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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
SRC 03 255 54281

Office: TEXAS SERVICE CENTER Date: APR 03 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

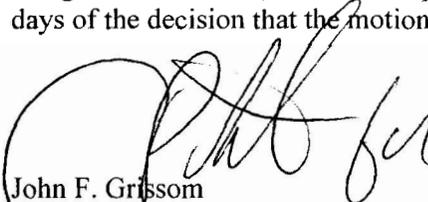
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

The regulation at 8 C.F.R. § 103.2(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence and affidavits with the motion demonstrates that the petitioner has established its ability to pay the proffered wage of \$34,736 as of the priority date of April 30, 2001.

The petitioner is a funeral home. It seeks to employ the beneficiary permanently in the United States as a funeral director. 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 its continuing ability to pay the proffered wage from the priority date and denied the petition accordingly. The AAO concurred with the director's decision on appeal.

The record shows that the motion is properly filed and timely. 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 AAO's May 3, 2006 dismissal, the single issue in this case is whether or not the petitioner has established its ability to pay the proffered wage of \$34,736 at the priority date and continuing to the present.

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 [USCIS].

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$34,736 annually.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes counsel's brief, a letter, dated May 15, 2006, from the petitioner, copies of the petitioner's previously submitted 2001 through 2003 Forms 1120S, U.S. Income Tax Returns for an S Corporation, a copy of the petitioner's previously submitted compiled financial statement for the period January through September 30, 2004,² and a copy of the

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 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's compiled financial statement for 2004 when determining the petitioner's ability to pay the proffered wage of \$34,736.

petitioner's 2005 Form 1120S. Other relevant evidence includes copies of the petitioner's Forms 941, Employer's Quarterly Federal Tax Returns for the first three quarters of 2004 and a copy of an appraisal report for the petitioner's property with attachments and appendices as of May 14, 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 and 2005 Forms 1120S³ reflect ordinary incomes or net incomes from Schedule K of -\$152,882, -\$80,455, -\$37,940, and -\$5,937, respectively. The petitioner's 2001 through 2003 and 2005 Forms 1120S also reflect net current assets of -\$10,270, -\$109,728, -\$108,282, and \$28,273, respectively.

The petitioner's Forms 941 for the first three quarters of 2004 show that the beneficiary began working with the petitioner in the third quarter of 2004 with a salary of \$1,961.57 for that quarter.

The appraisal report for the petitioner's property as of May 14, 2004 reflects a value of \$1,900,000.

The letter, dated May 15, 2006, from the petitioner states that "this letter is [to] acknowledge that [the beneficiary] has been an employee of this company since June 2004 and is currently still an employee."

On motion, counsel asserts:

According to Schedule L of the 2001 tax return, \$8,250 was cash amount. There was also other current depreciable asset included in the building and other depreciable asset amount of \$1,620,327. Since the note payable was \$1,458,138, at least some of difference between \$1,602,327 and \$1,458,138 which is \$162,189 is current asset value such as chair, fixture, auto...etc. 2004 financial statement show the current asset amount as \$206,500 (cash \$4,058; receivable \$19,707; furniture and fixture \$34,278; equipment \$88,392; vehicle \$60,067). Therefore, substantial amount of \$162,189 is current net asset value of the respondent. Also, the schedule L shows \$781,000 as shareholders equity. Therefore, respondent contends that the net asset difference is at least greater than wage offered amount of \$34,736.

AAO stated that the year 2002 tax return schedule L shows \$104 as an asset and \$109,832 as a liability giving a negative current asset of \$109,728.

Again, the respondent contends that AAO did not consider net cash value of furniture, fixture, equipment and vehicles. The para 10a contain some of current asset value in the total property value of \$1,546,271. Since the note payable is \$1,340,755, the positive net asset difference is \$205,516. Some of [the] \$205,516 is net current asset value, and, therefore, respondent believe, she had a current net asset which is greater than proffered wage. In 2002, there was also shareholder equity of \$781,000.

³ The petitioner did not submit its 2004 Form 1120S. It is unclear from the record why the petitioner did not submit this document.

The AAO also stated that [the] 2003 tax return shows \$1,062 as a current asset and liabilities of \$109,344 thereby giving negative asset of \$108,282. Again, respondent contends that [the] AAO did not consider the other current asset of furniture, fixture, equipment and vehicle. The total asset value was \$1,338,613 and the positive difference is \$144,533. Again, the net current asset is greater than the wage offered in the year 2003. The total shareholder's equity was \$781,000. Again, 2004 tax return shows total current asset of \$206,500.

