

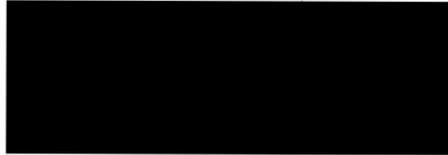
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

BC



FILE: [REDACTED]
EAC 05 178 53092

Office: VERMONT SERVICE CENTER

Date: DEC 26 2007

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 petitioner is an arborist company. It seeks to employ the beneficiary permanently in the United States as a supervisor of spray, lawn and tree service. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2001 priority date of the visa petition based on the petitioner's net income or net current assets. 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 July 12, 2006 denial, the primary 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 U.S. Department of Labor. 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 U.S. Department of Labor 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 27, 2001. The proffered wage as stated on the Form ETA 750 is \$28.56 an hour or \$59,404.80 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a statement with regard to the petitioner's cost of labor and other costs item enumerated on the petitioner's tax returns for the 2001 priority date year and through tax year 2005. The record also contains the petitioner's Forms 1120, U.S. Corporation Income Tax Return, for tax years 2001 to 2005. The record also contains a letter from [REDACTED], New York dated May 9, 2005. In this letter Mr. [REDACTED] states that the petitioner's income tax returns are filed on a cash basis, and that the returns do not reflect considerable accounts receivable that were outstanding at the end of each year. Mr. [REDACTED] states that as of December 31, 2001, the petitioner's accounts receivable were \$152,275.81. Mr. [REDACTED] estimated that the petitioner's accounts payable were probably less than \$5,000 as the petitioner made every effort to pay its bills by the end of the year when the petitioner was at the low end of their business cycle. The petitioner's accountant also submitted an annotated list of the petitioner's Account Receivables as of December 31, 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 on May 19, 1992, to have a gross annual income of \$1,724,127, a net annual income of \$2,437, and did not indicate how many employees it currently employed. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary claimed to have worked for the petitioner since March 1990 as a supervisor and since 1985 as a helper.

On appeal, counsel asserts that the director failed to consider items listed on the petitioner's federal income tax returns for tax years 2002² to 2005. Counsel states that Schedule A lists costs of labor as well as other costs, and that these costs are flexible. Counsel asserts that if the petitioner had to pay the proffered wage of \$59,404.80 in tax year 2002, it could have done so by using the labor costs or other costs figures. With regard to tax year 2001, counsel states that the petitioner also had other costs in the amount of \$745,682 that could have been used to pay the salary. With regard to tax year 2003, counsel asserts that the petitioner's cost of labor in the amount of \$545,558 and other costs in the amount of \$276,788 could have been used to pay the prevailing wage. Counsel asserts that the figures for cost of labor and other costs in tax year 2004 and 2005 could also have been used to pay the prevailing wage. Counsel states that these labor costs and other costs fluctuate and are not set in stone. Counsel also states that the director failed to note that the petitioner is a very successful business. Counsel notes that the petitioner had been in operation since May 19, 1992³ and that its gross receipts have been more than \$1.6 million dollars per year.

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

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).

² The petitioner has to establish its ability to pay the proffered wage as of the 2001 priority date and until the beneficiary obtains legal permanent residency, not from tax year 2002 as counsel suggests on appeal.

³ The record does not explain any further the nature of the beneficiary's work with the petitioner prior to its 1992 incorporation.

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).

On appeal, counsel appears to suggest that the funds expended to pay the petitioner's labor costs and other costs in the 2001 priority year and until 2005 could be used to establish the petitioner's ability to pay the proffered wage of \$59,040.80 during the same years. Counsel's assertion is not persuasive. 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.⁴ Since the cost of labor item on Schedule A is ostensibly used to pay compensation for work, this figure would not necessarily reflect additional funds available to pay the proffered wage. The petitioner would have to demonstrate that it will replace another worker currently compensated with the beneficiary, and that the compensation and job duties of the beneficiary and the replaced worker were identical. With regard to other costs, the petitioner does not identify how items such as those identified on Statement 2, Form 1120 for the petitioner's 2002 tax return, namely truck and equipment, material and supplies, and other job costs could be utilized instead to pay the beneficiary's proffered wage. Such expenses do not appear as flexible as counsel asserts. Therefore, the AAO will not consider such tax return items in its examination of the petitioner's ability to pay the proffered wage.

