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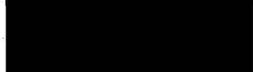
U.S. Citizenship  
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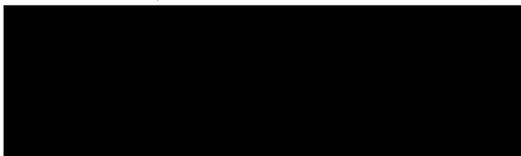
Petitioner:



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.<sup>1</sup> The appeal will be dismissed.

The petitioner is a masonry and landscaping company. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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). In the director's decision dated August 25, 2004, 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 both decisions of the director, 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).

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<sup>1</sup> This office notes that the petitioner filed a motion to reconsider the director's decision on the same day it filed the instant appeal. In a decision dated March 23, 2005, the director granted the petitioner's motion to reconsider and affirmed his previous decision.

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$30.69 per hour (\$63,835.20 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.<sup>2</sup> On appeal, counsel submits a brief, the petitioner's previously submitted IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, and the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003. Other relevant evidence in the record includes the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by the petitioner for 2001 and 2002, the beneficiary's IRS Forms 1040, U.S. Individual Income Tax Returns, for 2001 and 2002, and bank statements for Hedges & Gardens for November and December 2002.<sup>3</sup> 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 an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 28, 2001, the beneficiary did not claim to have worked for the petitioner.<sup>4</sup>

On appeal, counsel cites *The Matter of Oriental Pearl Restaurant*, 92 INA 59 (BALCA 1993) and *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) for the proposition that the petitioner's ability to pay the proffered wage can be established through factors determining the petitioner's financial viability such as its growth and volume of business. Counsel asserts that the petitioner's growth from 2001 to 2003, its high volume of business, total assets, gross profits, and its trend toward financial viability in the future demonstrate its ability to pay the proffered wage. Counsel also asserts that it is hiring the beneficiary to enhance its service and to increase its business and profitability.

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

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<sup>2</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).

<sup>3</sup> The record contains copies of the beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the petitioner for 1999 and the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return, for 1999. Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

<sup>4</sup> This office notes that the record of proceeding contains a Form G-325, Biographic Information sheet submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, the beneficiary left blank a section eliciting information about the beneficiary's employment the last five years.

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 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 and 2002 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$12,766.00.
- In 2002, the Form W-2 stated compensation of \$20,491.75.

Therefore, for the years 2001 and 2002, 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. Since the proffered wage is \$63,835.20 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 \$51,069.20 and \$43,343.45 in 2001 and 2002, 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).

The record before the director closed on June 14, 2003. The petitioner's tax returns demonstrate its net income for 2001 and 2003, as shown in the table below.<sup>5</sup>

- In 2001, the Form 1120S stated net income<sup>6</sup> of \$0.00.

<sup>5</sup> This office notes that the record does not contain the petitioner's 2002 federal income tax return. 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 2002.

<sup>6</sup> 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. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional deductions shown on its Schedule K for 2001 and additional income and deductions on its Schedule K for 2003, the petitioner's net income is found on line 23 of Schedule K of its tax returns. While the director erroneously stated that the petitioner's net income was \$6,351.00 in 2001, this error does not alter the ultimate outcome of the appeal.

- In 2003, the Form 1120S stated net income of \$1,361.00.

Therefore, for the years 2001 and 2003, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. We reject, however, counsel's 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.<sup>7</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 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 2001 and 2003, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$3,101.00.
- In 2003, the Form 1120S stated net current assets of \$80,527.00.

Therefore, for the 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. For the year 2003, the petitioner had 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 except for 2003.

On appeal, counsel states that DOL Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Counsel cites *The Matter of Oriental Pearl Restaurant*, 92 INA 59 (BALCA 1993) as holding that evidence on the gross profits and the increase in gross profits may be sufficient to establish the petitioner's ability to pay the proffered wage, and that where the evidence establishes that the petitioner is a substantial and thriving business, the business judgment of the petitioner to hire an additional employee should be respected. Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on

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<sup>7</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

all its employees in the administration of the Act, BALCA 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).

Moreover the evidence in the instant petition is less persuasive than the evidence relied upon by BALCA in that case. In *Oriental Pearl*, the Board cited evidence which included a listing of all of the employer's employees, with the monthly salary and job title for each employee, as well as supporting statements from a bank officer and from the president of the employer's accounting firm. The Board also cited a very favorable review of the employer in a guide to restaurants in the City of Atlanta, where the employer was located. In the instant case, the evidence of the petitioner's ability to pay consists solely of bank statements for an unrelated entity, the petitioner's income tax returns for 2001 and 2003 and IRS Forms W-2 issued by the petitioner to the beneficiary for 2001 and 2002. The evidence does not establish that the petitioner is a substantial and thriving business.

On appeal, counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which indicates that 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. 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.

In the instant case, the petitioner has been in business since 1994. While counsel cites the petitioner's gross profit of \$190,724.00 in 2001 and \$386,838.00 in 2003, the petitioner has not sufficiently established the historical growth of its business, its has not established its overall number of employees, it has not established the occurrence of any uncharacteristic business expenditures or losses, it has not established its reputation within its industry and it has not indicated whether the beneficiary is replacing a former employee or an outsourced service.<sup>8</sup> 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.

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<sup>8</sup> This office notes that the petitioner paid minimal salaries and wages in 2001 and 2003, with \$63,665.00 paid in 2001 and \$127,653.00 in 2003. The beneficiary earned approximately 20% of the total salaries paid by the petitioner in 2001.

On appeal, counsel also asserts that the petitioner's trend toward financial viability in the future demonstrate its ability to pay the proffered wage.<sup>9</sup> Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally, counsel's reliance on the balances in the bank accounts of Hedges & Gardens is misplaced. The petitioner has not demonstrated that the financial information contained on the bank statements for Hedges & Gardens relates to the petitioner. Even if this office accepts that the bank statements in the record relate to the petitioner, 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. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Counsel's assertions on appeal cannot 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 the DOL.

The evidence submitted does not 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 not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>9</sup> Counsel also asserts that it is hiring the beneficiary to enhance its service and to increase its business and profitability. The petitioner has provided no detail or documentation to explain how the beneficiary's employment will accomplish these benefits for the petitioner. 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). Counsel's hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Further, this office notes that if the beneficiary has been employed by the petitioner since 1999, the petitioner should be able to establish how the beneficiary's services have already impacted the company.