

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

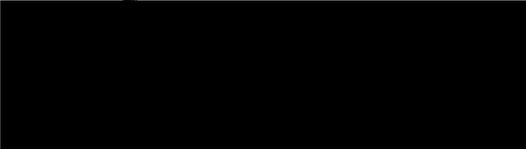


FILE: EAC 02 275 52910 Office: VERMONT SERVICE CENTER Date: AUG 10 2005

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, Director
Administrative Appeals Office

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

The petitioner is a custom woodworking firm. It seeks to employ the beneficiary permanently in the United States as a custom cabinet maker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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, counsel submits additional evidence and asserts that the petitioner has demonstrated its continuing financial ability to pay the certified 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 January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$22.86 per hour, which amounts to \$41,605.20 per annum, based on a 35-hour week as set forth on the ETA 750. On Form ETA 750B, signed by the beneficiary on January 6, 1998, the beneficiary claims to have worked for the petitioner since July 1995.

On Part 5 of the petition, the petitioner states that it was established in 1993, has a gross annual income of \$380,015, a net annual income of \$11,877, and currently employs two workers. In support of the petitioner's ability to pay the beneficiary's proposed wage offer, the petitioner initially submitted a copy of its Form 1120S, U.S. Income Tax Return for an S corporation for 1998. It shows that the petitioner files its taxes using a standard calendar year. For this year, the petitioner reported ordinary income of \$11,877.¹ Schedule L of the tax return shows that the petitioner had \$24,534 in current assets and no current liabilities, resulting in \$24,534 in net current

¹ For purposes of this review, the petitioner's ordinary income shown on line 21 will be treated as its net taxable income.

assets. Besides net income, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets as a measure of a petitioner's liquidity during a given period and as an alternative method of determining its ability to pay the certified wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² A corporation's year-end current assets are shown on line(s) 1 through 6 of Schedule L of the federal tax return. The current liabilities are shown on line(s) 16 through 18 of Schedule L. If a corporation's 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.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage, on July 2, 2003, the director requested additional evidence pertinent to that ability. The director instructed the petitioner to submit additional evidence demonstrating that it has had the ability to pay the proffered wage beginning on the priority date of January 13, 1998, and continuing until the present. She informed the petitioner that this evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements, pursuant to 8 C.F.R. § 204.5(g)(2). The director also advised the petitioner to submit copies of the beneficiary's Wage and Tax Statement (W-2s) if it employed the beneficiary at any time.

In response, the petitioner, through counsel, resubmitted a copy of the petitioner's 1998 corporate tax return. The petitioner also supplied copies of its bank statements for December 1996, and from January 1997 through November 1997.

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 December 23, 2003, denied the petition. The director noted that the 1998 tax return failed to indicate that either the petitioner's net income or its net current assets were sufficient to pay the proffered wage. She further noted that the petitioner had failed to submit any W-2s for the beneficiary and that the bank statements provided in response to her July 2, 2003, request for evidence only included information relevant to the period prior to the priority date of January 13, 1998.

On appeal, counsel submits a copy of the petitioner's 2002 corporate tax return, as well as copies of its bank statements for 1998–2002. The 2002 tax return shows that the petitioner reported \$23,059 in ordinary income. Schedule L reflects that the petitioner had \$282,767 in current assets, including \$280,001 in earnings as described on a supplemental schedule. No current liabilities were declared, yielding \$282,767 in net current assets.

Counsel states that no W-2s had been provided to the director because the beneficiary had not yet assumed employment with the petitioner. Counsel also asserts that the 1998 tax return showed that the petitioner had \$380,000 in gross receipts or sales before deductions. He further contends that there were many non-essential expenses that could have been eliminated and allocated to the beneficiary's salary. Counsel maintains that the petitioner's bank statements for 1998–2002 should be considered as more determinative of the petitioner's ability to pay the proffered wage and also notes that the 2002 federal tax return shows \$281,433.00 in retained earnings.

