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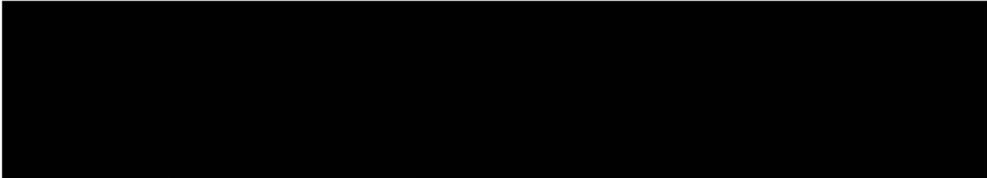
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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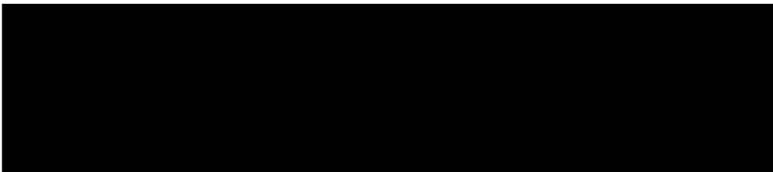
Date:

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 petitioner is a janitorial and cleaning services company. It seeks to employ the beneficiary permanently in the United States as a cleaning supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beyond the 1998 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. The AAO notes that the petitioner filed an earlier I-140 petition for the same beneficiary that was denied September 16, 2005. The AAO will also consider evidence submitted with the earlier petition in its review of the instant petition.

As set forth in the director's November 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.

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. . . . 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 the [Citizenship and Immigration Service].

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 the U.S. Department of Labor. 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 as certified by the U.S. Department of Labor 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 January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$678 a week, or \$35,256 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered.

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.¹

On appeal, counsel submits a brief with evidence previously submitted to the record. The only new evidence submitted on appeal is a copy of the beneficiary's Schedules C, Form 1040, for tax years 2002 to 2004. The brief is also accompanied by a letter written by [REDACTED] the petitioner's owner dated October 8, 2005.² In his letter, [REDACTED] stated that he is writing the letter in reference to the beneficiary's appeal for citizenship. [REDACTED] explained that his subcontractors are called supervisors, and that each subcontractor not only cleans for the petitioner, but also have cleaning accounts of their own. [REDACTED] stated that he currently employed five supervisors who on average are paid between \$55,000 and \$66,000 a year. Mr. [REDACTED] stated that it would take him less than a month to get the beneficiary up and running to his full potential and that [REDACTED] still retains a large percentage of the beneficiary's former customers. Mr. [REDACTED] then stated that the beneficiary left the petitioner to pursue his own business. [REDACTED] stated that the beneficiary left on good terms and it would be a very smart business move on the petitioner's part to rehire the beneficiary, who is welcome back at the petitioner any time.

The record also contains the following evidence:

A copy of the petitioner's Forms 1120, U.S. Corporate Income Tax Return, for the years 1997³ to 2004.

A copy of the beneficiary's Form 1099-MISC for tax year 1998 that indicates the petitioner paid compensation of \$56,223 to the beneficiary in tax year 1998;

A copy of four checks paid out to the beneficiary by the petitioner and dated November 26, 2004, December 10, 2004, December 24, 2004, and December 7, 2005. The four checks are annotated

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). 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).

² Based on this date, this document could have been submitted in an earlier petition for another benefit; however, the AAO could not find the letter in the record of proceedings. Thus, it is considered new evidence for the I-140 petition.

³ The petitioner's 1997 tax return indicates that the petitioner's business year runs from November 1, 1997 to October 31, 1998. The petitioner's subsequent tax returns all follow this tax year time period. Therefore the priority year date of January 14, 1998, would be covered by the petitioner's tax return for tax year 1997. For this reason, the director examined the petitioner's 1997 tax return. The AAO will also examine the petitioner's 1997 tax return.

“contractor” on the bottom left memo section and contain no further documentation as to rate of pay, or period of pay. The checks for 2004 total \$5,894, while the December 2005 check is for \$1,956;

A copy of the petitioner’s Form 1096, Annual Summary and Transmittal of U.S. Information Returns, for tax year 2004. This form contains copies of the petitioner’s Forms 1099-MISC that indicate the non-employee compensation paid to seven individuals in tax year 2004. The total compensation for tax year 2004, based on these documents, is \$262,294. The beneficiary is not identified as one of the individuals receiving non-employee compensation in tax year 2004;

A copy of an undated letter written by [REDACTED] the petitioner’s owner, in response to a prior RFE dated January 12, 2005. In his letter, [REDACTED] states that the beneficiary continues to work with the petitioner as a supervisor. The record reflects the director received the RFE response on April 6, 2005.

