

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

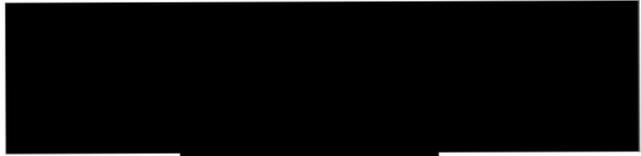
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6



FILE: [REDACTED]  
LIN 06 211 51045

Office: NEBRASKA SERVICE CENTER

Date: **JUL 28 2008**

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

The nature of the petitioner's business<sup>1</sup> is intrastate commercial shipping and delivery. It seeks to employ the beneficiary<sup>2</sup> permanently in the United States as a supervisor, customer service. 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).<sup>3</sup> 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated October 30, 2006, an 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 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

---

<sup>1</sup> The petitioner Champ Transportation Service, Inc. According to a letter from Champ Transportation Service Inc. by \_\_\_\_\_ president, dated May 25, 2006, the corporation Champ Express Inc. was established in 2000 and in 2003 changed its name to Champ Transportation Service Inc.

<sup>2</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

<sup>3</sup> According to the record of proceeding the employer named on the Application for Alien Employment Certification Form ETA 750 is Champ Express, Inc. The record contains tax returns for both the petitioner and Champ Express, Inc. The tax returns for the petitioner reflect that it was incorporated on April 15, 2003 and has a different Federal Employer Identification Number (FEIN) than Champ Express, Inc. The 2002 Champ Express tax return is marked as a "final return" and the petitioner's 2003 tax return is marked as an "initial return."

shall be either 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 DOL. *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 certified by DOL 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 26, 2001.<sup>4</sup> The proffered wage as stated on the Form ETA 750 is \$40,414.00 per year.

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 appeal.<sup>5</sup>

The petitioner's relevant evidence in the record includes the following: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2000,<sup>6</sup> 2001 and 2002 filed by Champ Express, Inc., and for 2003, 2004 and 2005 filed by the petitioner; the petitioner's Employers Quarterly Federal Tax Form (Form-941) for 2004, 2005 and the second quarter of 2006; an offer of employment to the beneficiary dated May 25, 2006; copies of the beneficiary's biographic page from his Republic of Korea passport and his U.S. entry visa; an explanatory letter from counsel dated October 10, 2006; a cover letter from the petitioner dated October 10, 2006; a statement by the petitioner's accountant dated September 18, 2006 that stated, *inter alia*, financial statements attached to the statement are compiled; the accountant's compiled statement of assets, liabilities and equity as of December 31, 2001, December 31, 2002, December 31, 2004 and December 31, 2005; the petitioner's accountant's compiled comparative statement of assets, liabilities and equity as of December 31, 2001, December 31, 2002, December 31, 2003, December 31, 2004 and December 31, 2005; a comparative exhibit of the petitioner's Employers Quarterly Federal Tax Form (Form-941) for 2004, 2005 and 2006; the

---

<sup>4</sup> It has been approximately seven years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>5</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

<sup>6</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. In 2000, the Form 1120S for Champ Express Inc. stated net income of <\$2,754.00>. The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

accountant's compiled statement of revenue and expenses for the four months ending December 31, 2004 and 2005; the petitioner's accountant's compiled statement of revenue and expenses for the 12 months ending December 31, 2005; an exhibit entitled "Total Bank Accounts Record, 2005"; exhibits entitled "Monthly bank statements for 2003" and "Monthly bank statements for 2005, with business checking account banking statements for 2003 and 2005"; exhibits entitled "Monthly bank statement summary for 2003," "Monthly bank statement summary for 2004" and "Monthly bank statement summary for 2005 (Metro Bank, Account Nos. 1-----; 1-----) with regular commercial account banking statements for 2004 and 2005;"<sup>7</sup> an exhibit entitled "Monthly bank statement summary for 2005 (Chase Account No. 0-----) with business checking account banking statements for 2005"; exhibits entitled "Monthly bank statement summary for 2005 (Bank of America Account Nos. 0----- and 0-----) with business checking account banking statements for 2005"; exhibits of Champ Transportation Service Inc. entitled "Monthly bank statement summary for 2003," "Monthly bank statement summary for 2004" and "Monthly bank statement summary for 2005" (Southwestern National Bank Account No. 1-----; 0-----) with business checking account banking statements for 2003, 2004 and 2005," as well as other documents.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2000<sup>8</sup> and to currently employ 11 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income was not stated on the petition. The gross annual income stated on the petition was "about 2 million dollars." On the Form ETA 750, signed by the beneficiary on May 15, 2006, the beneficiary did not claim to have worked for the petitioner.

As stated, the director denied the petition on October 30, 2006. On appeal, counsel submits a legal brief and the following additional evidence: a Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; previously submitted tax returns; a statement by the petitioner's accountant dated October 10, 2006, that stated, *inter alia*, financial statements attached to the statement are compiled as well as evidence already submitted by counsel as enumerated above.

