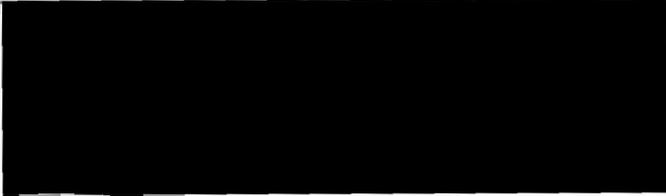




U.S. Citizenship
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FILE: WAC 02 199 50907 Office: CALIFORNIA SERVICE CENTER Date: **SEP 08 2006**

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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wienmann".

Robert P. Wienmann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a commercial bakery. It seeks to employ the beneficiary permanently in the United States as a pastry cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 4, 2003 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 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 May 19, 1997. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour or \$24,024 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 appeal¹. Relevant evidence submitted on

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

appeal includes a letter from [REDACTED] president of the petitioner, stating that the petitioner has “successfully processed payroll since 1987 without fault,” a copy of a fax from Automatic Data Processing (ADP) stating that the petitioner has processed its payroll with ADP since October 8, 1997 and continues to do so, copies of the petitioner’s 2002 payroll summaries from ADP, copies of the beneficiary’s 1998, 2001, and 2002 Forms W-2, Wage and Tax Statements, copies of Forms W-2 for [REDACTED]² for 1998 through 2000, and copies of the beneficiary’s 2000 through 2002 Forms 1040, U.S. Individual Income Tax Returns. Other relevant evidence includes the petitioner’s 1996 through 2001 Forms 1120, U.S. Corporation Income Tax Returns. The record does not contain any other evidence relevant to the petitioner’s ability to pay the proffered wage.

The beneficiary’s 1998, 2001, and 2002 Forms W-2 reflect wages issued by the petitioner to the beneficiary of \$13,090, \$13,827.59, and \$19,734.38, respectively.

The petitioner’s 1996 through 2001 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$18,558, -\$39,127, -\$27,985, -\$13,493, -\$34,531, and \$120,316, respectively. The petitioner’s 1996 through 2001 Forms 1120 also reflect net current assets of \$31,861, -\$108,506, -\$95,249, -\$124,476, -\$176,349, and -\$130,289, respectively.

On appeal, the petitioner states:

The employer’s previously submitted U.S. corporate taxes, which demonstrated to the service center a negative loss of earnings. Due to business related investments and purchases including the costs incurred by the employer for inventory purchases, new equipment purchase, including ovens, delivery vehicles and refrigeration. Therefore, the employer declares that naturally during those tax years, the corporate taxes would not indicate profits, However, the petitioning employer, beginning from the priority date of 1996 to present, has sufficiently and successfully processed the payroll for all employees.

* * *

In 2001, the petitioning employer was found capable to provide the similar prevailing wages by the service center, as was demonstrated in the approval Labor Certification case matter of [REDACTED], brother of the pending beneficiary, [REDACTED] specifically on January 18, 2001. Copy of said approval is now attached herewith.

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, 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

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).

² The petitioner provided no explanation as to why Forms W-2 were provided for [REDACTED]. They will, therefore, not be considered when determining the petitioner’s ability to pay the proffered wage of \$24,024 to the beneficiary.

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, 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 instant case, the Form ETA 750B is not in the record of proceeding; and therefore, it is unclear whether the beneficiary claimed the petitioner as a past or present employer. However, the petitioner submitted copies of the beneficiary's 1998, 2001, and 2002 Forms W-2 which reflect wages earned of \$13,090 or \$10,934 less than the proffered wage of \$24,024 in 1998, \$13,827.59 or \$10,196.41 less than the proffered wage of \$24,024 in 2001, and \$19,734.38 or \$4,289.62 less than the proffered wage of \$24,024 in 2002. The petitioner is obligated to establish that it has sufficient funds to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 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." *See also Elatos Restaurant Corp.*, 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.³ 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

³ 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.

current assets. The petitioner's net current assets in 1996 through 2001 were \$31,861, -\$108,506, -\$95,249, -\$124,476, -\$176,349, and -\$130,289, respectively. The petitioner could have paid the difference between the actual wages paid to the beneficiary and the proffered wage in 1996 from its net current assets, provided the petitioner had not petitioned for an additional employee, but not in 1997 through 2001.

The petitioner contends that it has successfully processed its payroll through ADP since 1996. However, the fax from ADP states that the petitioner did not begin processing its payroll through ADP until October 8, 1997. In addition, even though the petitioner provided its 2002 payroll summary from ADP, that summary only shows a total amount of wages paid and does not indicate the number of employees, the employees' names, or their salaries. Furthermore, one year of payroll summaries do not demonstrate that the petitioner has consistently met its payroll requirements. The mere fact that the petitioner paid salaries is not conclusive evidence that the petitioner can pay the difference of \$4,289.62 between the proffered wage of \$24,024 and the actual wage paid to the beneficiary of \$19,734.38, in addition to the salary of the beneficiary of the prior approved petition with a priority date of January 17, 1997.

The petitioner asserts that since the petition, with a similar salary, for the beneficiary's brother was approved with the evidence provided in this case, that fact should be considered when determining the petitioner's ability to pay the proffered wage of \$24,024 to the beneficiary. However, the director's decision does not indicate whether he reviewed the prior approval of the other immigrant petition. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petition on behalf of the beneficiary's brother, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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, in light of the petitioner's long and continuing business presence (since 1987), and since the difference between the proffered wage of \$24,024 and the actual wages paid to the beneficiary in the significant years are meager, even when including the salary of the additional employee with a similar priority date, when compared to the petitioner's continuous earnings of over \$1.5 million yearly, the AAO finds that the petitioner could pay the proffered wage in 1997 and continuing to the present.

After a review of the record, it is concluded that the petitioner has established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above and the assertions of counsel on appeal, the evidence submitted on appeal overcomes the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition will be approved.