A copy of a letter written by [REDACTED] C.P.A., C.V.A., Gurnee, Illinois. In his letter dated July 5, 2006,⁴ [REDACTED] stated that he had been the petitioner’s accountant since 1996. [REDACTED] stated that it was customary for businesses in the cleaning business to hire subcontractors to perform contracted services in residential and commercial buildings, and that each subcontractor was self-employed. [REDACTED] stated that each subcontractor is issued a Form 1099 by the petitioner at the end of the calendar year, and that these procedures have been in place since the company began operations. [REDACTED] further noted that the petitioner’s tax returns listed the total amount paid to all subcontractors in the respective Form 1120, under the item, cost of goods sold. With regard to the petitioner’s 1099 Forms filed in 2004, [REDACTED] stated that the highest compensation reported was \$65,910, and the lowest was \$3,773, and that the average excluding the two lowest paid individuals was \$50,696. [REDACTED] also stated that in his opinion the cleaning teams can be altered or added to accommodate additional individuals.

In his brief, counsel states the petitioner has a substantial business, and that between 1997 and 2004, the petitioner averaged \$402,000 in gross sales and that it paid wages and salaries totaling over \$262,294.⁵ Counsel asserts that CIS should examine the net income and salaries reflected on the petitioner’s federal income tax returns, and consider depreciation. Counsel also stated that an employer may have the ability to pay the proffered wage despite a showing of insufficient taxable income on the petitioner’s tax returns. In making this assertion, counsel refers to four unpublished AAO decisions that primarily refer to petitioners’ cash on hand being sufficient to pay the proffered wage.

Counsel also states that because the instant petition involves a business that provides services and employs independent contractors, the director improperly analyzed the petitioner’s tax return.⁶ Counsel states that as the petitioner’s owner and the petitioner’s accountant have attested, the petitioner includes the amount paid to

⁴ Another letter dated October 11, 2005 from [REDACTED] is also in the record. In this earlier letter, Mr. [REDACTED] stated that he has been the CPA for Wardco, Ltd, formerly Fast and Friendly Cleaning Service, since 1991, and has been the accountant for the petitioner’s owner since 1996.

⁵ Counsel refers to Statement Four of the petitioner’s 2004 tax return.

⁶ Counsel on appeal refers to the AAO November 26, 2006 decision, although he clearly meant the director’s November 26, 2006 decision, since the AO has not issue a decision on this matter and the director’s decision was issued on that date.

its subcontractors under the item, costs of goods sold. Counsel states that the director neglected to properly consider that the wages paid to the petitioner's workers are included as part of the petitioner's costs of goods sold.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner did not include any information on the date it was established, its gross or net annual income, or current number of employees. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner from September 1997 to the date he signed the Form ETA 750, namely, January 13, 1998.

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).

On appeal, counsel refers to four unpublished AAO decisions, concerning the use of the petitioner's cash on hand reserves when the respective petitioners did not have sufficient taxable income to pay the respective wages. Counsel does not provide any published citations. 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). Further, the AAO will examine how the petitioner's cash on hand is considered in calculating the petitioner's net current assets more fully further in these proceedings.

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 has established that it provided non-employee compensation to the beneficiary of \$56,223 based on the 1998 Form 1099-MISC submitted to the record. As previously stated, the petitioner's 1997 calendar year ran from November 1, 1997 to October 31, 1998, which includes the priority date of January 14, 1998. The petitioner's accountant stated in his letter that the petitioner prepared Forms 1099-MISC at the end of the calendar year which would suggest that the beneficiary's compensation received in 1998 covered the period of November 1997 to October 31, 1998. Thus, based on the beneficiary's compensation for the last two months in 1997 and the first ten months of 1998, the petitioner compensated the beneficiary at a level equal to or greater than the proffered wage of \$35,256 for the petitioner's 1997 calendar year. Thus, the petitioner has established its ability to pay the beneficiary the proffered wage as of the January 14, 1998 date.

