

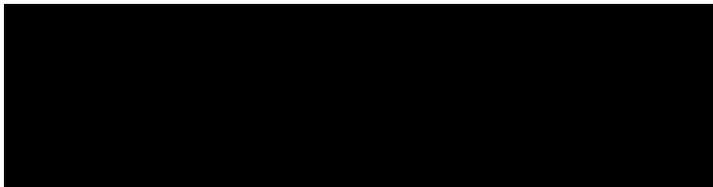
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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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File: EAC 02 126 54091 Office: VERMONT SERVICE CENTER

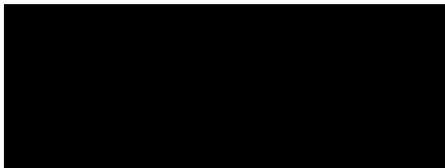
Date: APR 21 2004

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 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, Director
Administrative Appeals Office

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

The petitioner is a cleaner. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. 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 statement 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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility 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. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is \$437.60 per week, which equals \$22,755.60 per year.

The petition states that the petitioner employs two workers. With the petition, counsel submitted the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. The 1998 return shows that the petitioner declared a loss of \$5,478 as its taxable income before net operating loss deduction and special deductions 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 1999 return shows that the petitioner declared a loss of \$3,983 as its taxable income before net operating loss deduction and special deductions 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 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$2,559 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

Counsel also submitted the 2000 Form 1040 joint return of the beneficiary and the beneficiary's spouse.

That return indicates that the petitioner paid \$15,600 in wages during that year to either the beneficiary, the beneficiary's spouse, or both. No Form W-2, Wage and Tax Statement was submitted with that return to clarify to whom those wages were paid.

Finally, counsel submitted a notarized letter from the petitioner's president, dated June 20, 2001. That letter states that the petitioner has employed the beneficiary since September 1997 for approximately \$300 per week.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 8, 2002, requested additional evidence pertinent to that ability.

In that request, the Service Center noted that, pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner is obliged to demonstrate the ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.¹ The Service Center noted that the petitioner's tax returns did not demonstrate that it was able to pay the proffered wage and requested additional evidence of that ability. The Service Center also noted that the petitioner is obliged to demonstrate the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains permanent resident status. Finally, the Service Center specifically requested that, if the petitioner employed the beneficiary at any time during 1998 through 2000, it provide copies of the W-2 forms showing wages it paid to the beneficiary.

In response, counsel submitted a letter, dated July 22, 2002. In that letter, counsel noted the amount of the petitioner's gross receipts and its wage and labor expenses, and stated that those amounts demonstrate the petitioner's ability to pay the proffered wage. Counsel also stated that an employee, whom counsel did not identify, would leave the company when the beneficiary receives permanent resident status.

With that letter, counsel also submitted a letter, dated July 23, 2002, from the petitioner's accountant. That letter states that during 1998, 1999, and 2000, the petitioner's wage payments to the beneficiary were included on Schedule A, Cost of Goods Sold, at line 3, Cost of Labor. The accountant stated that those payments to the beneficiary were \$15,600 during each of those years. The accountant noted the amount of the petitioner's wage and labor expenses, including the amount paid to the beneficiary. Finally, the accountant stated that the petitioner's profitability had increased as it paid off indebtedness, and would continue to increase.

Counsel submitted the 2001 Form 1040 joint return of the beneficiary and the beneficiary's spouse. That return shows a \$15,600 payment from the petitioner. Counsel also submitted 1999, 2000, and 2001 Form 1099, Miscellaneous Income statements.² Those statements show that the petitioner paid the beneficiary \$15,600 during each of those years.

¹ The request for additional evidence also stated that, if the petitioner employs 100 or more workers, then it need not provide copies of annual reports, federal tax returns, or audited financial statements to show its ability to pay the proffered wage. This office also observes that, as the petition states that the petitioner employs two workers, that exception is irrelevant to this case.

² This office notes that Form 1099 is essentially equivalent to a Form W-2, but is for reporting non-wage payments, such as payments to an independent contractor.

Counsel did not then provide a form showing payments to the beneficiary during 1998, which the Service Center had requested. Counsel also did not provide copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001, although the petitioner's 2001 tax return, at least, should then have been available.

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 October 9, 2002, denied the petition.

On appeal, counsel submits another letter, dated November 5, 2002, from the petitioner's accountant. That letter states that the petitioner's stockholder owns the building in which the petitioner conducts business. The accountant states that, therefore, the petitioner's rent payments actually represent business profits. The accountant implied that the rent payments should be included in the computation of the funds available to pay the proffered wage. The accountant also noted that the petitioner's long-term liabilities have been decreasing, and implied that this shows the ability to pay the proffered wage.

In support of the assertion that the petitioner's stockholder owns the building in which the petitioner operates, counsel submitted a deed showing the transfer of a property on Livingston Avenue in Livingston, New Jersey, to the petitioner's stockholder and the stockholder's spouse.

The accountant further stated in his letter of November 5, 2002, that although the value of the building and equipment is shown as zero on the petitioner's tax return due to depreciation and amortization,³ their fair market value is substantial. Finally, the accountant states his opinion that based on the amount of its wage expenses, its profit, and the rent it paid to its stockholder, the petitioner has the ability to pay the proffered wage.

Counsel also submitted a copy of the 1998 Form 1040 joint return of the beneficiary and the beneficiary's spouse. That return shows a \$15,600 payment from the petitioner. Counsel also submitted a 1998 Form 1099 Miscellaneous Income statement showing the payment of \$15,600 to the beneficiary by the petitioner.

The reliance of counsel and the petitioner's accountant on the amount of the petitioner's gross receipts and its wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income⁴, the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that the remainder after all expenses were paid was sufficient to pay the proffered wage. That remainder is the petitioner's taxable income before net operating loss deduction and special deductions.