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 (BIA 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

---

<sup>7</sup> The number is obscured for privacy purposes.

<sup>8</sup> According to petitioner's tax returns in the record of proceeding, the petitioner was incorporated on April 15, 2003.

instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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 supported by judicial precedent. *See 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 that exceeded the proffered wage 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.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 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. 623 F. Supp. at 1084. 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 that 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*, 719 F. Supp. at 537.

The petitioner's tax returns<sup>9</sup> demonstrate the following financial information concerning the petitioner's ability to pay:

---

<sup>9</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See Internal Revenue Service, Instructions for Form 1120S, 2003*, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, *Instructions for Form 1120S, 2002*, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

- In 2001, the Form 1120S for Champ Express Inc. stated net income of \$17,938.00.
- In 2002, the Form 1120S for Champ Express Inc. stated net income of \$10,985.00.
- In 2003, the Form 1120S for the petitioner stated net income of \$48,768.00.
- In 2004, the Form 1120S for the petitioner stated net income of \$32,317.00.
- In 2005, the Form 1120S for the petitioner stated net income of \$46,541.00.

Since the proffered wage is \$40,414.00 per year, Champ Express Inc. and the petitioner did not have sufficient net income to pay the proffered wage for years 2001, 2002 and 2004. In 2003 and 2005 the petitioner did have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during the 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.<sup>10</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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.

- Champ Express' net current assets at the end of 2001 and 2002 were <12,424> and zero (final return) respectively. The petitioner's net current assets at the end of 2003, 2004 and 2005 were \$16,291.00, \$48,715.00 and <\$11,403.00> respectively.

Therefore the petitioner did not have sufficient net current assets to pay the proffered wage in 2001, 2002, 2003 and 2005. In 2004 the petitioner did have sufficient net current assets to pay the proffered wage.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,<sup>11</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel's reliance on the balances in the petitioner's bank 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

---

<sup>10</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>11</sup> 8 C.F.R. § 204.5(g)(2).

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, the bank statements in this case cannot show the sustained ability to pay the proffered wage because any funds expended to pay the proffered wage in one month would not be available in subsequent months. 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 cash specified on Schedule L that was considered above in determining the petitioner’s net current assets.

Counsel cites the case precedent *Ranchito Coletero*, 2002-INA-104 (2004 BALCA) for the proposition that CIS is required to consider the normal accounting practices of the petitioner. *Ranchito Coletero* concerns entities in an agricultural business that regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the Department of Labor’s (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. 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, BALCA 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). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

Counsel refers to a decision issued by the AAO concerning the ability to pay the proffered wage, 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 contends ‘the fact that the employer’s net profit for the previous year was not commensurate with the salary specifications of the labor certification does not require denial of a petition’ citing the case precedent of *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Counsel’s assertion must be qualified. *Matter of 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.

Counsel presumes that the petitioner is the successor-in-interest to Champ Express Inc. but that premise has not been demonstrated. For example, the record lacks documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). As discussed above, Champ Express operated under a different FEIN than the one under which the petitioner is now operating and filed a

final tax return the year before the petitioner filed its initial tax return, suggesting more than a mere change of name.

Even if we accepted that the petitioner is the successor-in-interest to Champ Express, in the five years for which tax returns were submitted for the two corporations, in 2001, 2002 and 2004, the companies stated net income of \$17,938.00, \$10,985.00 and \$32,317.00 for each of those years respectively. Further net current assets for the two companies were <\$12,424.00>, not stated, \$16,291.00 and <\$11,403.00> for 2001, 2002, 2003 and 2005 respectively. Therefore for the above years the above stated net income and net current assets were not sufficient to pay the proffered wage. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, 2003 or 2005 were an uncharacteristically unprofitable year for the petitioner.

Counsel asserts that by adding the petitioner's net income and net current assets, the resulting sums in years 2004 and 2005 is evidence of the ability to pay the proffered wage. The net income on the tax returns represents income over twelve months while the net current assets represent a figure as of a date certain, December 31 of the tax year. Counsel has not explained why combining these two numbers provides a meaningful picture of funds available to the petitioner to pay the proffered wage.

Counsel asserts that the reallocation of the petitioner's "non-critical business expenses" is evidence of the petitioner's ability to pay the proffered wage. In the totality of all the evidence submitted in this case, there is no evidence to demonstrate that the petitioner's business was in an uncharacteristically unprofitable period. There was no evidence submitted that there were unusual or novel expenses, losses or costs that would have depressed the net income of the petitioner.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date for years 2001, 2002 and 2004. Thus, we uphold the director's decision. Moreover, the record does not establish that the petitioner is the successor-in-interest to the entity that filed the Form ETA 750.

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 not met that burden.

**ORDER:** The appeal is dismissed.