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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: APR 22 2008

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:



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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is in retail sales. It seeks to employ the beneficiary permanently in the United States as a retail sales manager. 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 proffered wage from the priority date. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 30, 2007 denial, the issue in this case is whether or not the petitioner has established that it has the continuing ability to pay the proffered wage from the priority date of April 27, 2001.

On appeal, counsel submits a statement and indicates that a brief would be submitted within thirty days. On April 14, 2008, the AAO faxed counsel explaining that the brief was not received by this office and requesting that if counsel had indeed filed a brief, that counsel provide a duplicate copy of that brief within five business days. Counsel responded within the five business days explaining that she had not filed a brief or evidence in support of this appeal as she indicated on Form I-290B. Therefore, a decision will be determined based on the record, as it is currently constituted.

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 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 either 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 C.F.R. § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$26,000 annually.

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. Relevant evidence submitted on appeal includes counsel's statement. Other relevant evidence includes a copy of the petitioner's certificate of incorporation, a copy of a compiled financial statement for the petitioner for the period ended November 30, 2006, copies of the petitioner's 2001 through 2005 Forms 1120, U.S. Corporation Income Tax Returns, and a copy of the 2005 Form 1065, U.S. Return of Partnership Income, for Golden Time Management, LLC. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2005 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$17,162, -\$510, \$7,685, \$22,786, and \$0, respectively. The petitioner's 2001 through 2005 Forms 1120 also reflect net current assets of \$5,857, -\$1,107, \$63,568, \$109,309, and \$49,445, respectively.

Golden Time Management, LLC's 2005 Form 1065 reflects an ordinary income or net income from Schedule K of \$112,212 and net current assets of \$127,712.²

The petitioner's compiled financial statement for the period ended November 30, 2006 reflects a net income of \$38,090.12 and net current assets of \$83,248.83.³

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).

² It is noted that in response to a request for evidence, dated August 20, 2007, counsel claims that the petitioner's net income and net current assets from both the petitioner and its affiliate, Golden Times, Inc., exceeded the proffered wage by \$148,466 in 2001 and by \$95,752 in 2002. It is also noted that [REDACTED] accountant for American Business Accounting & Consulting Services, Inc., asserts that the petitioner and Golden Times, Inc. are under the same management and ownership, and that Golden Times, Inc. has the ability to loan funds to the petitioner for its operation in order to pay the proffered wage of \$26,000. However, in the instant case, the petitioner is a corporation, and because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Similarly, the AAO will not consider the net income or net current assets of Golden Time Management, LLC when determining the petitioner's ability to pay the proffered wage. The petitioner claims that Golden Times Management, LLC is the management company of the petitioner. The petitioner must show the ability to pay the proffered wage out of its own funds.

³ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying this statement, the AAO cannot conclude that it is an audited statement. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered

On appeal, counsel asserts:

The I-140 was denied because USCIS alleges that the employer lacks the ability to pay the proffered wage. In support of this, the decision lists the Net Income and Net Assets for [the petitioner] for 2001-2006. The proffered wage is \$26,000 per year. For 2001, the net income and assets total \$23,019. However, [the petitioner] did not come into existence until March 2001, and the Labor Certification was filed April 27, 2001. Therefore, for the 249 days of 2001 that the labor certification was pending, the employer would need to show the ability to pay a wage of \$17,737. The employer meets this requirement. The employer easily exceeds the net income/net asset requirement for every other year except 2002 and 2006. The 2006 taxes were not submitted due to an extension request. They are marked "INDETERMINATIVE" in the USCIS denial, and will be submitted within 30 days. In 2002, [the petitioner] did show a net loss of \$510. However, it paid \$24,000 in salaries that year, claimed \$391 in depreciation, and had \$21,802 in cash on hand and \$25,144 of inventory remaining at the end of the year. Therefore, [the petitioner] did have the ability to pay the proffered wage in 2002. Within 30 days, [the petitioner] will submit case law to support that the proper calculation of net income and assets will show that [the petitioner] was able to pay the proffered wage for all years since the Labor Certification for ETA-9089 [sic] was filed.

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 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, on the Form ETA 750, signed by the beneficiary on April 24, 2001, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to show that the petitioner employed the beneficiary in the pertinent years, 2001 through 2006.

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.

wage. Therefore, the compiled financial statement for the period ended November 30, 2006 will not be considered when determining the petitioner's ability to pay the proffered wage of \$26,000.

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. 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.

In 2001 through 2005, the petitioner was organized as a "C" corporation. For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2005 were \$17,162, -\$510, \$7,685, \$22,786, and \$0, respectively. The petitioner could not have paid the proffered wage of \$26,000 from its net incomes in 2001 through 2005.⁴

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.⁵ 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

⁴ It is noted that on appeal, counsel indicates that she would submit the petitioner's 2006 tax return. However, that tax return was not submitted, and, therefore, the petitioner has not established its ability to pay the proffered wage of \$26,000 in 2006 with regulatory-prescribed evidence.

⁵ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 through 2005 were \$5,857, -\$1,107, \$63,568, \$109,309, and \$49,445, respectively. The petitioner could have paid the proffered wage of \$26,000 from its net current assets in 2003 through 2005, but not in 2001 and 2002.⁶

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered wage in 2001 and 2002 based on its net income, net current assets, depreciation, cash on hand, and remaining inventory.

Counsel is mistaken. In 2001, counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

In addition, in 2001, counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, 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.

In 2002, counsel claims that the petitioner has established its ability to pay the proffered wage of \$26,000 based on the salaries it paid in 2002, its depreciation, its cash on hand, and its remaining inventory. However, although 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.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution

⁶ As noted herein, the petitioner has not established its ability to pay the proffered wage in 2006 with regulatory-prescribed evidence. See footnote 4.

in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

With regard to the petitioner's remaining inventory at the end of the year, as with cash on hand, adding the remaining inventory to the petitioner's net income would be inappropriate and likely duplicative. The petitioner's inventory is included in the calculation of the petitioner's net current assets, which are considered separately from its net income.

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 this case, the petitioner's tax returns indicate it was incorporated in 2001. The petitioner has provided tax returns for the years 2001 through 2005. However, only the 2003 through 2005 tax returns establish the petitioner's ability to pay the proffered wage of \$26,000, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.⁷

For the reasons discussed above, the assertions of counsel on appeal do not overcome 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 not been met.

ORDER: The appeal is dismissed.

⁷ It is noted that the proffered position of retail sales manager does not appear to be a supervisory position as required by the labor certification. The Form ETA 750 indicates that one of the duties of retail sales manager is to "supervise salespersons." The Form I-140, Immigrant Petition for Alien Worker, listed only two employees when it was filed with CIS on February 1, 2007. In addition, the Form ETA 750 indicates that the beneficiary will report to the President of the company, and under item 17, identifying the number of employees the beneficiary will supervise, the space is left blank on the Form ETA 750. Furthermore, it is noted that the petitioner paid only \$4,000 in salaries in 2001 indicating that the petitioner did not require the services of a retail sales manager as of the priority date, April 27, 2001. Therefore, the petitioner has not submitted any tangible evidence that the beneficiary would be employed in a supervisory position.