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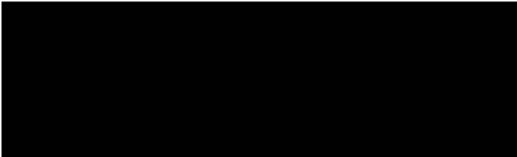
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 06 176 53777

Office: NEBRASKA SERVICE CENTER

Date: OCT 24 20

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment based 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 an auto repair shop. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

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 establish that its ETA 750 job offer to the beneficiary is realistic. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition subsequently filed based on the approved ETA 750. The priority date is the date that the 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); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Therefore, 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. Here, the ETA 750 was accepted for processing on July 22, 2002. The proffered wage as stated on Part A of the ETA 750 is \$13.51 per hour, which amounts to \$28,100.80 per year. On Part B of the ETA 750, signed by the beneficiary on July 2, 2002, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on May 30, 2006, the petitioner states that it was established in May 1994 and currently employs three workers.

As evidence of its continuing financial ability to pay the proposed wage offer of \$28,100.80 per annum and in response to the director’s request for evidence, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2002, 2003, 2004, and 2005. The returns indicate that the petitioner files its tax returns using a standard calendar year and is organized as a corporation under the name of “Hamidi Inc.”¹ The returns also contain the following information:

	2002	2003	2004	2005
Net Income ²	\$ 2,215	\$ 47,248	\$ 54,990	\$28,382
Current Assets	\$ 3,715	\$ 42,411	\$ 120,213	\$30,312
Current Liabilities	\$ n/a	\$ n/a	\$ n/a	\$ n/a
Net Current Assets	\$ 3,715	\$ 42,411	\$ 120,213	\$30,312

Besides net income and as an alternative method of reviewing a petitioner’s ability to pay a proposed wage, CIS will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ It represents a measure of liquidity during a given period

¹ The tax returns filed by Hamidi, Inc. indicate an incorporation date of July 14, 1996. Virginia State Corporation Commission records reflect an incorporation date of May 25, 2004. The record contains no evidence that the petitioner has provided evidence of the use of a fictitious business name. When or if future proceedings may be filed by this petitioner, such evidence should be provided and a full explanation should be offered to explain the relationship between these two entities.

² For the purpose of this review of the petitioner’s Form 1120 corporate tax returns, the petitioner’s net income is found on line 28 (taxable income before net operating loss deduction and special deductions). CIS uses a corporate petitioner’s taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner’s total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner’s taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

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

and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Following a review of the petitioner's net income and net current assets, the director denied the petition on November 2, 2007, determining that neither the petitioner's net income nor its net current assets were sufficient to demonstrate its ability to pay the proffered wage in 2002, the year covering the priority date.

On appeal, the petitioner, through counsel submits additional evidence including copies of the petitioner's bank statements for 2002, a copy of a letter, dated May 11, 2007, indicating that the petitioner has a contract to provide repair services to a fleet of taxicabs, and a copy of an unaudited financial statement for 2002.

Counsel asserts on appeal that the petitioner's bank statements show that the petitioner's monthly cash flow was significant and that the tax returns for 2002-2005 taken as a whole, demonstrate that the petitioner had the continuing financial ability to pay the proffered wage.

Although the petitioner's tax returns indicate that either the petitioner's net income or net current assets were sufficient to cover the proffered wage of \$28,100.80 in 2003-2005, we do not find counsel's assertions persuasive as to the petitioner's ability to pay the proposed wage offer in 2002. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear.

It is noted that the petitioner's bank statements show only a portion of a petitioner's financial profile and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as set forth on an audited financial statement or a corporate tax return. Further, cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Counsel provided no evidence that demonstrated that the funds reported on the petitioner's 2002 bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not already have been reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L. In this case, we do not conclude that the 2002 bank statements should be accepted as probative of the petitioner's ability to pay the proffered wage in lieu of the data set forth on the tax returns as required by 8 C.F.R. § 204.5(g)(2).

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.

The 2002 financial statement submitted on appeal is not audited and is not probative of the petitioner's ability to pay the proffered wage during that period of time. According to the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. Additionally, the 2007 letter referring to the petitioner's contract to provide repairs to a fleet of taxis does not establish its ability to pay the certified wage in 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record does not indicate that the petitioner has employed the beneficiary.

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 (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income or net current assets to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

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.

Similarly, we do not find that an approval based on *Matter of Sonogawa*, 12 I&N Dec. 612, is appropriate in this case. In *Sonogawa*, an appeal was sustained where the expectations of increasing business and profits supported the petitioner's ability to pay the proffered wages and overcame evidence of reduced profit. That case, however, related to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional

Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere and the fact that unlike the four and one-half years that the instant petitioner had been established at the time of the I-140 filing, the petitioner in *Sonegawa* had been in business for eleven years and had shown substantial potential for growth. In this case, although the petitioner's other tax returns reflect its ability to pay the proffered wage they do not represent a framework of profitable years analogous to the *Sonegawa* petitioner. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* have been submitted. The AAO cannot conclude that the petitioner has demonstrated that unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

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.