

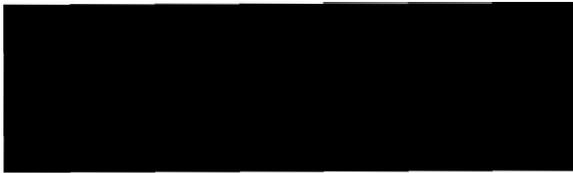
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U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: MAR 05 2009

EAC 04 233 52126

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

The petitioner is a wholesale retailer. It seeks to employ the beneficiary permanently in the United States as a wholesaler. As required by statute, the petition is accompanied by ETA Form 750, Application for Alien Employment Certification (labor 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 beginning on the priority date of the visa petition. The director denied the petition accordingly.

As set forth in the director's January 8, 2007 decision, 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 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 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 labor certification was accepted for processing by any office within the employment system of the U.S. Department of Labor (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 labor 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 labor certification was accepted on April 25, 2001.<sup>1</sup> The proffered wage as stated on the labor certification is \$21.50 per hour (\$44,720.00 per year). The labor certification states that the position requires two years experience in the job offered.

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<sup>1</sup> The AAO notes that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by DOL. DOL had published an interim final

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.<sup>2</sup> On appeal, counsel has submitted: a brief; the 2001 W-2 statement of the petitioner's now deceased owner<sup>3</sup>; and the 2001 bank statements of the petitioner. Other relevant evidence in the record of proceeding includes the following: a letter dated October 2, 2006 from the petitioner stating that the beneficiary has been working for the petitioner since February 2005; the 2001 to 2005 Form 1120 Tax Returns of the petitioner; and the 2005 W-2 statement of the beneficiary.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner did not list its date of establishment<sup>4</sup>, gross annual income, or number of current workers. According to the tax returns in the record, the petitioner's fiscal year is based on

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rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.3(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

<sup>2</sup> 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).

<sup>3</sup> Counsel notes in its February 1, 2007 brief that the previous owner of the company, [REDACTED], is now deceased.

<sup>4</sup> On the petitioner's 2001 through 2005 Form 1120 Tax Returns, the company's date of incorporation is listed as April 12, 1999.

a calendar year. On the ETA Form 750, signed by the beneficiary on May 28, 2004, the beneficiary did not claim to have worked for the petitioner at that point in time.<sup>5</sup>

On appeal, counsel asserts that USCIS should examine the petitioner's bank statements, which reflect that the petitioner had more than enough cash in 2001 to pay the beneficiary's proffered salary. Counsel also urges USCIS to factor into its analysis the company's depreciation amount in 2001, which was cash on hand at that point and could have been utilized to pay the beneficiary's wage. Additionally, counsel asserts that the 2001 W-2 Statement of [REDACTED] shows that he earned \$15,600.00 that year. Counsel states that, customarily, he would only take a salary once all of his employees' wages had been paid. Thus, these funds could have instead been used to pay the beneficiary's salary. Lastly, counsel notes that the company has employed the beneficiary since February 2005.

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 during a given period, USCIS 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 did not employ the beneficiary from 2001 through 2004. The petitioner did establish, by means of the 2005 W-2 statement of the beneficiary, that it employed and paid the beneficiary \$36,276.53 in 2005, \$8,443.47 less than the proffered wage in the labor certification. Therefore, for the years 2001 through 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage. Since the proffered wage is \$44,720.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid in 2005 and the proffered wage.

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, 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

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<sup>5</sup> The AAO notes that a letter from the petitioner dated October 2, 2006 indicates that the beneficiary started to work for the petitioner full-time in February 2005 for an annual salary of \$44,720.00.

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 receipts and wage expenses is misplaced. Showing that the petitioner's gross receipts 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 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. 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. [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* at 537

The petitioner's tax returns demonstrate its net income for 2001 through 2005:

- In 2001, the Form 1120 stated net income<sup>6</sup> of \$29,888.00.
- In 2002, the Form 1120 stated net income of \$45,304.00.
- In 2003, the Form 1120 stated net income of \$59,429.00.
- In 2004, the Form 1120 stated net income of \$51,748.00.
- In 2005, the Form 1120 stated net income of \$1,826.00.

In 2001, the petitioner reported a net income of \$29,888.00, \$14,832.00 less than the proffered wage. Therefore, for 2001, the petitioner did not have sufficient net income to pay the proffered wage. In 2002 through 2004, the petitioner did have sufficient net income to pay the proffered wage. In 2005, the petitioner reported a net income of \$1,826.00, \$42,894.00 less than the proffered wage. Therefore, for 2005, the petitioner did not have sufficient net income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage, which was \$8,443.47.00.

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<sup>6</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> 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 tax returns demonstrate its end-of-year net current assets for 2001 and 2005<sup>8</sup>:

- In 2001, the Form 1120 stated net current assets of \$10,221.00.
- In 2005, the Form 1120 stated net current assets of \$96,587.00.

For 2001, the petitioner did not have sufficient net current assets to pay the proffered wage. For 2005, the petitioner did have sufficient net current assets to pay the proffered wage.

Therefore, from the date the labor certification was accepted for processing by the U. S. Department of Labor in 2001, the petitioner has 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.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that USCIS should examine the petitioner's bank statements, which reflect that the petitioner had more than enough cash in 2001 to pay the beneficiary's proffered salary. 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. 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, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

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<sup>7</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>8</sup> Due to the fact that the petitioner had sufficient net income to pay the beneficiary's wage in 2002 through 2004, the AAO will analyze the petitioner's net current assets for the years 2001 and 2005.

Counsel also urges USCIS to factor in the company's depreciation amount in 2001, which was still cash on hand and could have been utilized to pay the beneficiary's wage. As previously stated, USCIS does not consider depreciation when analyzing the petitioner's ability to pay.

Additionally, counsel asserts that the 2001 W-2 statement of [REDACTED] shows that he earned \$15,600.00 that year. Counsel states that, customarily, he would only take a salary once all of his employees' wages had been paid. Thus, these funds could have instead been applied to pay the beneficiary's salary. Counsel provides no evidence to substantiate these claims. Accordingly, these assertions of counsel are not considered to constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel urges USCIS to consider the totality of the circumstances and to conclude that the petitioner had the ability to pay the beneficiary's proffered salary since the priority date. 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. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from when the labor certification was accepted for processing by the Department of Labor in 2001.

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.