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U.S. Citizenship
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Services

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File:

SRC 07 108 51327

Office: TEXAS SERVICE CENTER Date:

JUN 17 2009

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.

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

The petitioner operates a moving and storage business. It seeks to employ the beneficiary permanently in the United States as a director of transportation. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification certified by the U.S. 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 demonstrates that the appeal was properly filed, was timely, and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated May 16, 2007, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of 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 Application for Alien Employment Certification 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 April 23, 2001 and certified on August 28, 2006.¹ The proffered wage as stated on the Form ETA 750 is \$35.14 per hour (\$73,091.20 per year). The Form ETA 750 states that the position requires three years of experience in the proffered position.

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

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750 Application for Alien Employment Certification approved by the DOL; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax returns for 2001 to 2005; the petitioner's state of California quarterly wage and withholding reports for 2006 and 2007³; the beneficiary's IRS Form W-2 Wage and Tax Statements for 2002 to 2005 issued by the petitioner in the amounts of \$21,253.00, \$16,675.00, \$13,130.35, and \$15,423.60 respectively; financial statements regarding the petitioner's ability to pay the proffered salary from 2001 to 2005⁴; and documentation concerning the beneficiary's qualifications.

¹ It has been over eight years since the Application for Alien Employment Certification has been accepted and the proffered wage established. The employer certification that is part of the application, Form ETA 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

² The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

³ The AAO notes that state tax returns do not constitute regulatory-prescribed ability to pay evidence.

⁴ There is no indication that the financial statements submitted were audited, and they were not accompanied by an auditor's report. 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. The AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1991 and to employ 17 workers currently. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$71,572.00 and \$2,080,648.00. On the Form ETA 750, signed by the beneficiary on April 17, 2001, the beneficiary claimed to have worked for the petitioner since June 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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). 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner 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 not established that it paid the beneficiary the full proffered wage from the priority date.

Counsel submitted the beneficiary's IRS Form W-2 Wage and Tax Statements for 2002 to 2005 issued by the petitioner in the amounts of \$21,253.00, \$16,675.00, \$13,130.35, and \$15,423.60 respectively. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$73,091.20 per year, the petitioner must establish that it can pay the beneficiary the full proffered wage for 2001 and the difference between wages actually paid and the proffered wage for 2002 to 2005, which is \$60,838.20, \$56,416.20, \$59,960.95, and \$57,667.60, respectively.

If the petitioner does not establish that it paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS 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 that exceeded the proffered wage is misplaced. Showing that the petitioner's gross

sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Immigration and Naturalization Service, now 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. *Id.* at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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. Therefore the petitioner cannot establish its ability to pay the proffered wage through depreciation as an asset.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the IRS Form 1120S stated net income of \$71,783.00.⁵

⁵ The AAO notes that 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* IRS, Instructions for Form 1120S, 2001, at <http://www.irs.gov/pub/irs-prior/fl120s--2001.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-prior/fl120s--2002.pdf>, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-prior/fl120s--2003.pdf>, Instructions for Form 1120S, 2004, at <http://www.irs.gov/pub/irs-prior/fl120s--2004.pdf>, Instructions for Form 1120S, 2005, at <http://www.irs.gov/pub/irs-prior/fl120s--2005.pdf>, (last

- In 2002, the IRS Form 1120S stated net income of \$71,159.00.
- In 2003, the IRS Form 1120S stated net income of \$24,374.00.
- In 2004, the IRS Form 1120S stated net income of \$5,196.00.
- In 2005, the IRS Form 1120S stated net income of \$38,887.00.

The petitioner did not have sufficient net income to pay the proffered wage for 2001. The petitioner did have sufficient net income to pay the difference between wages actually paid and the proffered wage for 2002. The petitioner did not have sufficient net income to pay the difference between wages actually paid and the proffered wage for 2003 to 2005.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6, of the IRS Form 1120S and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were -\$17,062.00.
- The petitioner's net current assets during 2003 were -\$86,358.00.
- The petitioner's net current assets during 2004 were -\$77,454.00.
- The petitioner's net current assets during 2005 were -\$76,034.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage for 2001. Based on the petitioner's net current assets, it cannot demonstrate its ability to pay

visited May 28, 2009). The petitioner had income from sources other than from a trade or business in 2001 to 2005, so USCIS takes the net income figure from Schedule K for those years.

⁶ 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.

the proffered wage for 2003 to 2005 even if the petitioner's net current assets are combined with wages paid to the beneficiary.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the 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 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 relevant to the petitioner's ability to pay the proffered wage. The petitioner has maintained over \$1.5 million in gross sales since the priority date, has been in business since 1991, and has employed 17 workers, but it has failed to demonstrate that it has even close to enough net income or net current assets to pay difference between wages actually paid and the proffered wage. 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 evidence submitted fails to establish that the petitioner has 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.