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U.S. Citizenship
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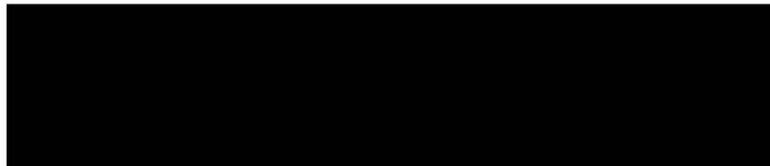
Office: VERMONT SERVICE CENTER

Date: SEP 07 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 and the petition will be approved.

The petitioner is a commercial janitorial service. It seeks to employ the beneficiary permanently in the United States as a janitor services supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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. Therefore, the director denied the petition.

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.

According to the director's April 24, 2006 denial, the issue in this case is whether 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 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.

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 is 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 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$8.50 per hour, 40 hours per week, or \$17,680 annually.¹ The Form ETA 750 states that the position requires two years of experience in the proffered position.

¹ Counsel indicated in his letter dated February 10, 2006 that an unspecified regulatory guideline states that a thirty-five hour workweek is a fulltime schedule. He claimed that, as such, the proffered position should be viewed as involving a thirty-five hour workweek, rather than a forty-hour workweek, as stated on the Form ETA 750, as certified. Counsel then suggested that the proffered hourly wage of \$8.50 be multiplied by 35

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 on appeal.²

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage:

- the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, 2003 and 2004, together with certain attachments filed with these forms;
 - copies of the beneficiary's Form W-2, Wage and Tax Statement, for 2001, 2002, 2003 and 2004 issued by the petitioner;
 - copies of the petitioner's monthly business checking statements for 2001 through 2005;
- the petitioner's owner's letter dated February 8, 2006 which indicates that the petitioner terminated the employee [REDACTED] during 2003;
- the Form W-2 for [REDACTED] for 2002 issued by the petitioner;
- counsel's letter dated February 10, 2006 submitted in response to the director's Request for Evidence; and
- an undated appeal brief submitted May 22, 2006.

The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as an S corporation. On the petition, the petitioner listed August 6, 1992 as the date it was established. It stated that it had eighteen employees and a gross annual income of \$854,023. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on February 20, 2002, the beneficiary claimed to have worked for the petitioner from July 1997 until the date that form was signed.

On appeal, counsel indicates that the petitioner has demonstrated the ability to pay the proffered wage in that its monthly bank statements show sufficient balances to pay one-twelfth of the proffered, annual wage each month; in that officer(s)' compensation in this matter combined with the petitioner's net income covers the proffered wage; and in that the petitioner has shown that it is well-established with reasonable expectations of increased profits in the future.

(hours) and then multiplied by 52 (weeks) to yield an annual wage of \$14,875. Counsel's reliance on this unspecified regulatory guideline is misplaced. In this matter, the DOL certified a proffered wage of \$8.50 per hour, 40 hours per week. CIS shall adhere to the terms of the Form ETA 750, as certified, when analyzing whether the petitioner has demonstrated an ability to pay the wage. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983)(stating that "DOL bears the authority for setting the *content* of the labor certification.")(Emphasis in the original.) *See also* § 8 CFR 204.5(g)(2).

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 this 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition subsequently based on that Form 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, 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 Sonegawa*, 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 this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards. However, the Forms W-2 in the record do indicate that in 2001, the petitioner paid the beneficiary \$12,340, or \$5,340 less than the proffered wage; in 2002, the petitioner paid the beneficiary \$10,684, or \$6,996 less than the proffered wage; in 2003, the petitioner paid the beneficiary \$10,092, or \$7,588 less than the proffered wage; and, in 2004, the petitioner paid the beneficiary \$10,832, or \$6,848 less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 not sufficient. It is also insufficient for the petitioner to show that it paid wages in excess of the proffered wage.

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* stated:

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* 719 F. Supp. at 537.

The petitioner's tax returns demonstrate the following financial information concerning its ability to pay the proffered annual wage of \$17,680 from the priority date of April 30, 2001 onwards:

- Petitioner's 2001 Form 1120S states a net income or loss³ of -\$19,768.
- Petitioner's 2002 Form 1120S states a net income or loss of \$840.
- Petitioner's 2003 Form 1120S states a net income or loss of \$12,814.
- Petitioner's 2004 Form 1120S states a net income or loss of -\$20,337.