However, the record does not establish that the petitioner compensated the beneficiary at a level equal to or greater than the proffered wage in the petitioner's 1998 to 2004 tax years. On appeal, counsel submits a letter from [REDACTED] the petitioner's owner, who states that the beneficiary left the petitioner's employ, although he still worked for some previously established cleaning accounts after his departure. [REDACTED] provided no date of when the beneficiary left the petitioner's employ.

With regard to any more substantive evidence as of the beneficiary's employment with the petitioner, the record contains the petitioner's Forms 1099-MISC from tax year 2004 (November 1, 2003 to October 31, 2004); however, the beneficiary is not identified as having received non-employee compensation in that year. Although the petitioner submitted copies of four checks to the record as evidence of compensation paid to the beneficiary, the checks do not provide any information as to the rate of compensation or the period of time covered by the individual checks, or any indication of the work performed. Thus, the petitioner's checks are not sufficient evidence to establish any annual compensation in tax year 2005. They simply reflect that the petitioner paid the beneficiary a total of \$5,894 in the first two months of the petitioner's 2005 tax year, and \$1,956 in the second month of the petitioner's 2006 tax year. Thus the petitioner cannot establish its ability to pay the entire proffered wage beyond the 1998 priority date based on the beneficiary's compensation as the petitioner's subcontractor in the subsequent calendar years.⁷ The petitioner thus has to establish its ability to pay the entire proffered wage from the petitioner's 1998 to 2004 calendar years.

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, contrary to counsel's assertion on appeal, 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 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. 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 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 Fang* 719 F. Supp. at 537.

⁷ It is noted that the record of proceeding closed with the submission of the petitioner's response to the director's request for further evidence dated July 6, 2006. At this time, the petitioner's 2006 income tax return would not have been available, based on the petitioner's stated calendar year. Therefore the AAO will not examine whether the petitioner had sufficient net income or net current assets to pay the difference between the beneficiary's actual 2005 wages and the proffered wage.

As stated previously, the petitioner established its ability to pay the proffered wage based on the beneficiary's Form 1099-MISC for tax year 1998, which covers a period of November 1, 1997 to October 31, 1998. Therefore the AAO does not have to examine the petitioner's net income in tax year 1997. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,256 per year during the years 1998 to 2004:

- In 1998, the Form 1120 stated a net income⁸ of -\$6,469.
- In 1999, the Form 1120 stated a net income of \$1,051.
- In 2000, the Form 1120 stated a net income of -\$15,616.
- In 2001, the Form 1120 stated a net income of \$1,614.
- In 2002, the Form 1120 stated a net income of \$5,825.
- In 2003, the Form 1120 stated a net income of -\$6,419.
- In 2004, the Form 1120 stated a net income of -\$8,150.

Therefore, for the calendar years 1998 through 2004, the petitioner did not have sufficient net income to pay the 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.⁹ 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 1998 were -\$12,338.
- The petitioner's net current assets during 1999 were -\$13,071.
- The petitioner's net current assets during 2000 were -\$10,814.
- The petitioner's net current assets during 2001 were -\$27,646.
- The petitioner's net current assets during 2002 were -\$27,432.
- The petitioner's net current assets during 2003 were -\$17,661.
- The petitioner's net current assets during 2004 were -\$13,395.

⁸The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁹According 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.

Therefore, for the petitioner's calendar years 1998 to 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for calendar year 1997, which includes the priority date.

Counsel asserts in his brief accompanying the appeal that CIS should have considered the petitioner's depreciation as stated in the petitioner's tax returns, but as previously stated, CIS does not add back the petitioner's depreciation with calculating net income. On appeal, counsel also notes that the director did not take into consideration that the petitioner paid the compensation of its subcontractors and identified such compensation in the item cost of goods sold on the petitioner's tax returns.

The AAO acknowledges that many businesses also identify non-employee compensation under cost of goods sold. The petitioner did not have to establish that it provided compensation for its subcontractors, but rather had to establish what compensation it provided to the beneficiary during the time period in question. The petitioner only provided its Forms 1099-MISC for the 2004 calendar year, and one Form 1099-MISC for the beneficiary for calendar year 1998. The evidence provided by the petitioner is not sufficient to establish it can pay the proffered wage based on the compensation provided to the beneficiary as of the January 1998 priority date and continuing. Further, if the petitioner wished to establish that it could employ the beneficiary by putting him in another position already being compensated, it provided no further documentation as to what employee it would replace with the beneficiary. 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 Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.