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U.S. Citizenship  
and Immigration  
Services

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FILE:



EAC 03 254 51549

Office: VERMONT SERVICE CENTER

Date: SEP 05 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 dismissed.

The petitioner is an automobile repair company. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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 October 4, 2004 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 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 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$24.31 per hour (\$50,564.80 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>1</sup> On appeal, counsel submits a brief, the petitioner's previously submitted IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001, 2002 and 2003, the petitioner's previously submitted IRS Forms 941, Employer's Quarterly Federal Tax Returns, for 2002, 2003 and the first two quarters of 2004, IRS Forms 1065, U.S. Returns of Partnership Income, for [REDACTED] for 2001 and 2002, the beneficiary's previously submitted IRS Forms W-2 issued by the petitioner for 2001, 2002 and 2003, a letter dated December 1, 2004 from [REDACTED] and [REDACTED] IRS Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] and [REDACTED] for 2001, 2002 and 2003 and IRS Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] and [REDACTED] for 2001, 2002 and 2003. Other relevant evidence in the record includes copies of the beneficiary's paychecks issued by the petitioner for April and May 2004. 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. On the petition, the petitioner claimed to have been established in 1988 and to currently employ four workers. 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 April 26, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's business was negatively affected by the events of the terrorist attacks on September 11, 2001. He states that the petitioner's business is located near the former World Trade Center site in New York, and that the petitioner lost substantial business in the last part of 2001 and the first part of 2002 when access to the Holland Tunnel, which served as access to the World Trade Center, was restricted due to state travel regulations. He states that the events of September 11 caused a general decline in the area's consumer spending and particularly affected automobile industries. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that an uncharacteristically unprofitable year can be overlooked in certain circumstances. Counsel asserts that the petitioner's net profit, cash and current assets listed on Schedule L of its federal income tax return and depreciation should be considered in the determination of its ability to pay the proffered wage, and that the profits of a partnership owned by the petitioner's two shareholders should be considered in the ability to pay determination. Counsel also states that the petitioner's shareholders have agreed to guarantee the payment of the proffered wage with their personal funds. He cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), and *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), for the proposition that undertakings of others to pay the proffered wage are acceptable evidence of a petitioner's ability to pay the wage. Counsel also asserts that the Subchapter S status of the corporation and the flow-through payments to its shareholders should be considered in the ability to pay determination.

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>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).

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, on the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary did not claim to have worked for the petitioner. However, the beneficiary's IRS Forms W-2 for 2001, 2002 and 2003 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$23,400.00.
- In 2002, the Form W-2 stated compensation of \$33,800.00.
- In 2003, the Form W-2 stated compensation of \$33,800.00.

The beneficiary's paychecks for 2004 showed compensation received from the petitioner of \$3,308.34. 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. Since the proffered wage is \$50,564.80 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 \$27,164.80, \$16,764.80, \$16,764.80 and \$47,256.46 in 2001, 2002, 2003 and 2004, respectively.<sup>2</sup>

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 court in *Chi-Feng Chang* 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.

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<sup>2</sup> This office notes that the record does not contain the petitioner's 2004 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 2004.

The record before the director closed on August 20, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>3</sup> of -\$15,030.00.
- In 2002, the Form 1120S stated net income of -\$5,074.00.
- In 2003, the Form 1120S stated net income of \$12,709.00.

Therefore, for the years 2001, 2002 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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</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, 2002 and 2003, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$18,185.00.
- In 2002, the Form 1120S stated net current assets of \$32,502.00.
- In 2003, the Form 1120S stated net current assets of \$28,588.00.

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 years 2002 and 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, for the year 2001, 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.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. He states that the petitioner's shareholders have agreed to guarantee the payment of the proffered wage with their personal funds. He cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), and *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049 (S.D.N.Y. 1986), for the proposition that undertakings of others to pay the proffered wage are acceptable evidence of a petitioner's ability to pay the wage. The decision in *Full Gospel* is not binding here.

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<sup>3</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

<sup>4</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.

Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a sponsored alien. Here, however, the petitioner is a corporation, not a church. Additionally, the petitioner in *Elatos* asked CIS to consider its gross income instead of net income in the determination of its ability to pay the proffered wage, and the judge determined that CIS properly considers net income for both individuals and corporations. Therefore, *Elatos* does not allow CIS to consider the personal resources of the individual shareholders of the corporation as counsel suggests.

Further, financial information about the shareholders of the petitioner, [REDACTED] and [REDACTED] does not establish the ability of the petitioner to pay the proffered wage since the petitioner is a corporation. [REDACTED] and [REDACTED] are not legally liable for the financial obligations of the corporation. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Additionally, although [REDACTED] and [REDACTED] submitted an affidavit stating their desire to guarantee the payment of the wages of the beneficiary, that affidavit does not appear to be legally enforceable as a guarantee. The affidavit lacks the period of the purported guarantee. Further, the affidavit is dated December 1, 2004, nearly three years after the priority date. Even if enforceable as a guarantee of the future wages of the beneficiary, the affidavit of [REDACTED] and [REDACTED] could not help to establish the ability of the petitioner to pay the proffered wage in 2001. With the I-140 petition, evidence is required of a sponsoring employer's ability to pay a proffered wage as of the priority date, not its guarantee to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2).

Counsel urges that the petitioner's Schedule L Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would likely be duplicative, at least in part. The petitioner's Schedule L Cash is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonegawa*, 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. The petitioner was incorporated in 1988. The petitioner's gross receipts steadily increased from 2001 to 2003. However, the petitioner paid minimal salaries and wages in the years 2001, 2002 and 2003, with a large portion of wages paid to the beneficiary. The record shows that the petitioner employed no more than four employees during the relevant period. Counsel asserts that the petitioner's business was negatively affected by the events of the terrorist attacks on September 11, 2001. However, other than the petitioner's 2001 through 2003 tax returns, counsel provides no evidence to support his assertions, such as evidence of the petitioner's receipt of payments from 9/11 relief funds or the petitioner's tax returns prior to 2001 to establish that the petitioner's 2001 losses were uncharacteristic. The record contains no evidence of the petitioner's reputation within its industry. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage in 2001.

Finally, counsel is correct in his assertion that the shareholders of an S corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. However, counsel has not established how the petitioner's shareholders would have allocated expenses differently in order to establish the petitioner's ability to pay the proffered wage in 2001.<sup>5</sup>

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.

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<sup>5</sup> This office notes that a denial of an I-140 petition is without prejudice to the petitioner submitting a new I-140 based on the same approved ETA 750 labor certification. *Cf.* 8 C.F.R. §§ 103.2 (a)(7)(ii) (new fees will be required with any new petition), 103.2(b)(15) (withdrawal of a petition or denial of a petition due to abandonment does not preclude the filing of a new petition with a new fee). However, any new petition submitted by the petitioner would have to be supported by evidence sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, including the years since the record closed in the instant petition.



**ORDER:** The appeal is dismissed.