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, in response to the director's request for further evidence, counsel stated that the petitioner did not have Forms W-2 Wage and Tax statement because the beneficiary was paid in cash. Therefore, the petitioner cannot establish that it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2005.

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.

⁴ Further if the petitioner has employed the beneficiary during the relevant years in question, the petitioner's compensation of the beneficiary is included in labor costs and there is no replacement issue in the present petition.

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 Chang* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$59,040.80 per year from the priority date:

- In 2001, the Form 1120 stated a net income⁵ of -\$33,444.
- In 2002, the Form 1120 stated a net income of \$16,247.
- In 2003, the Form 1120 stated a net income of \$18,318.
- In 2004, the Form 1120 stated a net income of -\$122,451.
- In 2005, the Form 1120 stated a net income of -\$6,370.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net income to pay the 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁶According 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.

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 net current assets during 2001 were -\$68,482.
- The petitioner's net current assets during 2002 were \$7,740.
- The petitioner's net current assets during 2003 were \$30,548.
- The petitioner's net current assets during 2004 were -\$38,171.
- The petitioner's net current assets during 2005 were -\$11,677.

Therefore, for the years 2001 to 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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 on appeal that the petitioner's cost of labor expenses and other costs identified on Schedule A should be taken into consideration with regard to the petitioner's ability to pay the proffered wage. As previously stated, the petitioner has not provided any further explanation of why the compensation paid to others would be available to pay the proffered wage to the beneficiary and why the funds used to pay expenses such as trucks and equipment would be available to pay the proffered wage. These expenses do not appear to be discretionary expenses in terms of business operations.

As previously stated, the AAO will also examine 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).

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years. 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. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*.

On appeal, counsel states that the petitioner is a very successful business, that it has been in operation since May 19, 1992 and that its gross receipts have been more than \$1.6 million each year. The AAO notes that

counsel's assertions do not constitute evidence,⁷ and the petitioner has provided no evidence as to its gross receipts from its inception and to tax year 2000.

Nevertheless the AAO does note that for the relevant years in question, the petitioner had gross profits of over \$1.6 million at the same time it has provided significant officer compensation to either one or two shareholders, as well as significant paid salaries and wages or labor costs. For example, the petitioner has provided officer compensation to its two shareholders in tax years 2001, 2002, and 2003 of \$124,800, \$124,800, and \$73,200 and officer compensation for its sole shareholder of \$74,100 and \$78,000 in tax years 2004 and 2005. The petitioner's tax returns reflect wages and salaries paid with a range of \$295,143 to \$259,669 in tax years 2001 to 2005, and also reflect compensation of other workers under "cost of labor" from tax years 2002 to 2005 that ranged from \$482,042 to \$572,381 as identified on the petitioner's Schedules A.⁸ While the petitioner's Form 1120 reflects no cost of labor expenditure on Schedule A, the ensuing tax years reflect a consistent pattern of significant wages or compensation.

While the AAO does not view officer compensation as a source of additional funds with which to pay the proffered wage, the varying amounts of officer compensation provided by the petitioner from tax years 2001 to 2005 does indicate some financial flexibility with regard to the distribution of the petitioner's assets. In examining the totality of the petitioner's circumstances, the AAO finds that the evidence in the record is sufficient to establish that the petitioner is a viable business, and that the petitioner does have the ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO notes that the record indicates that the beneficiary has been previously removed from the United States on March 28, 1998, having been found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, for fraud or misrepresentation of a material fact. The record indicates that the beneficiary attempted entry into the United States by presenting a valid Form I-94 bearing a counterfeit Temporary I-551 stamp in his name for the purpose of gaining entry into the United States. Therefore, should the beneficiary file a Form I-485, Application to Register Permanent Residence or Adjust Status, he should be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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 the burden of establishing its ability to pay the proffered wage.

ORDER: The appeal is sustained.

⁷ 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).

⁸ The AAO does note that the petitioner did not identify the number of employees that it employed on the I-140 petition, versus the labor costs and wages paid, therefore it is problematic to determine the magnitude of the petitioner's business and its overall financial viability, solely from the size of the petitioner's payroll.