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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

FILE:

Office: VERMONT SERVICE CENTER

Date: JUL 29 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 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.

for Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a shoe company. It seeks to employ the beneficiary permanently in the United States as retail manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied 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 and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits an additional tax return and asserts that it has had the continuing ability to pay the beneficiary's proffered wage.

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 the 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$737 per week, which amounts to \$38,324 annually. Part 5 of the visa petition indicates that the petitioner was established in 1992 and currently has 6 employees. Part B of the ETA 750, signed by the beneficiary states that the petitioner employed the beneficiary from September 1999 to May 2000.

With the petition, the petitioner submitted an incomplete copy of its Form 1065, U.S. Return of Partnership Income for 2001. It reflects that the petitioner files its taxes based on a standard calendar year. In 2001, it reported gross receipts or sales of \$413,668, salaries and wages of \$40,155 and a net income of \$12,781.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 31, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested the

petitioner to submit copies of the 2001 and 2002 Wage and Tax Statement (W-2) that it issued to the beneficiary, showing how much he was paid during those years.

Counsel responded that the petitioner had not employed the beneficiary in 2001 or 2002, so it could not provide any W-2s. Counsel did submit partial copies of the petitioner's partnership tax returns for 2001 and 2002. Its 2001 return reflected the same information provided originally. Its 2002 partnership return shows that it reported \$393,180 in gross receipts or sales, \$53,354 in salaries and wages, and declared a net income of -\$51,677. Schedule L of this tax return indicates that the petitioner had \$42,204 in current assets and \$7,325 in current liabilities, resulting in \$34,879 in net current assets. Besides net income, as an alternate means of demonstrating a petitioner's ability to pay a proffered salary, CIS will review a petitioner's net current assets during a given period. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A partnership's year-end current assets and liabilities are shown on Schedule L of its federal tax return. If its end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In addition to these tax returns, counsel provided a letter, dated October 21, 2003, from Andre Noujaim, one of the petitioner's partners [REDACTED] states that he has owned the company for 11 years. He adds that the petitioner's low income in 2001 was due to the adverse effect of the September 11th attacks in New York. The petitioner was located in Atlantic City at that time and sustained a drop in retail sales due to the decline in tourism after September 11, 2001. [REDACTED] also states that the company relocated in 2002 and the cost of moving and disruption of operations caused its net loss in 2002.

The acting center 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 December 17, 2003, denied the petition. The acting center director found that the petitioner's net income of \$12,781 in 2001 and -\$51,677 in 2002 was insufficient to pay the beneficiary's proffered wage of \$38,324. The petitioner's 2002 net current assets of \$34,879 were also not enough to cover the proffered wage. The acting center director recognized the petitioner's financial straits described in [REDACTED] letter, but concluded that the petitioner had failed to establish a history of profitability which would demonstrate its continuing ability to pay the beneficiary's proposed annual wage offer of \$38,324.

On appeal, counsel submits a copy of the petitioner's partnership tax return for 2000 in support of the petitioner's ability to pay the proffered wage. It shows that the petitioner declared \$479,799 in gross receipts or sales, salaries and wages of \$50,359, and a net income of \$20,547. Schedule L reflects that the petitioner had \$45,844 in current assets and \$2,907 in current liabilities, resulting in \$42,937.

The rationale set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) is applicable in some cases where the expectations of increasing business and profits support the petitioner's ability to pay the proffered wage.

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<sup>1</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.

That case relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established due to the various factors including the petitioner's longevity and outstanding reputation. Although Mr. Noujaim's letter suggests that his business has also sustained some unusual losses, the submission of one additional tax return showing an acceptable level of net current assets to cover the proffered salary does not persuasively document that the petitioner's losses have occurred within a *framework* of profitable years sufficiently to predict the petitioner's continuing ability to pay the proffered salary of \$38,324.

Counsel also maintains that the combination of the petitioner's 2000 net income of \$20,547, depreciation of \$779, and total assets of \$46,063 is sufficient to cover the proffered wage.

Counsel's reasoning is not persuasive. In evaluating a petitioner's ability to pay a proffered wage, CIS will 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). As stated by the court in *Chi-Feng Chang*:

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. [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.

719 F. Supp. at 537. We also reject counsel's claim that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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, as noted above, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently. Although the petitioner may have had unusual circumstances

contribute to its modest net income in 2001 and net loss in 2002, the evidence provided does not establish that the petitioner has maintained a framework of profitability sufficient to overcome the concerns expressed in the acting center director's decision. 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.