified by the DOL 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 December 6, 1999. The proffered wage as stated on the Form ETA 750 is \$20.90 per hour (\$43,472.00 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered.

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.¹ On appeal, counsel submits a brief, the petitioner's previously submitted Supplemental Schedule to IRS Form 1120, U.S. Corporation Income Tax Return, for 1999, a letter dated April 18, 2005 from the petitioner indicating that a former employee, [REDACTED] left employment with the petitioner in January 2000, the petitioner's payroll records for [REDACTED] for 1999, the beneficiary's previously submitted IRS Form W-2, Wage and Tax Statement, issued by the petitioner for 2002, and the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2003 and 2004. Relevant evidence in the record includes the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Returns, for fiscal years 1999, 2000 and 2001, and the beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the petitioner for 2001. 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 1974. According to the tax returns in the record, the petitioner's fiscal year begins on June 1 and ends on May 31. On the Form ETA 750B, signed by the beneficiary on December 4, 1999, the beneficiary claimed to have worked for the petitioner as an assistant press operator from January 1999 to the date he signed the Form ETA 750B.

On appeal, counsel asserts that the salary of [REDACTED] who left employment with the petitioner in January 2000, is available to pay the proffered wage. Counsel asserts that the petitioner's outside printing costs of \$18,882.00 in 1999 are available to pay the proffered wage, as the petitioner has moved its printing in-house. Counsel states that the petitioner's gross sales, cost of labor, depreciation expense and retained earnings should be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel also asserts that the petitioner's net income was \$30,379.00 in 2002 and \$29,189.00 in 2003 and, therefore, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage. Counsel asserts that the petitioner operated its business at a profit in excess of \$6,742.85 in 2004 and, therefore, the petitioner had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage. Finally, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), for the proposition that the petitioner may establish its ability to pay the proffered wage if its expectations of continued increase in business and profits are reasonable.

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

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).

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 beneficiary's IRS Forms W-2, Wage and Tax Statements, for 2001, 2002, 2003 and 2004 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$6,682.50.
- In 2002, the Form W-2 stated compensation of \$26,130.00.
- In 2003, the Form W-2 stated compensation of \$29,216.46.
- In 2004, the Form W-2 stated compensation of \$35,326.40.

Therefore, for the years 2001, 2002, 2003 and 2004, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year.² Since the proffered wage is \$43,472.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$36,789.50, \$17,342.00, \$14,255.54 and \$8,145.60 in 2001, 2002, 2003 and 2004, respectively.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.³

² The petitioner's fiscal year runs from June 1 to May 31, and the beneficiary's IRS Forms W-2 cover the period from January 1 to December 31 of each calendar year. The record does not indicate if the beneficiary earned his wages for 2001, 2002, 2003 and 2004 during the petitioner's fiscal years or during the calendar years. For this appeal, we will credit the petitioner with having paid the beneficiary the wages stated on each IRS Form W-2 in each fiscal year.

³ 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. However, where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be 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. In this case, the record does not establish that the petitioner has replaced or will replace [REDACTED] with the beneficiary. The record indicates that [REDACTED] earned \$20.50 per hour as lead pressman at the end of 1999. The petitioner asserts that [REDACTED] left the company in January 2000 and consequently, his position became available. However, the beneficiary claims to have worked for the petitioner since January 1999 as an assistant pressman, and the record contains no evidence that the petitioner has replaced or will replace [REDACTED] with the beneficiary. Moreover, the record contains no evidence that the position of lead pressman involves the same duties as those set forth in the Form ETA 750 for the position of assistant press operator, offset. If [REDACTED] performed duties other than those listed on the Form ETA 750, then the beneficiary could not have replaced him.

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.

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 3, 2004. The petitioner's tax returns demonstrate its net income for fiscal years 1999, 2000 and 2001, as shown in the table below.

- For fiscal year 1999, the Form 1120 stated net income of \$9,886.00.
- For fiscal year 2000, the Form 1120 stated net income of \$27,963.00.
- For fiscal year 2001, the Form 1120 stated net income of \$19,202.00.

Therefore, for fiscal years 1999 and 2000, the petitioner did not have sufficient net income to pay the proffered wage. For fiscal year 2001, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.⁴

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. 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

⁴ On appeal, counsel asserts that the petitioner's net income was \$30,379.00 in fiscal year 2002 and \$29,189.00 in fiscal year 2003 and, therefore, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage. Counsel also asserts that the petitioner operated its business at a profit in excess of \$6,742.85 in fiscal year 2004 and, therefore, the petitioner had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage. However, the record does not contain the petitioner's fiscal year 2002, 2003 or 2004 federal income tax returns. Therefore, the petitioner's net income and net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in fiscal years 2002, 2003 or 2004.

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.

and include cash-on-hand. 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 tax returns demonstrate its end-of-year net current assets for fiscal years 1999, 2000 and 2001, as shown in the table below.

- For fiscal year 1999, the Form 1120 stated net current assets of -\$274,171.00.
- For fiscal year 2000, the Form 1120 stated net current assets of \$10,108.00.
- For fiscal year 2001, the Form 1120 stated net current assets of -\$24,769.00.

Therefore, for fiscal years 1999 and 2000, the petitioner did not have sufficient net current assets to pay the proffered wage. For fiscal year 2001, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, 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.

On appeal, counsel recommends the use of retained earnings to pay the proffered wage. 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, CIS 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.

However, as noted by counsel on appeal, CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, CIS may, at its discretion, consider evidence relevant to the 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 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 relevant to the petitioner's ability to pay the proffered wage.⁶

⁶ Counsel asserts that the petitioner's outside printing costs of \$18,882.00 in fiscal year 1999 are available to pay the proffered wage, as the petitioner has moved its printing in-house. However, the petitioner is a

In the instant case, the petitioner has been in business since 1974. While the record does not establish the petitioner's overall number of employees, the petitioner's tax returns show that it paid substantial costs for labor in each relevant year.⁷ The petitioner also had substantial gross receipts in each relevant year, with receipts of \$4,807,625.00 in fiscal year 1999, \$4,950,718.00 in fiscal year 2000 and \$5,896,133.00 in fiscal year 2001. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and has shown its ability to pay the proffered wage.

The evidence submitted establishes 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.

printing company, and the petitioner provided no explanation as to why it had to outsource its printing in fiscal year 1999. 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). Therefore, this office is not persuaded by counsel's argument that the beneficiary is replacing an outsourced service.

⁷ The petitioner paid \$59,400.00 in salaries and wages and \$919,982.00 in costs of labor in fiscal year 1999. The petitioner paid \$58,900.00 in salaries and wages and \$911,554.00 in costs of labor in fiscal year 2000. The petitioner paid \$57,200.00 in salaries and wages and \$1,057,053.00 in costs of labor in fiscal year 2001.