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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

BCIS

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

AUG 06 2003

File: WAC 02 208 52485 Office: CALIFORNIA SERVICE CENTER Date:

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

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: [REDACTED]

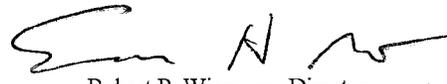
INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a commercial recycling company. It seeks to employ the beneficiary permanently in the United States as its controller. 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 on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 Immigration and Nationality Act (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.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on May 27, 1999. The proffered wage as stated on the Form ETA 750 is \$39,000 per year.

With the petition counsel submitted the petitioner's 1999 and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The 1999 tax return shows that the petitioner declared an ordinary income of \$136,341 during that year. The 2000 tax return shows that the petitioner declared an ordinary income of \$51,876 during that year.

In addition, counsel submitted a letter, dated June 10, 2002, from the petitioner's president. That letter states that the petitioner suffered a loss during 2001 due to various factors beyond the petitioner's control. Those factors included depressed prices for recycled materials, the California energy crisis that raised utility expenses, and the terrorist attacks of September 11, 2001 that resulted in delays in crossing the Mexican border.

Counsel also submitted the petitioner's California Form DE-6 Quarterly Wage Report for the second, third, and fourth quarters of 1999, all four quarters of 2000, all four quarters of 2001 and the first quarter of 2002. Those report shows that the petitioner employed the beneficiary during all of those quarters and paid him \$9,000, \$10,500, \$10,500, \$15,600, \$14,000, \$12,000, \$15,600, \$14,993.94, \$15,456.26, \$14,993.94, \$17,393.94, \$14,993.94 during those quarters, respectively.

Finally, counsel submitted an unaudited profit and loss statement for the period from January to April, 2002, and an unaudited profit and loss statement for the month of April 2002.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on October 11, 2002, requested additional evidence pertinent to that ability. The Service Center asked the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date using copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted a letter, dated October 28, 2002. That letter reiterated that the petitioner's losses during 2001 had been the result of depressed prices, the terrorist attacks of September 11, 2002, and the California energy crisis. Counsel also stated that the petitioner's business had rebounded.

As support for his assertions that the petitioner's business waned during 2001 and that it had recently improved, counsel submitted copies of press releases pertinent to economic conditions on the Southwestern border of the United States, and the petitioner's unaudited Profit and Loss statement for January through September 2002. With the unaudited Profit and Loss statement, counsel submitted a letter, dated October 30, 2002, from the petitioner's president. In that letter, the president noted that an outside accounting firm prepares the petitioner's financial statements, and that this is a common practice among firms of the petitioner's size. The president did demonstrate, nor even allege, that the petitioner's financial statements were produced pursuant to an audit.

In addition, counsel provided a page of the petitioner's payroll data, showing that the beneficiary's salary at the end of 2001 was \$64,400. Further, counsel submitted the petitioner's California Form DE-6 Quarterly Wage Reports for the third quarter of 2002, which shows that the petitioner paid the beneficiary \$14,740.74 during that quarter.

Counsel provided several pay stubs from October 2002. The most recent, dated October 18, 2002, shows that, during that year, as of that date, the petitioner had paid the beneficiary \$50,400.

Finally, counsel submitted a copy of the petitioner's Form 2001 1120S, U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared a loss of \$350,846 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year, the petitioner's current liabilities exceeded its current assets.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on February 13, 2003, denied the petition.

On appeal, counsel argues that the analysis of the petitioner's tax returns was flawed. Counsel urges that the petitioner's depreciation deduction be included in the calculation of the petitioner's ability to pay the proffered wage. Counsel also states that the petitioner conducts business in cash except with a very few long-term customers. As such, the petitioner's receivables are low. Counsel urges that this fact, too, should be considered in assessing the petitioner's ability to pay the proffered wage.

With the appeal, counsel provides copies of pay stubs from

January and February of 2003. Those pay stubs indicate that the petitioner was then paying the beneficiary at a rate of \$1,200 weekly, which equals \$62,400 annually. The most recent of those pay stubs, dated February 28, 2003, shows that, during that year, as of that date, the petitioner had paid the beneficiary \$10,800 for nine weeks of work.

Counsel also provides a copy of the petitioner's California Form DE-6 Quarterly Wage Report for the second and fourth quarters of 2002. Those reports show that the petitioner paid the beneficiary \$15,076.04 and \$17,048.14 during those quarters, respectively.

Further, counsel submits copies of 1999, 2000, 2001, and 2002 Form W-2 Wage and Tax Statements. Those statements show that the beneficiary earned \$30,000, \$57,200, \$62,838.08, and \$61,858.86 during those years, respectively.

