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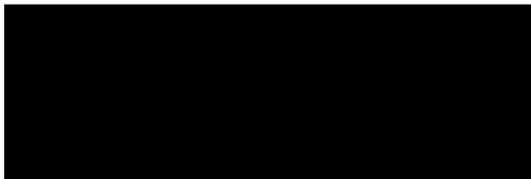
FILE: EAC-06-123-52527 Office: TEXAS SERVICE CENTER Date: NOV 06 2007

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 Acting Director (Director), Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a hair stylist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that [REDACTED] is not the petitioner and thus the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition with [REDACTED] Inc.'s tax returns and bank statements. 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 29, 2006 denial, the single issue in this case is whether or not the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence with [REDACTED] tax returns and bank statements.

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 June 26, 2002. The proffered wage as stated on the Form ETA 750 is \$17.95 per hour (\$37,336 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on May 2, 2002, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 2000, and to currently employ six workers. However, the petitioner did not provide information about its gross annual income and net annual income on the petition.

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 letter dated August 29, 2006 from the petitioner's accountant and a copy of Form 8TA-NE Renewal Application for Business, Professional and Occupational License, County of Fairfax, Department of Tax Administration for 2006. Other relevant evidence in the record includes [REDACTED]'s corporate tax returns for 2002 through 2005 and bank statements of [REDACTED] bank account for the months from February 2002 through May 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the information provided for [REDACTED] is the financial information of the petitioner and therefore, the petitioner did in fact demonstrate the ability to pay the proffered wage.

The petitioner of the instant petition and the employer listed on the relevant labor certification application is Sebastian Unisex Hair Salon. However, the petitioner submitted [REDACTED]'s federal tax returns as evidence of the petitioner's continuing ability to pay the proffered wage as of the priority date. The director determined that [REDACTED] is not the petitioner. It is noted that the federal tax returns filed by [REDACTED] show that [REDACTED] and the petitioner are located at the same address, and more importantly, they share the same federal employer identification number. In addition, the petitioner's accountant verifies in his letter dated August 29, 2006 that [REDACTED] is doing business under the trade name of Sebastian Unisex Hair Salon. Form 8TA-NE Renewal Application for Business, Professional and Occupational License filed by [REDACTED] with the Fairfax County Department of Tax Administration on February 20, 2006 shows that the petitioner's name is listed as trade name under [REDACTED]. The AAO concurs with counsel's assertion that the submitted evidence is sufficient to show that [REDACTED] and the petitioner are the same entity, and thus [REDACTED]'s tax returns and other regulatory-prescribed evidence should be considered as evidence of the petitioner's continuing ability to pay the proffered wage in the instant case. Accordingly, the director's determination that [REDACTED] is not the petitioner will be withdrawn.

However, the AAO will further discuss whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date with [REDACTED]'s tax returns and other financial documents.

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

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).

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 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 did not claim to have worked for the petitioner and the petitioner did not submit W-2 forms, 1099 forms or other documents showing the petitioner paid the beneficiary during the relevant years. The petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$37,336 per year from the year of the priority date to the present with its net income or its net current assets.

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 total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2002 through 2005. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is

based on a calendar year. The tax returns for 2002 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,336 per year from the year of the priority date:

- In 2002, the Form 1120 stated a net income² of \$2,024.
- In 2003, the Form 1120 stated a net income of \$6,673.
- In 2004, the Form 1120 stated a net income of \$(3,484).
- In 2005, the Form 1120 stated a net income of \$(5,810).

Therefore, for the years 2002 through 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.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 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 2002 were \$2,573.
- The petitioner's net current assets during 2003 were \$10,702.
- The petitioner's net current assets during 2004 were \$8,603.
- The petitioner's net current assets during 2005 were \$3,848.

Therefore, for the years 2002 through 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, its net income or its net current assets.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

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.

Counsel asserted in response to the director's request for evidence (RFE) dated May 19, 2005 that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel submitted bank statements for the petitioner's business checking accounts covering the months from February 2002 to May 2006. Counsel's reliance on the balances in the petitioner's bank checking accounts is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

In response to the director's RFE, counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) and argued that much like *Sonogawa*, the petitioner is a relatively well established organization and reasonably expects continuing increase in business and profits. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful 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*, nor has it been established that the years 2002 through 2005 were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner.

Counsel referred to a decision issued by the AAO, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished 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).

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 Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 not been met.

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ORDER: The appeal is dismissed. The portion of the director's July 29, 2006 decision regarding the petitioner's identity is withdrawn, however, the portion of the director's decision regarding the petitioner's ability to pay the proffered wage is affirmed.