The petitioner might show that hiring the beneficiary would decrease its expenses if it showed that the

³ This office notes that amortization is the allocation (and charge to expense) of the cost or other basis of an intangible asset (e.g. a patent, copyright, or leasehold interest) over its estimated useful life. The accountant did not give any indication of any amortizable assets belonging to the petitioner and this office is aware of none.

⁴ The petitioner might be able to demonstrate, for instance, that hiring the beneficiary would contribute more to its receipts than the amount of the proffered wage.

beneficiary would replace a specific named employee whose wages would then be available to pay the proffered wage. Counsel did state, in his letter of July 22, 2002, that when the beneficiary is accorded permanent resident status, another employee will leave the petitioner's company. Counsel did not identify that employee or allege that the unidentified employee performs the duties of the position offered to the beneficiary. As such, counsel has not demonstrated that the beneficiary could replace that employee. The assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, according to the June 20, 2001 letter from the petitioner's president, the beneficiary has worked for the petitioner since September 1997. Finally, the petitioner indicated on the visa petition that the proffered position is a new position. Under these circumstances and with these discrepancies, this office cannot find that, upon being granted permanent resident status, the beneficiary would replace another employee.

In his November 5, 2002 letter, the accountant asserted that the petitioner is carrying the building in which it conducts its business as a fully depreciated asset, although its market value is substantial. Counsel implies that the building's value is an index of the petitioner's ability to pay the proffered wage.

The accountant is correct that the petitioner is carrying \$318,476 in buildings and depreciable assets, minus \$318,476 in accumulated depreciation. The accountant implies that this is the fully depreciated cost or other basis of the building in which the petitioner conducts business. This office notes, however, that the petitioner's accountant also stated, in his letter of November 5, 2002, that the petitioner's stockholder owns the building in which the petitioner conducts business. This office also notes that counsel provided a deed, purporting to show that the petitioner's stockholder and the stockholder's wife own the building in which the petitioner conducts business. The petitioner's owner owning the building appears to be inconsistent with the petitioner carrying it as an asset. This office is unable to reconcile the apparently contradictory statements pertinent to the ownership of the building in which the petitioner conducts its business.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Whether the petitioner's premises are owned by the petitioner or by the petitioner's owner, real estate is not the sort of liquid asset that can be used to pay wages. Regardless of who owns it, the value of the petitioner's premises is not a part of the computation of the funds available to pay the proffered wage.

The accountant asserts that the petitioner pays rent to the owner of its premises, who is also the petitioner's owner. The accountant asserts that, therefore, the petitioner's rental payments are actually part of the petitioner's profits, and implies that they were funds available to pay the proffered wage.

A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders and their ability, if they wished, to pay the

corporation's debts and obligations, are irrelevant to this matter.

Rent paid to the owner of a building is not part of the profits of the company that pays them, but is an expense of doing business. To whom they are paid does not change them from an expense to an asset. The petitioner paid rent for the use of its premises and that rent became the property of its owner, who is also the building's owner. As was noted above, the income and assets of the petitioner's owner are not part of the determination of the petitioner's ability to pay the proffered wage.

The accountant stated that the petitioner's profits are growing and will continue to grow. The petitioner, however, is obliged to show the ability to pay the proffered wage not only prospectively, but beginning on the priority date. The petitioner's future increase in profits that the accountant predicts cannot show the petitioner's ability to pay the proffered wage from 1997 to the present.

The accountant may have meant to imply that the petitioner's losses and low profits were uncharacteristic and unlikely to recur. The decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), relates to such a situation. *Sonogawa, Id.*, permits CIS to overlook a petitioner's low profits under some circumstances. *Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years. 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. 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.

If the petitioner's losses and low profits are uncharacteristic, occurred within a framework of profitable or successful years, and are unlikely to recur, then those losses might be overlooked in determining ability to pay the proffered wage. In this case, however, the record contains no evidence that the petitioner and has ever posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns in assessing a petitioner's ability to pay a proffered wage. *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 INS, 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. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no

precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The priority date is January 14, 1998. The proffered wage is \$22,755.60 per year. The petitioner has sufficiently demonstrated that it paid the beneficiary \$15,600 during each of the salient years. The petitioner is not obliged, therefore, to show the ability to pay the entire proffered wage during those years, but only the difference after the amount it actually paid to the beneficiary is subtracted. That difference is \$7,155.60, which is the additional amount the petitioner must show the ability to pay during each of the salient years.

The petitioner declared a loss of \$5,478 during 1998 and ended the year with negative net current assets. The petitioner has not demonstrated that any other funds were available to pay the salient portion of the proffered wage during that year. The petitioner has not, therefore, shown the ability to pay the entire proffered wage during 1998.

The petitioner declared a loss of \$3,983 during 1999 and ended the year with negative net current assets. The petitioner has not demonstrated that any other funds were available to pay the salient portion of the proffered wage during that year. The petitioner has not, therefore, shown the ability to pay the entire proffered wage during 1999.

The petitioner declared a taxable income before net operating loss deduction and special deductions of \$3,983 during 2000. That amount is insufficient to pay the salient portion of the proffered wage. The petitioner ended that year with negative net current assets. The petitioner has not demonstrated that any other funds were available to pay the salient portion of the proffered wage during that year. The petitioner has not, therefore, shown the ability to pay the entire proffered wage during 2000.

The petitioner did not submit copies of annual reports, federal tax returns, or audited financial statements pertinent to 2001. Therefore, the petitioner has not demonstrated the ability to pay the proffered wage during 2001.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998, 1999, 2000, and 2001. Therefore, the petitioner has not established that it 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.