Further still, counsel provides a copy of the beneficiary's Social Security Statement. The Earnings Record on that statement indicates that the beneficiary earned \$30,000 during 1999, \$57,200 during 2000, and \$62,838 during 2001.

In addition, counsel submits copies of the petitioner's unaudited Balance Sheets and unaudited Profit and Lost statements for 1999, 2000, and 2001.

Finally, counsel submits a letter from the petitioner's accountant, dated March 3, 2003, urging that non-cash deductions, such as depreciation, should be added back to the petitioner's ordinary income to determine its ability to pay the proffered wage.

A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a 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. The value lost as equipment and buildings deteriorate and the cost of their replacement are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

While the depreciation deduction does not require or represent the current use of cash, it is not 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*, *Supra* at 537. See

also *Elatos Restaurant Corp. v. Sava*, 532 F.Supp. at 1054. 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 his present purpose, nor treat it as a fund available to pay the proffered wage.

In calculating the petitioner's ability to pay the proffered wage, the Bureau will first examine the net income 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 both Bureau and 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau, then the Immigration and Naturalization Service, had properly relied upon the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra.* at 1084. The court specifically rejected the argument that the Bureau should have considered income before expenses were paid rather than net income.

Counsel has stated that the petitioner's receivables are low because it conducts most of its business in cash. That the petitioner does not generally extend credit would, in fact, cause its receivables to be very low, but would cause the cash it received to be commensurately higher. Counsel's argument that this fact should be considered in determining the petitioner's ability to pay the proffered wage is unconvincing.

Counsel has provided unaudited financial statements as evidence of the petitioner's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are competent to demonstrate the petitioner's ability to pay the proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The unaudited financial statements submitted by counsel will not be considered.

Counsel appears to imply that the petitioner's large loss during 2001 should be disregarded, as it was the result of factors over which the petitioner had no control. This office observes that losses are often the result of factors out of the control of the

companies that sustain them. Whether the petitioner's loss during 2001 was due to poor management or to outside factors is not dispositive of whether those losses show the inability to pay the proffered wage.

If counsel meant that the loss was uncharacteristic, occurred within a framework of profitable or successful years, and is unlikely to recur, then that loss might be correctly disregarded pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioning entity in *Sonogawa* changed business locations during the year in which the petition was filed, and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonogawa*, 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 couturière.

Here, no special circumstances exist to demonstrate that the petitioner will flourish, with or without hiring the beneficiary. The petitioner must show that it has had the continuing ability, since the priority date, to pay the proffered wage.

The proffered wage is \$39,000 per year. The priority date is May 27, 1999. During 1999, the petitioner declared an ordinary income of \$136,341. During 2000 the petitioner declared an ordinary income of \$51,876. Clearly, the petitioner has demonstrated the ability to pay the proffered wage during those years.

The petitioner declared a loss of \$350,846 as its ordinary income during 2001 and ended the year with negative net current assets. The petitioner has not demonstrated that it was able to pay the proffered wage during 2001 out of either its income or its assets.

The petitioner's Form DE-6 Quarterly Wage Reports, however, demonstrate that during 2001 the petitioner paid wages of \$62,838.08 to the beneficiary. The beneficiary's W-2 form confirms that amount, as does the beneficiary's Social Security Statement. The petitioner's payroll data indicates that by the end of 2001, the beneficiary's salary had reached \$64,400. The petitioner has demonstrated that during 2001 it actually paid the beneficiary an amount in excess of the proffered wage. The petitioner's need to demonstrate the ability to pay the proffered wage during that year is thereby obviated.

The petitioner's Form DE-6 Quarterly Wage Reports for 2002 demonstrate that the petitioner paid the beneficiary wages of \$61,858.86 during that year. The beneficiary's W-2 form confirms that amount. A pay stub issued to the petitioner on October 18, 2002, shows that, during that year, as of that date, the petitioner had paid the beneficiary \$50,400, an amount which exceeds the proffered wage. The petitioner has demonstrated that during 2002 it actually paid the beneficiary an amount in excess of the proffered wage. The petitioner's need to demonstrate the ability to pay the proffered wage during that year is thereby obviated.

A copy of a pay stub dated February 28, 2003 shows that the beneficiary's salary was then \$62,400. Because the appeal was filed shortly after that date, no more recent evidence was the available, nor was any more recent evidence requested.

The petitioner has demonstrated the ability to pay the proffered wage during each of the salient years.

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 met that burden.

ORDER: The appeal is sustained.