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

PUBLIC COPY

B6

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date: SEP 02 2008

SRC-06-063-51913

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.¹ The appeal will be dismissed.

The petitioner is a sign manufacturer. It seeks to employ the beneficiary permanently in the United States as a software engineer (network analyst). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that 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 shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 16, 2006 denial, the primary 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 was accepted for processing by any office within the employment system of the 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 as certified by the 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 September 18, 2003. The proffered wage as stated on the Form ETA 750 is \$55,000 per year. On the Form ETA 750B signed on August 18, 2003, the beneficiary claimed to

¹ While the instant appeal was pending with the AAO, the petitioner filed an identical immigrant petition on behalf of the instant beneficiary with the Nebraska Service Center on June 7, 2007. The petition (LIN-07-177-52999) is currently pending with the Nebraska Service Center.

have worked for the petitioner since November 2002. On the petition, the petitioner claimed to have been established in 1985, to have gross annual income of \$700,000, and to currently employ seven workers.

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.² On appeal, counsel submits the petitioner's W-2 forms issued to its employees for 2003 through 2006, the petitioner's Form ORM C-3, Employer's Quarterly Report, for 2004, 2005 and the first two quarters of 2006, the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 2006, and the petitioner's bank account statements for the period from January 1, 2003 to June 30, 2006. Other relevant evidence in the record includes the petitioner's corporate federal tax returns for 2002 through 2004, the beneficiary's W-2 form for 2005, and the petitioner's bank account statements for February and March of 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that evidence submitted established that the petitioner has had, has now and will have the ability to pay the proffered wage.

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the petitioner's W-2 forms issued to its employees for 2003 through 2006, and the petitioner's quarterly report for 2004, 2005 and the first two quarters of 2006. These

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) and 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). In the instant case, the Form I-290B was submitted timely and the subsequent brief and/or evidence were sent to the AAO on August 11, 2006, within 30 days as indicated on the Form I-290B. Counsel also submitted additional evidence on December 7, 2006 and May 22, 2007 respectively. Although the regulations do not allow an applicant or petitioner an open-ended or indefinite period in which to supplement an appeal once it has been filed, this office will consider all documentation submitted to support the appeal since they were submitted prior to adjudication of the instant appeal.

documents show that the petitioner paid the beneficiary \$3,000.00 in 2003, \$36,039.58 in 2005, and \$39,874.36 in 2006. The quarterly reports from 2004 do not list the beneficiary as an employee during that year. The petitioner also submitted evidence showing that it paid to other employees. However, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Thus, the petitioner failed to establish its ability to pay the proffered wage through wages paid to the beneficiary from 2003 onwards. The petitioner is obligated to demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage of \$55,000 in 2004 and the difference of \$52,000 in 2003, \$18,960.42 in 2005 and \$15,125.64 in 2006 between wages actually paid to the beneficiary and the proffered wage respectively.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp. 537.

The petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 2002 through 2004 and 2006 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. However, the priority date in the instant case is September 16, 2003, therefore, the tax return for 2002 is not necessarily dispositive. The tax returns for 2003, 2004 and 2006 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$55,000 per year from the priority date:

- In 2003, the Form 1120S stated a net income³ of (\$1,985).
- In 2004, the Form 1120S stated a net income of (\$15,844).
- In 2006, the Form 1120S stated a net income of \$5,473.

For the years 2003, 2004 and 2006, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage. For 2005, the petitioner did not submit its tax return, and therefore, the AAO cannot determine whether the petitioner had sufficient net income to pay the difference of \$18,960.42 between wages actually paid to the beneficiary and the proffered wage that year. Thus, the petitioner failed to establish its ability to pay the proffered wage with its net income in these years.

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.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 lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2003 were (\$5,864).
- The petitioner's net current assets during 2004 were (\$17,118).
- The petitioner's net current assets during 2005⁵ were (\$15,752).

³ 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 1120S 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 line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

⁴ 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.

⁵ The record does not contain a copy of the petitioner's 2005 tax return. However, the Schedule L of the petitioner's 2006 tax return shows the assets and liabilities at the beginning of year 2006. This office takes the figures at the beginning of 2006 as the ones at the end of 2005.

- The petitioner's net current assets during 2006 were (\$12,109)

Therefore, for the years 2003 through 2006, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage, and thus, it failed to establish its ability to pay the proffered wage with its net current assets in these years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had continuing ability to pay the beneficiary the proffered wage as of the priority date in 2003 to 2006 through an examination of wages paid to the beneficiary, its net income or net current assets.

Counsel submitted the petitioner's bank account statements as evidence to establish the petitioner's ability to pay. 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 ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage as funds available in one month would no longer 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. Significantly, the petitioner's 2006 tax return shows a negative cash balance at the beginning of the year.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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.