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, USCIS 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, USCIS 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 750B, signed by the beneficiary on April 20, 2001, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, as proof of the beneficiary's employment with the petitioner. The petitioner did, however, submit a copy of its 2004 third quarter Form 941 that shows the beneficiary was employed in that quarter at a salary of \$1,961.57. Therefore, the petitioner has not established that it employed the beneficiary in 2001, 2002, 2003 and 2005, and it is obligated to show that it had sufficient funds to pay the entire proffered wage of \$34,736 in those years. The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$34,736 and the actual wage it paid to the beneficiary in 2004 of \$1,961.57.⁴ That difference is \$32,774.43.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS 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

⁴ It is noted that although the petitioner has submitted a letter claiming that the beneficiary has been employed by it since June 2004, the petitioner has not submitted any evidence of that employment such as Forms W-2, Wage and Tax Statements.

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. 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 USCIS 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 USCIS 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 *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. [USCIS] 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.

Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) or line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional 2003 and 2005 income and deductions shown on its Schedule K, the petitioner's net income is found on line 23 of Schedule K for 2003 and line 17e for 2005.

In the instant case, the petitioner's net incomes for 2001 through 2003 and 2005 were -\$152,882, -\$80,455, -\$37,939, and -\$5,937, respectively. The petitioner could not have paid the proffered wage of \$34,736 from its net incomes in 2001 through 2003 and 2005. As the petitioner did not submit its 2004 income tax return, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$32,774.43 between the proffered wage of \$34,736 and the actual wages paid to the beneficiary of \$1,961.57 from its net income in 2004.

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, USCIS 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, USCIS 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 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 2001 through 2003 and 2005 net current assets were -\$10,270, -\$109,728, -\$108,282, and \$28,273, respectively. The petitioner could not have paid the proffered wage of \$34,736 from its net current assets in 2001 through 2003 and 2005. In addition, since the petitioner did not submit its 2004 income tax return, the AAO is unable to determine if the petitioner had sufficient funds to pay the difference of \$32,774.43 between the proffered wage of \$34,736 and the actual wages paid to the beneficiary of \$1,961.57 from its net current assets in 2004.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage based on its depreciable assets (building, chair, fixtures, auto, etc.) and shareholders' equity.

Counsel is mistaken. 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 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.

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.

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. In addition, the real property at the funeral home which includes the building, fixtures, etc. is considered to be long-term assets (having a life longer than one year), and its value is not considered to be readily available to pay the proffered wage to the beneficiary as the property and its furnishings are not easily converted into cash. Therefore, the AAO will not consider the real estate property or the furnishings of the petitioner's premises when determining the petitioner's ability to pay the proffered wage of \$34,736.

On appeal, counsel claims that shareholders' equity should be considered when determining the petitioner's ability to pay the proffered wage of \$34,736. However, counsel has not provided any authority or precedent decisions to support the use of shareholders' equity in determining the petitioner's ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS 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).

In addition, shareholders' equity is the owners' interest in the assets of the enterprise after deducting all its liabilities, is equal to assets less liabilities (debts and other amounts owed), and, formally, is a form of a liability even though it is typically separated from other liabilities since it is a residual interest. Shareholders' equity is the initial amount of money invested into a business. If, at the end of the fiscal year, a company decides to reinvest its net earnings into the company (after taxes), these retained earnings will be transferred from the income statement onto the balance sheet into the shareholder's equity account. This account represents a company's total net worth. In order for the balance sheet to balance, total assets on one side have to equal total liabilities plus shareholders' equity on the other. The assets and liabilities sections of the balance sheet are organized by how current the account is. So for the asset side, the accounts are classified typically from most liquid to least liquid. For the liabilities side, the accounts are organized from short to long-term borrowings and other obligations. Therefore, as shareholders' equity is listed near the bottom of the liabilities side, it is considered a long-term liability and cannot be considered in determining the petitioner's ability to pay the proffered wage. *See the above discussion on net current assets.* 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the

petitioner shows insufficient net income or net current assets, USCIS 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*, USCIS 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. USCIS 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 USCIS 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 1998. The petitioner has provided its tax returns for 2001 through 2003 and 2005, with none of the tax returns establishing the petitioner's ability to pay the proffered wage of \$34,736. In addition, the tax returns are 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 or of any temporary and uncharacteristic disruption in its business activities. 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.

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

ORDER: The motion to reopen is granted. The AAO's decision of May 3, 2006 is affirmed. The petition remains denied.