² According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it may have 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, as noted above, the beneficiary claimed on the ETA 750B that he had been working 35 hours per week for the petitioner as a custom cabinet maker, since July 1995. In contrast, counsel claims that the beneficiary has not yet assumed the certified position with the petitioner, and thus could provide no W-2s. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

If the petitioner does not establish that it may have employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net taxable 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). Contending that the petitioner's gross receipts reached a certain level or exceeded the proffered wage is insufficient as it is also necessary to consider the expenses generated in order to produce the gross receipts. 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 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. (Original emphasis.) *Chi-Feng* at 536.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. Bank statements show only a portion of a petitioner's available resources and do not reflect other encumbrances that may affect a petitioner's continuing ability to pay the proffered wage. Further, 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 unavailable. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, at least in reference to 1998 and 2002, somehow reflect additional available funds that were not reflected on the corresponding tax returns, such as the cash specified on Schedule L, which is already included in considering the petitioner's net current assets.

The 1998 federal tax return shows that neither the petitioner's net taxable income of \$11,877, nor its net current assets of \$24,534 was sufficient to cover the \$41,605.20 wage offer. Counsel's assertion that the petitioner could have elected to allocate certain funds a different way is not specific or persuasive. Monies already expended will not be added back to the tax return's net income.

Other than the petitioner's bank statements for 1999 through 2001, none of the regulatory-prescribed financial documentation, consisting of either audited financial statements, annual reports, or federal tax returns, for these years has been submitted. As such, standing alone, it cannot be concluded that the petitioner has established its ability to pay the proffered salary during this period.

Because the petitioner's net current assets of \$283,433 exceeded the proffered wage in 2002, its ability to pay has been demonstrated for this year. Counsel's assertion, however, related to the petitioner's retained earnings shown on line 24 of Schedule L of the 2002 tax return is not persuasive. Retained earnings are the total amount of a company's net earnings since its inception, minus any payments made to stockholders. Retained earnings are shown on Schedule L of a corporate tax return and, unlike the current assets shown elsewhere on Schedule L, retained earnings actually represent part of the shareholders' equity and also represent the portion of a company's non-cash and non-current assets that are financed from profitable operations rather than from selling stock to investors or borrowing from external sources. Assets of a company's shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay a proffered wage. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel cites two AAO cases from 1990 and 1993, as well as an extract from the Department of State and a Board of Alien Labor Certification Appeals (BALCA) case in support of his assertion that the petitioner's evidence is sufficient to establish its continuing ability to pay the proffered wage. The facts of those cases are not before the AAO in the instant matter. Counsel does not state how DOL's BALCA case law is binding on the AAO. Moreover, the cases cited by counsel is not considered binding precedents within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions.

Counsel also cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) in support of the petitioner's position that its evidence sufficiently demonstrates the ability to pay the proffered wage. That decision includes a criticism of CIS for failure to specify a formula used in determining the proffered wage and for failure to consider a worker's potential ability to contribute to the company's revenue. Additionally, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In this instance, however, no detail or documentation has been provided to explain how the beneficiary's employment as a custom cabinet maker will significantly increase the petitioner's revenue, particularly as here, where there appears to be some discrepancy as to whether the petitioner has employed the beneficiary. The regulation at 8 C.F.R. § 204.5(g)(2), issued in 1991, specifies the type of evidence required to establish the continuing financial ability to pay the proffered wage. In exceptional circumstances, such as that described in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), which counsel also cites in support of the petitioner's position, expectations of increasing business and profits can support a petitioner's ability to pay the proffered wage.

Matter of Sonogawa, however, 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 *Sonogawa* 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 for the 11-year old business. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the two tax returns submitted to the record do not represent a framework of profitable years analogous to the *Sonogawa* petitioner. From the evidence provided in this case, the AAO cannot conclude that the petitioner has demonstrated that such unique circumstances have been shown to exist in this case, which parallel those in *Sonogawa*.

Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate its continuing ability to pay the proffered wage as of the visa priority date and must submit either federal tax returns, annual reports, or audited financial statements as part of this demonstration. Based on a review of the evidence in the record and the evidence and argument offered on appeal, the AAO concludes that the petitioner's evidence has not persuasively demonstrated that it has 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.