Therefore, for the years 2001, 2002 and 2004, the petitioner did not have sufficient net income to pay the proffered wage, or to pay the balance of the proffered wage after actual wages paid to the beneficiary are subtracted. However, during 2003, the petitioner need only show an ability to pay \$7,588, or the proffered wage minus actual wages paid. Its net income in 2003 of \$12,814 does cover the balance of the proffered wage remaining after the wages paid the beneficiary are subtracted.

Thus, the petitioner has demonstrated an ability to pay the proffered wage in 2003 by combining the actual wages that it paid the beneficiary and its net income for that year. It has not shown the ability to pay the wage during 2001, 2002 and 2004, through net income, or a combination of net income and actual wages paid.

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. Thus, in this matter, CIS will review the petitioner's assets for 2001, 2002 and 2004. 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.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, 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

³For purposes of this analysis, net income is equal to ordinary income (loss) from trade or business activities as reported on Line 21 of the Form 1120S, except in tax year 2001. In 2001, the figure reported on Line 23 of Schedule K varies from Line 21, page 1 of the petitioner's tax return. This indicates additional income from sources other than a trade or business. Thus, for 2001, net income is equal to income (loss) reported on Line 23 of Schedule K.

⁴According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Schedule L, lines 1 through 6 and lines 16 through 18 for 2001 and 2002 were left blank. Thus, this office is not able to calculate its net current assets for those years.

- The petitioner's current assets and current liabilities for 2001 were not listed on the Schedule L. The petitioner's current assets and current liabilities for 2002 were not listed on the Schedule L.
- The petitioner's net current assets during 2004 were \$73,734.

Thus, for the years 2001 and 2002, the petitioner has not shown that it had sufficient net current assets to pay the proffered wage, or to pay the balance of the proffered wage after subtracting actual wages paid to the beneficiary. During 2004, the petitioner had sufficient net current assets to pay the full proffered wage.

In sum, the petitioner has demonstrated an ability to pay the wage during 2003 and 2004. It has not established that it had the ability to pay the beneficiary the proffered wage during 2001 and 2002 through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel's argument concerning the petitioner's size, longevity, and number of employees, however, cannot be overlooked. 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, as in the present matter where the petitioner has shown an ability to pay in two years and has shown, through actual wages paid, an ability to pay a significant portion of the proffered wage during the first two years of the relevant period of analysis. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated over fifteen years ago and employs approximately eighteen employees according to information presented on the petition. The petitioner's gross income in 2004 was over \$850,000 and its gross income has steadily increased during the relevant period of analysis. Indeed, by 2004, the petitioner's gross income had risen to nearly two-hundred and seventy-percent of its 2001 gross income. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has proven its financial strength and viability and that it has the ability to pay the proffered wage.

It is also noted that reliance on any undocumented assertions that the beneficiary would be assuming a portion of the officer(s)' duties or those of another employee at the petitioner's company, and that, as such, a portion of these individuals' compensation should be considered funds available to pay the proffered wage is misplaced. The petitioner failed to provide a Form W-2, Wage and Tax Statement, for such officer(s) or other documentation to identify the officer(s) whose workload would be reduced or to verify what salary the petitioner paid these officer(s) from the priority date onwards. The petitioner did provide a Form W-2 for one year during the relevant period for [REDACTED] an individual whom the petitioner's owner claimed was terminated in 2002. However, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary will replace [REDACTED] and the precise percentage of his duties that the beneficiary would assume. Likewise, there is no notarized, sworn statement from an officer in the record which attests to the claim that the officer is willing to forego his or her compensation, that the beneficiary will replace the officer, and that the beneficiary would assume a specified percentage the officer's duties. Further, there is no evidence in the record that an officer and/or [REDACTED] performed the duties of the proffered position. 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)).

Also, the petitioner's business checking account statements submitted into the record do not help demonstrate that the petitioner has had the ability to pay the proffered wage from the priority date onwards. Bank statements are not among the three types of evidence enumerated in 8 C.F.R. § 204.5(g)(2) as the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional evidence to be considered "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner in this matter. Also, the various bank statements submitted show the amount in the petitioner's checking account on a given date. Such statements standing alone cannot show an ability to pay the proffered wage from the priority date onwards. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's monthly checking statements somehow reflect additional available funds that were not listed on its tax returns.

Finally, CIS will not prorate the proffered wage for the portion of the year that occurred after the priority date, as suggested by counsel. This office will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The evidence submitted does 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 been met.

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