



U.S. Citizenship
and Immigration
Services

PUBLIC COPY
identifying data deleted
prevent clearly unwarranted
invasion of personal privacy

B6



FILE: [REDACTED]
SRC 05 191 51382

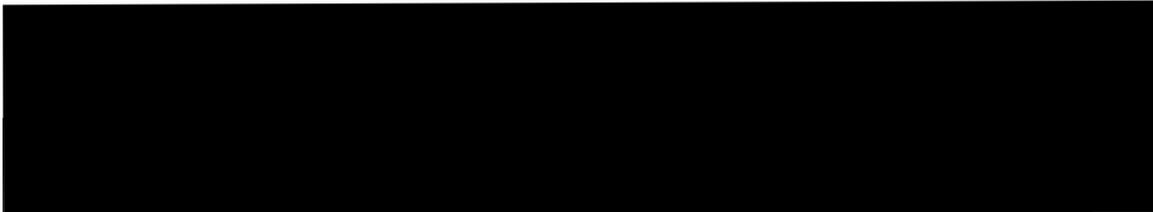
Office: TEXAS SERVICE CENTER

Date: APR 24 2007

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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an importing and wholesaling company. It seeks to employ the beneficiary permanently in the United States as an accounting manager. 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 beginning from 2001, the priority date year, to tax year 2004. 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.¹

As set forth in the director's October 18, 2005 denial, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 U.S. Department of Labor. See 8 CFR § 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).

¹ It is noted that some of the director's calculations with regard to the petitioner's net current assets are erroneous, and the AAO will correct the record during these proceedings.

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$25.60 per hour (\$53,248 per year). The Form ETA 750 states that the position requires college, and a "B. Sc." in accounting, along with one year of experience in the related occupation of accounting.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal, counsel submits a copy of a memo written by William R. Yates, former Citizenship and Immigration Services (CIS) Associate Director for Operations³. Counsel also submits a statement made by [REDACTED], Houston, Texas, as well as materials taken from the Internet that describe the work of the above-named law firm. In his letter, [REDACTED] states that the petitioner's net income and net assets in the relevant years can be combined to assess the petitioner's ability to pay the proffered wage. [REDACTED] uses the figures identified by the director in his denial of the petition, with regard to the petitioner's net assets. [REDACTED] further states that it makes no sense why CIS would not take both net income and net assets into account when examining the petitioner's ability to pay the proffered wage. [REDACTED] then notes that in tax year 2004, the combination of the petitioner's net income and net assets was sufficient to pay the proffered wage. He further states that in tax years 2001 to 2003, while the petitioner's combined net income and net assets were not sufficient to pay the proffered wage, the petitioner also had discretionary travel and entertainment expenses that could have been reallocated to make up any shortage of funds. [REDACTED] also states that the petitioner's depreciation expenses could have been used as additional funds with which to pay the proffered wage.

[REDACTED] also cites *Matter of Sonogawa*, 12 I&N Dec. 612, (Reg. Comm. 1967), in asserting that even if the petitioner's net profit is not commensurate with the proffered wage, the petitioner could establish its ability to pay proffered wages. The record also contains the petitioner's IRS Forms 1120, for tax years 2001 to 2004, as well as W-2 forms for two employees for tax years 2002 to 2004. Finally the record contains the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for all four quarters of tax years 2001 to 2004.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$1,100,000, and to currently employ two workers. On the Form ETA 750B, signed by the beneficiary on December 4, 2002, the beneficiary claimed that he had worked for the petitioner since September 2001.

On appeal, counsel asserts that the petitioner has always had the money to pay the proffered wage. Counsel states that the statement by [REDACTED] whose firm specializes in representing clients on financial matters

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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 Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

before such federal agencies as the Internal Revenue Service, explains where the money for the proffered wage would come from.

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, 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 the Yates memo, but makes no specific reference to the contents of the memo. Nevertheless, the AAO will comment on this memo, since as counsel correctly notes, the only issue in these proceedings is the petitioner's ability to pay the proffered wage. The Yates' memorandum relied upon by counsel provides guidance to CIS adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay in the following three circumstances: if the initial evidence reflects that the petitioner's net income is equal to or greater than the proffered wage; if the initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage; or if the record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage. The AAO consistently adjudicates appeals in accordance with the Yates memorandum.

Further on appeal, counsel submits a statement from another law firm that asserts the petitioner's net income and net current assets⁴ can be combined to pay the proffered wage. However, the AAO does not examine the petitioner's net income and net current assets in combination. Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

⁴ Although [REDACTED] utilizes the term "net assets" in his analysis of the petitioner's ability to pay the proffered wage, the figure that he uses is the figure identified by the director as the petitioner's net current assets. Therefore, the AAO regards [REDACTED] reference to be to the petitioner's net current assets.

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. On the Form ETA 750, Part B, and on the G-325 document submitted with the beneficiary's I-485 petition found in the record, the beneficiary indicates that he had worked for the petitioner since September 2001; however, the petitioner provided W-2 Forms for tax years 2001, 2002, and 2003 that indicates the petitioner paid wages to two employees, neither of which was the beneficiary. Thus, the record is confused. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." In the instant case, the petitioner has not established that it employed and paid the beneficiary as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residency. Thus the petitioner has to establish its ability to pay the entire proffered wage in tax years 2001 to 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, and contrary to [REDACTED] assertion, without consideration of depreciation or other non-discretionary or discretionary expenses, such as travel and entertainment. 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). Although [REDACTED] also states that the petitioner's gross income can be used to examine the petitioner's ability to pay the proffered wage, 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* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$53,248 per year from the priority date:

- In 2001, the Form 1120 stated a net income⁵ of \$17,156.
- In 2002, the Form 1120 stated a net income of \$10,839
- In 2003, the Form 1120 stated a net income of \$17,429.
- In 2004, the Form 1120 stated a net income of \$20,809.

Therefore, for the years 2001 to 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6.⁷ 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 \$7,329.
- The petitioner's net current assets during 2002 were -\$2,531.
- The petitioner's net current assets during 2003 were \$8,181.
- The petitioner's net current assets during 2004 were \$18,962.

Thus, for the years 2001 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.

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁶According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷In her decision, the director erroneously added in line 7 of Schedule L, loans to shareholders, when calculating the petitioner's current assets. The AAO's calculations of the petitioner's current assets are based on the combination of Lines 1 through 6, Schedule L.

in his statement submitted to the record on appeal cites to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). However, this decision relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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 the years 2001, 2002, 2003 and 2004 were uncharacteristically unprofitable years for the petitioner. The petitioner also provides no further information with regard to such factors as the petitioner's longevity, or reputation in the industry, among other issues. As stated previously, the petitioner's W-2 Forms indicate that it has two employees.

also suggests that it is reasonable to consider the beneficiary's potential to increase the petitioner's business and that the beneficiary's services would further improve the petitioner's efficiency. However, neither the petitioner, counsel, nor provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.⁸

Counsel's assertions and the assertions made by 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. The appeal will be dismissed.

⁸ It is also noted that the petitioner's owner and the beneficiary share the same last name, which may raise questions as to the bonafide nature of the proffered position. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart* 374, 00-INA-93 (BALCA May 15, 2000).



Page 8

ORDER: The appeal is dismissed.